Homeland Security

FEDERAL LAW ENFORCEMENT
TRAINING CENTER
GLYNCO, GEORGIA

LEGAL DIVISION

REFERENCE BOOK

2009

Foreword to the 2009 Edition

The *Legal Division Reference Book* is the culmination of almost thirty years of dedicated efforts of many members of the Legal Division at the Federal Law Enforcement Training Center. What originally began as a book containing case briefs of Fourth Amendment issues has evolved into this comprehensive resource. You will find brief descriptions of the facts, issues and holdings of every important Supreme Court case decided concerning Fourth, Fifth and Sixth Amendment issues, as well as several others, taught by the Legal Division. This year, an Additional Resources section is added to include guidance from the Departments of Homeland Security, Justice, and State as well as selected Federal Criminal Procedure and Evidence Rules, selected Federal Criminal Statutes, and other helpful law enforcement legal resources.

I invite you to visit the Legal Division's website at –

www.fletc.gov/legal

There you will find other resources to keep you up to date on the ever changing law enforcement legal landscape, such as

The Informer – a monthly review of significant Supreme Court and Federal Courts of Appeals cases of interest to law enforcement. You can subscribe to *The Informer* by going to its page on the web site, clicking the "subscribe" link, and entering your e-mail address.

Case Digests – compilations of all of the cases reported in *The Informer* during the year. For the years 2006–2009 and 2010 there are two digests. One is organized by federal circuit and the other by subject matter.

PodCasts – covering the Fourth, Fifth, and Sixth Amendments as well as many other issues of import to law enforcement, these 7-10 minute presentations can be accessed through your computer or downloaded to you mp3 player.

You will also find articles, training programs, FAQs, and downloads.

We trust that these books and other resources will serve you well during a long and successful law enforcement career.

Poppi Ritacco
Editor

April 2010

How to Use this Book

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

This *Reference Book* is helpful in preparing for legal examinations. The facts of each case can mimic multiple choice test questions. The issue in each case brief can serve as a test question. You may attempt to answer the question posed in the issue before reading the Supreme Court's answer and rationale as a means of testing your knowledge gained from course work and the *Handbook*. For additional practice test questions, see the Practice Exam booklet or visit

www.fletc.gov/training/programs/legal-division/practice-exams

Specific guidance from the Departments is arranged for quick reference on issues such as Use of Race, Legal Ethics, Consensual Monitoring, HIPAA, Use of Deadly Force, Consular Notification, Interviewing Government Employees, the USA Patriot Act, and sample search warrant language. You will find this guidance in the Table of Contents.

Step by step guidance on how to draft a Criminal Complaint, Search Warrant application, and their probable cause affidavits, as well examples of common federal documents and forms are contained in the *Legal Division Student Guide to Preparing Criminal Complaints, Arrest Warrants, and Search Warrants.*

Clicking on the Table of Contents entry will take you directly to that material

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FOURTH AMENDMENT

I. EXCLUSIONARY RULE

A. ORIGINS

Weeks v. United States
232 U.S. 383, 34 S. Ct. 341 (1914)

FACTS: Police officers arrested the defendant without a warrant at his place of employment. Other police officers went to his home. After a neighbor told the officers where the defendant kept a key, they entered the house. The officers searched and found evidence of gambling paraphernalia that they turned over to the U.S. Marshal. Later that day, the Marshal returned to the house and found additional evidence. Neither the Marshal nor the police had a search warrant. The government used this evidence to convict the defendant of using the mails to transport gambling paraphernalia.

ISSUE: Whether the evidence seized by the U.S. Marshal was admissible?

HELD: No. As the evidence was obtained through unconstitutional means, it was not admissible.

DISCUSSION: An official of the United States seized the evidence acting under the color of office in direct violation of the constitutional rights of the defendant. The Supreme Court held that the federal government could not use unreasonably obtained evidence in a federal courtroom. However, the fruit of the first search conducted by the state officers was admissible. "As the Fourth Amendment is not directed to the individual misconduct of such officials," the fruits of the state search were admissible in a federal trial.

Note: The Fourth Amendment would not be completely applicable to state actions until the Mapp v. Ohio decision in 1961.

Elkins v. United States
364 U.S. 206, 80 S. Ct. 1437 (1960)

FACTS: State officers, having received information that the defendants possessed obscene motion pictures, obtained a search warrant for the defendant's house. The officers did not find any obscene pictures but they found various paraphernalia they believed was used to make illegal wiretaps. A state court held that the search was illegal under state law. During these state proceedings, federal officers, acting under a federal search warrant, obtained the items in state custody. Shortly after that, state officials abandoned their case and federal agents obtained a federal indictment.

ISSUE: Whether evidence obtained because of an unreasonable search and seizure by state officers, without involvement of federal officers, is admissible in a federal criminal trial?

HELD: No. Evidence obtained because of an unreasonable search and seizure by state officers is inadmissible in a federal criminal trial.

DISCUSSION: The Supreme Court created the exclusionary rule to prevent, not repair. Its purpose is to deter unreasonable activity - to compel respect for the constitutional guaranty to be free from unreasonable searches in the only effective way - by removing the incentive to disregard it. Evidence obtained by state officers during a search that, if conducted by federal officers, would have violated the Fourth Amendment, is inadmissible in a federal criminal trial.

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Mapp v. Ohio
367 U.S. 643, 81 S. Ct 1684 (1961)

FACTS: Three police officers arrived at the defendant's home pursuant to information that "a person [was] hiding out

in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." The officers knocked on the door and demanded entry. The defendant, after telephoning her attorney, refused to admit them without a search warrant.

Three hours later, the officers (now with four additional officers) again sought entry. When the defendant did not immediately come to the door, the officers forcibly opened at least one door to the house. It appeared that the defendant was halfway down the stairs from the upper floor when the officers broke into the house. She demanded to see the search warrant. One officer held up a paper claimed to be a warrant. The defendant grabbed the "warrant" and placed it in her bosom. A struggle followed in which the officers recovered the piece of paper. They handcuffed the defendant because she had been "belligerent" in resisting their official rescue of the "warrant" from her person. Running roughshod over the defendant, a police officer "grabbed" her, "twisted" [her] hand, and she "yelled [and] pleaded with him" because "it was hurting." The officers discovered the obscene materials for which she was ultimately convicted of possessing in the course of a widespread search. At trial, the officers produced no search warrant, nor was the failure to produce one explained.

ISSUE: Whether the Fourth Amendment applies to state actions?

HELD: Yes. The Supreme Court made the Fourth Amendment and the exclusionary rule applicable to the states.

DISCUSSION: The Fourth Amendment right of privacy is enforceable against the states through the due process clause of the Fourteenth Amendment. All evidence obtained by searches and seizures in violation of the Constitution is inadmissible in both federal a state court.

B. FRUIT OF THE POISONOUS TREE

Silverthorne Lumber Co. v. United States
251 U.S. 385, 40 S. Ct. 182 (1920)

FACTS: Silverthorne was indicted and arrested. While he was being detained, DOJ representatives and the U. S. Marshal went to his corporate office. Without authority, they confiscated and copied his records. The federal trial court held that the officers unconstitutionally obtained the records and ordered their return. Based on the copies, the government obtained a new indictment, and served the defendant a subpoena for the original records.

ISSUES:

1. Whether the government can use information obtained from an illegal search and seizure to secure other evidence?

2. Whether the Fourth Amendment protects corporations against unlawful searches and seizures?

HELD:

1. No. The government may not use illegally obtained evidence to gain additional evidence.

2. Yes. Corporations enjoy Fourth Amendment protections.

DISCUSSION: Information gained by the government's unlawful search and seizure may not be used as a basis to subpoena that information. The essence of a rule prohibiting the acquisition of evidence in an illegal way is that it cannot be used at all. This is the "Fruit of the Poisonous Tree" doctrine. This doctrine prohibits law enforcement officers from doing indirectly what they are prohibited from doing directly. Also, the Court held that corporations enjoy a right be free from unreasonable searches and seizures.

Nardone v. United States
308 U.S. 338, 60 S. Ct. 266 (1939)

FACTS: The government convicted the defendant of fraud, based on evidence secured through a wiretap. The conviction was reversed on appeal because the wiretap violated federal law. At the second trial, the government did not introduce the evidence from the wiretap. However, the defendant was again convicted. On appeal, he argued that the trial court should have suppressed much of the evidence against him, because the government would not have learned about it but for the fact that they had performed the original illegal wiretap.

ISSUE: Whether courts must exclude all evidence that the government gained directly and indirectly from an illegal search?

HELD: No. If the government performs an illegal search, and the information learned eventually led it to other evidence, that evidence may still be introduced, if the connection between that evidence and the illegal search is distant and tenuous.

DISCUSSION: If the only reason that the government has a particular piece of evidence is that it performed an illegal search, then a court will exclude evidence. However, if the trial judge determines that its connection to the illegal search is remote, the evidence may be admissible.

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United States v. Ceccolini
435 U.S. 268, 98 S. Ct. 1054 (1978)

FACTS: The FBI investigated gambling in the defendant's place of business. A full year after the FBI ended its surveillance, a police officer, while taking a break in defendant's flower shop, "tarried" behind the customer counter, and conversed with an employee of the shop. During this illegal search, he noticed an envelope with money protruding on the

cash register. Upon examination, he found it contained money and policy (gambling) slips. The officer then placed the envelope back on the register and, without telling the employee what he had found, asked her to whom the envelope belonged. She said it belonged to the defendant and that she had instructions to give it to someone. The officer's finding was reported to local detectives and to the FBI. Four months later, officers interviewed the employee. Six months after that the defendant testified before the grand jury that he had never taken wagers at his shop. The employee testified to the contrary, and the government indicted the defendant for perjury.

ISSUES: Whether the employee's testimony was inadmissible as "fruit of the poisonous tree?"

HELD: No. The employee's testimony was admissible as the illegal search was attenuated as to the employee's statements.

DISCUSSION: The time lapse between the police officer's illegal search and the store clerk's testimony as to the defendant's activities was significant. This attenuation was sufficient to evaporate the connection between the illegality and the testimony so as to render the testimony admissible. A substantial period of time elapsed between the illegal search and initial contact with the store clerk who was present at the time of the search. The clerk's testimony was an act of her own free will and was not coerced or induced by official authority because of the illegal search.

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United States v. Crews
445 U.S. 463, 100 S. Ct. 1244 (1980)

FACTS: The defendant was in the general area of some recent crimes. He resembled a police "lookout" that described the perpetrator. An eyewitness to one of the crimes tentatively identified the defendant to a law enforcement officer as he left a nearby restroom.

The officers detained the defendant and summoned the detective assigned to the robberies. Upon his arrival ten to fifteen minutes later, his attempt to take a photograph of the defendant was thwarted by the inclement weather. The officers then took the defendant into custody, ostensibly because he was a suspected truant. The officers took a photograph of the defendant at the station.

The following day, the police showed the first victim a photo display including a photo of the defendant. She immediately selected the defendant as her assailant. Later, another victim made a similar identification. The officers arrested the defendant. At a court-ordered lineup, the two women who had previously made the photographic identifications positively identified the defendant as their assailant. The defendant was later identified in court by the two witnesses.

ISSUE: Whether the in-court identification was tainted by the identifications made through the illegal seizure?

HELD: No. In-court identification can be tainted by identifications made through an illegal seizure. But in this instance, the eyewitness' identification was not the result of the illegal seizure.

DISCUSSION: The police knew the victim's identity before the arrest and was not discovered because of the unlawful arrest. Also, the unlawful police conduct did not bias the victim's capacity to identify the perpetrator of the crime.

"The exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality. . . . The pretrial identification obtained through use of the photograph taken during defendant's illegal detention cannot be introduced; but the in-court identification is admissible . . . because the police's knowledge of defendant's identity and the victim's independent recollections of him both antedated the unlawful arrest and were thus untainted by the constitutional violation."

Taylor v. Alabama
457 U.S. 687, 102 S. Ct. 2664 (1982)

FACTS: After a robbery, an incarcerated individual told police that he had heard that the defendant was involved. Based on this information, two officers arrested petitioner without a warrant, searched him, fingerprinted him, questioned him, and placed him a lineup. Subsequently, the police matched the defendant's fingerprints with those found on items that had been handled by one of the robbers. Once told of this, the defendant waived his rights and confessed. A court found that the tip from the incarcerated individual was insufficient to give police probable cause to obtain a warrant or to arrest petitioner.

ISSUE: Whether the confession obtained from the defendant was the fruit of an illegal seizure?

HELD: Yes. The initial fingerprints, which were themselves the fruit of an illegal arrest, and which were used to extract a confession from petitioner, were not sufficiently attenuated to break the connection between the illegal arrest and the confession.

DISCUSSION: The Court held that a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession. The Court identified several factors that should be considered in determining whether a confession has been purged of the taint of the illegal arrest: time between the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. The government bears the burden of proving that a confession is admissible.

Here, there was no meaningful intervening event. The illegality of the initial arrest was not cured by the facts that six hours elapsed between the arrest and confession, that the confession was "voluntary" for Fifth Amendment purposes because Miranda warnings were given; that the defendant was permitted

a short visit with his girlfriend; or that the police did not physically abuse petitioner. Nor was the fact that an arrest warrant, based on a comparison of fingerprints, was filed after the defendant had been arrested.

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Trupiano v. United States
334 U.S. 699, 68 S. Ct. 1229 (1948)

FACTS: A Federal agent illegally seized evidence of an illicit alcohol still. The Supreme Court held that the officer had ample time to secure a search warrant and failed to do so.

ISSUE: Whether the defendant is entitled to the return of his contraband property?

HELD: No. The exclusionary rule prohibits the government from using illegally obtained evidence in its case-in-chief against the defendant. It does not compel the government to return contraband to the defendant.

DISCUSSION: Where officers illegally seize property in violation of the Fourth Amendment that is contraband, the owner is not entitled to its return. The exclusionary rule only entitles the defendant to have the unlawfully seized property suppressed as evidence.

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C. EXCEPTIONS

1. No Standing to Object

Rawlings v. Kentucky
448 U.S. 98, 100 S. Ct. 2556 (1980)

FACTS: Police officers, armed with an arrest warrant for Marquess, lawfully entered his house. Another resident of the

house and four visitors (including the defendant) were present. While searching the house unsuccessfully for Marquess, several officers smelled marihuana and saw marihuana seeds. Two officers left to obtain a search warrant and the other officers detained the occupants, allowing them to leave only if they consented to a body search. About forty-five minutes later, the officers returned with the search warrant for the premises. Cox, a visitor, was ordered to empty her purse, which contained controlled substances. Cox told the defendant, who was standing nearby, "to take what was his." The defendant immediately claimed ownership of the controlled substances.

ISSUES: Whether the defendant had a reasonable expectation of privacy in Cox's purse?

HELD: No. The defendant did not have a reasonable expectation of privacy in the purse, and therefore had no standing to challenge the illegal search of it.

DISCUSSION: The defendant failed to sustain his burden of proving that he had a reasonable expectation of privacy in Cox's purse. Therefore, he had no standing to object to the search of the purse. The fact that the defendant claimed ownership of the drugs in the purse did not entitle him to challenge the legality of a search of the purse itself. Even assuming that police violated the defendant's Fourth Amendment rights by detaining him while other officers obtained a search warrant, exclusion of the defendant's admissions would not be necessary unless his statements were the direct result of his illegal detention.

*****

Rakas v. Illinois
439 U.S. 128, 99 S. Ct. 421 (1978)

FACTS: After receiving a robbery report, police stopped the suspected getaway car being driven by the owner and in which the defendants were passengers. The officers ordered the occupants out of the car and searched the interior of the

vehicle. They discovered a box of rifle shells in the locked glove compartment and a sawed-off rifle under the front passenger seat. The officers then arrested the defendants. They conceded that they did not own the automobile and were simply passengers.

ISSUE: Whether the defendants had standing to object to the search of the vehicle?

HELD: No. The defendants had no property or privacy interest in the interior of the vehicle.

DISCUSSION: The defendants admitted they had neither a property nor a possessory interest in the automobile. They had no interest in the property seized, and they failed to show any reasonable expectation of privacy in the glove compartment or under the seat of the vehicle in which they were passengers. Therefore, the defendants lacked standing to challenge the search of those areas.

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Wong Sun v. United States
371 U.S. 471, 83 S. Ct. 407 (1963)

FACTS: Agents illegally seized Johnny Yee, then "Blackie" Toy, who led them to the defendant's neighborhood where he pointed out where the defendant lived. An agent rang a doorbell, identified himself as a narcotics agent to the woman on the landing, and asked for "Mr. Wong." She said that he was "in the back room sleeping." The agent and six other officers entered the apartment. One of the officers went into the back room and brought the defendant from the bedroom in handcuffs. A thorough search of the apartment followed, but the officers did not discover any narcotics. The defendant made incriminating statements.

The government tried the defendant for distribution of narcotics. The trial court admitted the government's evidence over the objections by the defense that the following items were

fruits of unlawful arrests and searches: (1) the statements made orally by Toy at the time of his arrest; (2) the heroin surrendered by Johnny Yee; (3) Toy's pretrial unsigned statement; and (4) the defendant's statements.

ISSUE: Whether the four items of evidence are admissible against the defendant Wong Sun?

HELD: Yes. The defendant did not have standing to object to the introduction of the first three pieces of evidence and his statements were admissible.

DISCUSSION: A search that is unlawful at its inception is not validated by what officers discover in that search. However, even though contraband seized by officers is inadmissible against one defendant, it is admissible against another who has not suffered the unauthorized invasion of his privacy. Defendants must have standing to object.

As for the defendant's statements, "The exclusionary rule has no application because the Government learned of the evidence from an independent source. . . . We need not hold that all evidence is the fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." The Court held that the illegality that led to the defendant's statements had become attenuated.

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United States v. Salvucci, Jr.
448 U.S. 83, 100 S. Ct. 2547 (1980)

FACTS: The defendant and Zackular were charged with unlawful possession of stolen mail. The police used a search

warrant to search an apartment rented by Zackular's mother. They found twelve checks that formed the basis of the indictment. The defendant moved to suppress the checks on the ground that the affidavit supporting the application for the search warrant was inadequate to show probable cause.

ISSUE: Whether the defendants have standing to object to the search of the apartment?

HELD: No. Defendants may claim the benefits of the exclusionary rule only if the government has violated their Fourth Amendment rights.

DISCUSSION: Legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest. Property ownership is only one factor to be considered in determining whether an individual has a Fourth Amendment right. Possession of a good may not be used as a substitute for a factual finding that the owner had a legitimate expectation of privacy in the area searched.

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United States v. Payner
447 U.S. 727, 100 S. Ct. 2439 (1980)

FACTS: The Internal Revenue Service launched an investigation into the financial activities of United States citizens in the Bahamas. Agents focused their suspicion on the Castle Bank. An IRS agent asked Casper, a private investigator and occasional informant, to learn what he could about the Castle Bank, of which the defendant had been a client. Casper cultivated a friendship with a Castle Bank Vice President. Casper introduced the Vice President to another private investigator, Ms. Kennedy. When Casper learned that the Vice President intended to spend a few days in Miami, he devised a scheme to gain access to bank records the Vice President might be carrying in his briefcase. The IRS agent approved the basic outline of the plan.

The Vice President arrived in Miami and went directly to Ms. Kennedy's apartment. Shortly after the two left for dinner, Casper entered the apartment using a key supplied by Kennedy. He removed the briefcase and delivered it to the agent. The agent supervised the photocopying of approximately 400 documents taken from the briefcase. The records were returned without the Vice President's knowledge of their removal. The photocopied documents led to the indictment of one of the bank's clients for falsifying his income tax return.

ISSUES:

1. Whether the defendant has standing to object to the illegal search and seizure of the Vice President briefcase?

2. Whether the defendant's right to due process had been violated by the gross illegality of the government?

HELD:

1. No. The defendant does not have standing to block the admission of evidence derived through violations of the constitutional rights of others.

2. No. The defendant's right to due process was not violated by the government's actions.

DISCUSSION: The defendant had no reasonable expectation of privacy in the Castle Bank documents taken from the Vice President. He neither owned nor had control over the briefcase. Therefore, he has no standing to object to the illegal search and seizure of the briefcase.

Although courts should not condone unconstitutional and possible criminal behavior by government agents, such behavior does not demand the exclusion of evidence in every case of illegality. Rather, courts must weigh the applicable principles against the considerable harm that would flow from indiscriminate application of the exclusionary rule.

United States v. Padilla
508 U.S. 77, 113 S. Ct. 1936 (1993)

FACTS: The police unreasonably stopped and arrested Arciniega, after finding cocaine in a car he drove. They subsequently arrested several others connected to the crime, including the defendant. The government charged them with conspiracy to distribute and possess with intent to distribute cocaine. The defendant moved to suppress the evidence discovered during the investigation, claiming that it was the fruit of an unlawful investigatory stop of a car.

ISSUE: Whether the defendant has the ability to complain about the illegal search of a co-conspirator's reasonable expectation of privacy?

HELD: No. Expectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims. Participants in a criminal conspiracy may have had such expectations or interests, but the conspiracy itself neither added to nor detracted from them.

DISCUSSION: A defendant can seek the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that his Fourth Amendment rights were violated by the challenged search or seizure. The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself. Coconspirators and codefendants are not accorded any special standing in establishing a reasonable expectation in each other's privacy.

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Alderman v. United States
394 U.S. 165; 89 S. Ct. 961 (1969)

FACTS: The defendants were suspected of transmitting information regarding the national defense of the United States

to a foreign power. One of the defendants discovered that his place of business had been subject to electronic surveillance by the government. The government admitted that this surveillance was unlawful.

ISSUE: Whether the unlawfully obtained information is excluded from all the defendants' trials?

HELD: No. Only the defendant that suffered the unreasonable intrusion by the government has standing to challenge the use of the evidence.

DISCUSSION: The Court reaffirmed its position that a "Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing." The rights found within the Fourth Amendment are personal, limiting redress only to the offended party. The Court was "not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."

*****

Mancusi v. DeForte
392 U.S. 364, 88 S. Ct. 2120 (1968)

FACTS: The defendant, a vice president of a union, objected to the government's use of a subpoena to seek union records. When the union refused to honor the subpoena, the government conducted a search and seized records from an office the defendant shared with other union officials. The seized records were used at trial against the defendant.

ISSUE: Whether the defendant has standing to object to the search for union records?

HELD: Yes. The capacity to claim the protection of the Fourth Amendment depends upon whether the area searched was one in which the defendant has a reasonable expectation of freedom from governmental intrusion.

DISCUSSION: The Court observed that the papers in question belonged to the union, not the defendant. However, "one with a possessory interest in the premises might have standing." As the defendant "shared an office with other union officers" he could "reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups." Therefore, he had a reasonable expectation of privacy in the office.

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2. Good Faith Exception

United States v. Leon
468 U.S. 897, 104 S. Ct. 3405 (1984)

FACTS: An officer prepared an application for a warrant to search several places. The application was reviewed by several Deputy District Attorneys, and approved by a state court judge. The resulting searches produced large quantities of drugs. The government indicted the defendants and they filed motions to suppress the evidence seized. An appellate court granted the motions in part, concluding that the affidavit was insufficient to establish probable cause.

ISSUES: Whether a good faith exception to the exclusionary rule exists?

HELD: Yes. A good faith exception to the exclusionary rule exists.

DISCUSSION: The exclusionary rule should not apply to evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate. Reasonable minds frequently differ on whether a particular search warrant affidavit established probable cause. Officers are entitled to rely on the judgment of the issuing magistrate.

However, deference to a magistrate in search warrant matters is not boundless. A reviewing court's deference to a finding of probable cause does not preclude its inquiry into the knowing or reckless falsity of the affidavit on which probable cause was based. A magistrate must perform a neutral and detached function and not serve merely as a rubber stamp for the government. Suppression is an appropriate remedy if information in an affidavit misled the issuing magistrate that the affiant knew was false or should have known was false (reckless disregard for the truth).

*****

Massachusetts v. Sheppard
468 U.S. 981, 104 S. Ct. 3424 (1984)

FACTS: The defendant was a suspect in a murder case. A police officer drafted an affidavit for a search warrant for the defendant's house. Because it was a Sunday, the local court was closed, and the police had a difficult time finding a warrant application form. One officer found a warrant form for a controlled substance violation. He proceeded to make changes to the form to adapt it to his search but he failed to delete the reference to "controlled substance."

The officer took the affidavit form to the home of a judge. He told the judge that the form as presented dealt with controlled substances and showed the judge where he had crossed out subtitles. After unsuccessfully searching for a more suitable form, the judge said he would make the necessary changes. The judge then took the form, made some changes to it, and then signed it. However, he did not change the section that

authorized a search for "controlled substances." The police searched the defendant's house and found several items of evidence. At a pretrial suppression hearing, the trial judge concluded that the warrant violated the Fourth Amendment because it did not particularize the items to be seized. However, he admitted the evidence because the police had acted in good faith reliance on the warrant. The defendant was convicted.

ISSUES:

1. Whether the officers reasonably believed that the search they conducted was authorized by a valid warrant?

2. Whether Federal law requires the exclusion of evidence seized under a defective warrant issued by an appropriate judicial officer?

HELD:

1. Yes. The officers reasonably believed that the search they conducted was authorized by a valid warrant.

2. No. Federal law does not require the exclusion of evidence seized under a defective warrant issued by an appropriate judicial officer.

DISCUSSION: Citing United States v. Leon, the Supreme Court held that the exclusionary rule should not be applied when the officer conducting the search acted in reasonable reliance on a warrant issued by a neutral and detached magistrate. The officers took every necessary step that the Court could reasonably expect of them. Officers are entitled to rely on warrants that they reasonably believe are lawfully issued. The exclusionary rule is designed to deter unreasonable actions by law enforcement officers.

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Arizona v. Evans
514 U.S. 1, 115 S. Ct. 1185 (1995)

FACTS: The defendant was stopped for a routine traffic violation. During this encounter, the officer learned of an outstanding warrant for the defendant's arrest. The officer arrested the defendant and conducted a search of the automobile incident to that arrest, where he found a bag of marijuana. He charged the defendant with possession of a controlled substance. Later, the government learned that a court clerk should have previously removed the arrest warrant from the computer database. The defendant moved to suppress the marijuana as it was the fruit of an unlawful arrest.

ISSUE: Whether the fruit of the poisonous tree doctrine is applicable when the officer acted in good faith reliance on a computer warrant database?

HELD: No. The fruit of the poisonous tree doctrine is designed to deter the unreasonable actions of police officers.

DISCUSSION: Under the framework of the good faith exception to the exclusionary rule established by United States v. Leon, the rule does not require the suppression of evidence seized because of clerical errors of court employees. Exclusion is appropriate only if such action serves the remedial objectives of the rule. The exclusionary rule is designed to deter police misconduct, not mistakes of court employees. In the case at hand, there was no unreasonable or illegal police activity that needed to be deterred.

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Illinois v. Krull
480 U.S. 340, 107 S. Ct. 1160 (1987)

FACTS: A state statute, as it existed in 1981, required licensed motor vehicle and vehicular parts sellers to permit state officials to inspect certain records. Pursuant to the

statute, a police officer entered the defendant's wrecking yard and asked to inspect records of vehicle purchases. The defendant stated that the records could not be found but gave the officer a list of approximately five purchases. The officer received permission from the defendant to look at the cars in the yard. He discovered that three were stolen and a fourth had its identification number removed. The officer seized the cars and arrested the defendant. An appellant court subsequently held that the statute was unconstitutional because it allowed too much discretion in the officers conducting the examinations.

ISSUE: Whether the exclusionary rule commands the suppression of the evidence?

HELD: No. The Fourth Amendment's exclusionary rule does not apply to evidence obtained by police who acted in objectively reasonable reliance upon a statute authorizing warrantless administrative searches.

DISCUSSION: The purpose of the exclusionary rule is to discourage officers from engaging in unreasonable searches and seizures. The application of the exclusionary rule in these circumstances would not affect future police misconduct. Officers conducting such searches are simply fulfilling their responsibility to enforce the statute as written. If a statute is not clearly unconstitutional, reviewing courts cannot expect officers to question the judgment of the legislature that passed the law.

Applying the exclusionary rule to deter legislative misconduct is ineffective. There is also no indication that the exclusion of evidence seized pursuant to a statute subsequently declared unconstitutional would affect the enactment of similar laws. Police, not legislators, are the focus of the rule.

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3. Impeachment Purposes

Walder v. United States
347 U.S. 62, 74 S. Ct. 354 (1954)

FACTS: At his trial on the charge of sale of narcotics the defendant testified that he never sold or possessed narcotics. The government then sought to introduce evidence that it had unreasonably seized (a heroin capsule that had been found in his possession). The trial judge admitted this evidence over the defendant's objection that the police had obtained the heroin capsule through an unlawful search and seizure.

ISSUE: Whether unconstitutionally seized evidence is admissible for impeachment purposes?

HELD: Yes. The exclusionary rule does not create a license for the defendant to commit perjury.

DISCUSSION: The government cannot violate the Fourth Amendment and use the fruits of such unlawful conduct to secure a conviction. Nor can it use such evidence to support a conviction on evidence obtained through leads from the unlawfully obtained evidence.

However, the defendant cannot turn the existence of the exclusionary rule to his own advantage by using it as a license to commit perjury on direct examination. The defendant's assertion on direct examination that he had never possessed narcotics opens the door, solely for the purpose of attacking his credibility. The illegally seized evidence can be used for impeachment purposes.

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United States v. Havens
446 U.S. 620, 100 S. Ct. 1912 (1980)

FACTS: Law enforcement officers stopped a man named McLeroth and searched him, finding cocaine in makeshift

pockets in his underclothes. McLeroth implicated the defendant, who was then illegally seized and searched. In the defendant's luggage, the officers found a tee shirt from which pieces had been cut. These missing pieces matched McLeroth's makeshift pockets.

The government tried the defendant for conspiracy to import cocaine. At trial, the court suppressed all evidence of the tee shirt as the fruit of an illegal search. The defendant testified in his own defense. During a proper cross-examination, the prosecutor asked the defendant if he had anything to do with sewing pockets into McLeroth's underclothes. The defendant answered "absolutely not."

The prosecutor offered to introduce evidence of the tee shirt for the limited purpose of impeaching the defendant's credibility. The shirt was admitted over defense objections, with an instruction from the judge to the jury that they could not consider the shirt as evidence of a crime, but that they could consider it in deciding whether the defendant had testified truthfully.

ISSUE: Whether evidence suppressed as the fruit of an unlawful search and seizure may nevertheless be used to impeach a defendant's perjury?

HELD: Yes. Suppressed evidence can be used to impeach a defendant who perjures himself.

DISCUSSION: Defendants who lie on the witness stand do so at their peril. Our courts work best when witnesses tell the truth. Therefore, the courts have developed a strong public policy against perjury.

The exclusionary rule is not constitutionally mandated. Rather, it is a creation of case law, designed to discourage officers from violating the Constitution. As case law, the exclusionary rule is subject to judge-made exceptions based on public policy.

Here, the Supreme Court decided that the policy against perjury is sufficiently strong to limit the action of the exclusionary rule to direct evidence against a defendant. If a defendant chooses to take the stand and lie, evidence that would normally be inadmissible against him will now be admissible for the limited purpose of showing that the defendant is not truthful.

*****

James v. Illinois
493 U.S. 307, 100 S. Ct. 648 (1990)

FACTS: The police violated the defendant's Miranda protections in obtaining a statement. The murder suspect stated that on the day of a murder his hair was reddish-brown and slicked-back, and that the next day it was dyed black and curled. The defendant did not testify at trial but called a family friend as a witness. The witness testified that the defendant's hair had been black on the day of the murder. Witnesses for the prosecution however, testified that the murderer had "reddish" slicked-back hair. The prosecution sought to introduce the defendant's illegally obtained statement to the police to impeach the credibility of the defense witness' testimony.

ISSUE: Whether illegally obtained evidence may be used to impeach a defense witness?

HELD: No. Evidence illegally obtained may not be used to impeach a defense witness other than the defendant.

DISCUSSION: The Court felt that expanding the impeachment exception to all defense witnesses would have a chilling effect on a defendant's ability to present his defense for three reasons. First, defense witnesses pose difficult challenges. Hostile witnesses called by the defense might willingly invite impeachment. Friendly defense witnesses might, through simple carelessness, subject themselves to

impeachment. Also, expanding the impeachment exception to encompass the testimony of all defense witnesses would dissuade some defendants from calling witnesses who would otherwise offer probative evidence.

Second, the defendant rarely fears a perjury prosecution since the substantive charge is usually much more compelling. A witness other than the defendant fears a prosecution for perjury. Therefore, the Court's need to deter perjured testimony is less than where the witness is the defendant, so that illegally obtained evidence can be introduced against them.

Third, expansion of the exception would significantly weaken the exclusionary rules' deterrent effect on police misconduct by opening the door inadvertently to the admission of any illegally obtained evidence. This expansion would enhance the expected value to the prosecution of illegally obtained evidence by increasing the number of occasions when evidence could be used.

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4. Independent Source

Murray v. United States
487 U.S. 533, 108 S. Ct. 2529 (1988)

FACTS: Federal agents observed suspected narcotics traffickers drive vehicles into and out of a warehouse. Later, those vehicles were lawfully seized elsewhere and found to contain marijuana. The agents then entered the warehouse without a warrant, observed a number of burlap-wrapped bales that were later found to contain marijuana, and then left. They kept the premises under surveillance. The agents then applied for and obtained a warrant to search the warehouse. They did not mention their prior illegal entry or rely on any observations made while inside. With the warrant, the agents re-entered the warehouse and seized evidence.

ISSUE: Whether the evidence was secured through an independent source?

HELD: Yes. The Fourth Amendment does not require the suppression of evidence initially discovered during an illegal entry if that evidence is also discovered during a later search pursuant to a valid warrant that is wholly independent of the illegal entry.

DISCUSSION: The exclusionary rule prohibits the introduction into evidence, in a criminal prosecution, of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search. The exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the unlawful search.

However, the connection between an unlawful search and superseding events can become so attenuated as to dissipate the taint. The "independent source" doctrine allows evidence secured in connection with a violation of the Fourth Amendment to be admissible if that evidence has a source independent of the illegality.

The Court held this rule applies to evidence initially obtained during an independent lawful search as well as evidence that is discovered during an unlawful search but is later obtained independently from activities untainted by the illegality. The evidence here would be admissible if the second search, conducted with a search warrant, was a genuinely independent source of that evidence. If the agents' decision to seek that warrant was prompted by what they saw during the illegal entry or if information obtained during that entry was presented to the reviewing magistrate, independence does not exist.

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5. Inevitable Discovery

Nix v. Williams
467 U.S. 431, 104 S. Ct. 2501 (1984)

FACTS: During the holiday season, a young girl disappeared from a YMCA building in Des Moines, Iowa. Police arrested the defendant the next day 160 miles away.

After his initial appearance, the police informed the defendant's attorney that they would pick up the defendant and return him to the appropriate district without questioning him. During the return trip one of the officers initiated a conversation with the defendant, which resulted in the defendant stating where the victim's body was located. As they approached the location, the defendant agreed to direct the officers to the child's body.

At that time, one search team was only two and one-half miles from where the defendant soon guided the officer and his party to the body. The child's body was found next to a culvert in a ditch beside a gravel road within the search area.

ISSUE: Whether evidence that was about to be discovered through lawful channels must be suppressed if it is discovered through illegal means?

HELD: No. The evidence derived from the conversation was admissible as it would have been inevitably discovered.

DISCUSSION: The Court held that when illegally seized evidence could have been obtained through an independent source and efforts are underway that would lead to that discovery, exclusion of such evidence is not justified. While the independent source exception may not justify the admission of evidence here (as the evidence had been removed and could not be independently discovered), its rationale is wholly consistent with and justifies the adoption of the inevitable discovery exception to the exclusionary rule. Unlawfully obtained

evidence is admissible if ultimately or inevitably it would have been discovered by lawful means.

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6. Other Hearings

United States v. Calandra
414 U.S. 338, 94 S. Ct. 613 (1974)

FACTS: Federal agents obtained a warrant to search the defendant's business premises for evidence of illegal gambling operations. The warrant specified the object of the search was bookmaking records and wagering paraphernalia. The search did not reveal any gambling paraphernalia. However, in exceeding the scope of the warrant, an agent discovered an index card suggesting that Dr. Walter Loveland had been making periodic payments to the defendant. The agent stated that he was aware that the U.S. Attorney's Office was investigating possible violations of extortionate credit transactions, and that Dr. Loveland had been the victim of a "loan sharking" enterprise then under investigation. The defendant was subpoenaed by a special Grand Jury convened to investigate the proliferation of "loan sharking" activities. The defendant refused to respond because the information identifying him with these activities had been illegally obtained.

ISSUE: Whether grand jury witnesses can refuse to answer questions on the ground that they were developed on illegally seized evidence?

HELD: No. The grand jury may question the witness based on the illegally obtained material, and the witness may not refuse to answer on those grounds.

DISCUSSION: The exclusionary rule does not extend to grand jury proceedings. The rationale for this rule is that allowing the grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious

discharge of the grand jury's duties, and would achieve only a speculative and minimal advance of the exclusionary rule's purpose of deterring police that disregard Fourth Amendment requirements.

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Pennsylvania Board of Probation and Parole v. Scott
524 U.S. 357, 118 S. Ct. 2014 (1998)

FACTS: The defendant was released from prison on parole. Subject to that parole, he signed an express consent to search form that permitted parole officers to search his residence without a search warrant. Parole officers, acting on this consent, found evidence of a parole violation and attempted to revoke his parole.

ISSUE: Whether the exclusionary rule applies to parole revocation hearings.

HELD: No. There is no substantial societal interest protected by applying the exclusionary rule to parole revocation hearings.

DISCUSSION: The Court stated that the government' "use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution." The exclusionary rule's design and intent is to deter illegal searches and seizures but does not "proscribe the introduction of illegally seized evidence in all proceedings or against all persons." It is only to be employed by the courts where a substantial societal benefit can be obtained. The Court was hesitant to extent the exclusionary rule matters outside of the criminal courtroom because the "[A]pplication of the exclusionary rule would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings."

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II. WHAT IS A SEARCH?

A. APPLIES TO GOVERNMENT ACTIVITIES ONLY

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

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

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

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

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

command of the Fourth Amendment is that searches and seizures be reasonable.

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

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

FACTS: Police went to the defendant's house on January 28th to question him about a murder. During their inquiry he showed them three guns and he agreed to take a lie-detector test on February 2nd. The test was inconclusive. However, the defendant admitted to a theft. Other police officers went to the defendant's house to corroborate his admission to the theft. The defendant was not home but his wife agreed to speak to the officers. The police asked about any guns that might be in the house. The defendant's wife showed them four weapons that she offered to let them take. The police took the weapons and several articles of clothing acquired in the same manner. One gun was later determined to be the murder weapon.

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

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

DISCUSSION: The Fourth Amendment controls governmental actions. The Fourth Amendment was not implicated when the government obtained the guns and clothing from the defendant's wife. The government exerted no

effort to coerce or dominate her, and was not obligated to refuse her offer to take the guns. In making these and other items available to the government, she was not acting as an instrument or agent of the government. The items were secured through private actions.

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

FACTS: Investigators believed military personnel and an attorney were involved in a conspiracy of using the mails to defraud the United States. One defendant agreed with police to go to a co-defendant's office and pretend to make a friendly visit. He had gained admission to the co-defendant's office and, in the co-defendant's temporary absence, seized and carried away several documents.

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

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

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

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B. REASONABLE EXPECTATION OF PRIVACY

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

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

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

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

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

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

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

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

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

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

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

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

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

FACTS: The defendant operated a 2,000-acre chemical plant. The plant consisted of numerous covered buildings, with outdoor manufacturing equipment and piping conduits located between the buildings that were exposed to visual observation from the air. The defendant maintained an elaborate security system around the perimeter of the complex, barring ground-level public views of the area. When the defendant denied a request by the EPA for an on-site inspection of the plant, the

EPA employed a commercial aerial photographer, using a standard precision aerial mapping camera, to take photographs of the facility from various altitudes, all of which were within lawful navigable airspace.

ISSUE: Whether this conduct was a Fourth Amendment search?

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

DISCUSSION: The EPA's aerial photograph of the defendant's plant complex from aircraft that was lawfully in public navigable airspace was not a search. The open areas of an industrial plant complex are not analogous to the "curtilage" of a dwelling. The intimate activity associated with family privacy, the home and its curtilage do not include the outdoor areas between structures and buildings of a manufacturing plant. The open areas of an industrial complex are more comparable to an "open field" in which an individual may not legitimately demand privacy. Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735 (1984).

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

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

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

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

DISCUSSION: The Supreme Court had previously approved flying a fixed wing aircraft at 1,000 feet over curtilage. The aircraft was in public airspace and complied with FAA regulations. Therefore, no reasonable expectation of privacy existed. The Court also approved flying over an industrial complex and taking photographs. Dow Chemical Co. v. United States, 476 U.S. 226, 106 S. Ct. 1819 (1986).

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

*****

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

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

In Boston, DEA agents did not have a search warrant nor an arrest warrant, but they did have a trained drug dog. The agents observed Machado and Leary as they claimed their baggage and the footlocker. The agents released the drug dog near the footlocker and he covertly alerted to the presence of a controlled substance. The defendant joined Machado and Leary and together they lifted the 200-pound footlocker into the trunk of a car. At that point, the officers arrested all three. A search incident to the arrests produced the keys to the footlocker. All

three were removed from the scene. Agents followed with the defendant's car and the footlocker. Ninety minutes later the agents opened the footlocker. It contained large amounts of marijuana.

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

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

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

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

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

FACTS: A Customs inspector initiated a lawful border search and found marijuana concealed inside a table. The inspector informed the DEA of these facts. The next day, the agent put the table in a delivery van and drove it to the defendant's building. A police inspector met him there. Posing as deliverymen, the two men entered the apartment building and announced they had a package for the defendant.

At the defendant's request, the officers left the container in the hallway outside the defendant's apartment. The agent stationed himself to keep the container in sight and observed the defendant pull the container into his apartment. While the inspector left to secure a search warrant for the defendant's apartment, the agent maintained surveillance. The agent saw the defendant leave his apartment, walk to the end of the corridor, look out the window, and then return to the apartment. The agent remained in the building but did not keep the apartment door under constant surveillance.
Between thirty and forty minutes after the delivery the defendant reemerged from the apartment with the shipping container and was immediately arrested. At the station the officers reopened the container and seized the marijuana found inside the table. The search warrant had not yet been obtained.

ISSUE: Whether the Fourth Amendment requires a search warrant to reopen a container that had previously been lawfully opened?

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

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

Normally, the police will not let the container out of their sight between the time they discover the contraband and the time it

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

*****

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

FACTS: The DEA learned through an informant that the defendant had ordered fifty gallons of ether (commonly used to process cocaine). The government obtained a court order to install and monitor a beeper in one of the cans of ether. With the informant's consent, the DEA substituted their own can containing a beeper for one of the cans in the shipment.
The agents saw the defendant pick up the ether from the informant, followed him to his home, and determined by using the beeper that the ether was inside the residence. The ether was moved several other times. Finally, the ether was transported to a house rented by Horton, Harley and Steele. Using the beeper, agents determined that the can was inside the house, and obtained a search warrant for the house, based in part on information derived through the use of the beeper. The search warrant was executed and cocaine was seized.

ISSUES:
1. Whether the installation of the beeper was lawful?

2. Whether the monitoring of the beeper inside the residences was a search?

HELD:
1. Yes. The defendant did not have a reasonable expectation of privacy in the container when the beeper was installed.

2. Yes. The defendant had a reasonable expectation of privacy inside the residence.

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

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

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

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United States v. Knotts
460 U.S. 276, 103 S. Ct. 1081 (1983)

FACTS: Armstrong was suspected of buying chemicals for the production of controlled substances. With the consent of the chemical company, government officers installed a beeper in a five-gallon can of chloroform, which is often used to manufacture drugs. The company agreed to use this can the next time Armstrong purchased chloroform. When Armstrong made his next purchase, the company sold him the beeper-laden can. The officers followed the beeper signal to its final destination, underneath the defendant's cabin. Relying on this information, the officers obtained a search warrant. They discovered the defendant's drug laboratory in the cabin.

ISSUE: Whether the monitoring of the beeper on public roadways or at its final destination amounted to a search?

HELD: No. The monitoring of the beeper on public roadways and at its final destination did not amount to a search.

DISCUSSION: The government's activity does not amount to a search unless it intrudes into a reasonable expectation of privacy. The Court held that a person traveling on a public roadway has no reasonable expectation that other members of the public or law enforcement officers will not observe their movements. As the officers could have used visual surveillance techniques to obtain the information provided by the beeper, they did not intrude on the defendant's reasonable expectation of privacy.

Likewise, the monitoring of the beeper while on the defendant's property did not amount to an intrusion of the defendant's reasonable expectation of privacy. The Court reasoned that members of the public could have visually observed the can that contained the beeper in the transfer from the public domain to private property. However, if the beeper had been used to reveal information about the movement of the can while inside the cabin, which is not observable from a public place, this would have amounted to an intrusion into a reasonable expectation of privacy.

*****

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

FACTS: Police officers focused their murder investigation on the defendant. Officers went to the defendant's place of business to question him. While there, they observed the car that they suspected might have been used in the murder. Several months later, the officers questioned the defendant again. They also obtained an arrest warrant. The defendant

drove his car to the station for questioning and left his car in a commercial parking lot. The suspect was arrested and the car was towed to a police impound lot where a warrantless examination of its exterior was conducted the following day.

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

HELD: Yes. The examination of the exterior of the defendant's automobile invaded no right to privacy.

DISCUSSION: Nothing from the interior of the car and no personal effects were searched or seized. The intrusion was limited to the exterior of the vehicle left in a public parking lot. No reasonable expectation of privacy is violated by the examination of a tire on an operative wheel or in the taking of exterior paint samples from a vehicle that had been parked in a public place. Further, the police had probable cause to search the car. Where probable cause exists, a warrantless search of an auto is reasonable under the Fourth Amendment. See Carroll v. United States.

*****

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

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

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

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

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

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

FACTS: The defendant, the President of Teamsters Union, was on trial in Federal Court for labor racketeering. During the trial, he occupied a three-room suite in a hotel. Several friends and fellow teamster officials were his constant companions during the trial. One companion was a teamster official and an FBI informer.

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

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

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

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

*****

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

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

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

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

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

No exigent circumstances existed that would excuse the officers' warrantless entry into the home. While the crime was serious, the defendant was not considered to be the murderer, but only the getaway driver. The police had previously recovered the murder weapon and there was no evidence that the two women inside the residence were in danger. The police had the home surrounded. It was apparent that the defendant was not able to leave. If he had, he would have been arrested in a public place. For all of these reasons, exigent circumstances did not exist to enter the home. The defendant's statement was suppressed as the fruit of his unlawful arrest.

*****

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

FACTS: The defendant and the lessee of an apartment packaged cocaine in the apartment. A law enforcement officer observed this activity by looking through a drawn window blind. The defendant did not live in the apartment, he had never

visited that apartment before and his visit only lasted a matter of hours. His singular purpose in being there was to package cocaine. The defendant was arrested for conspiracy to commit a controlled substance crime. He complained that the information that led to his arrest was the product of an unreasonable search.

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

HELD: No. A visitor does not enjoy a reasonable expectation of privacy in a premises visited for commercial reasons.

DISCUSSION: The Supreme Court distinguished the defendant's presence in this apartment from the social, overnight guests' presence in Minnesota v. Olson. In Olson, the Court held that a guest staying overnight in another's home had a reasonable expectation of privacy. The defendant in Carter however, went to the apartment for a business transaction, limiting his presence to a matter of hours. He did not have a previous relationship with the lessee of the apartment, nor did he have a connection to the apartment similar to that of an overnight guest. While the apartment was a dwelling for the lessee, the property was equivalent to a commercial site as to the defendant. Lacking a significant connection to the property, the defendant did not have standing to object to the search conducted on that premises.

*****

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

FACTS: The defendant, a physician, was an employee of a state hospital. Hospital officials became concerned about possible improprieties in his conduct, particularly concerning his acquisition of a computer and charges of sexual

harassment. Hospital officials entered his office while the defendant was on administrative leave pending the investigation. The officials entered the office to inventory and secure state property. They seized personal items from his desk and file cabinets. These items were later used in administrative proceedings resulting in his discharge. No formal inventory of the property in the office was made, and the other papers in the office were placed in boxes for storage. The defendant filed an action under 42 U.S.C. § 1983.

ISSUES:

1. Whether the defendant, a public employee, had a reasonable expectation of privacy in his office, desk, and file cabinet at his place of work?

2. Whether a public employer must establish probable cause before searching an employee's reasonable expectation of privacy?

HELD:

1. Yes. It is possible for an employee to establish a reasonable expectation of privacy in a work place environment. The defendant had been the sole occupant of the office for 17 years, kept personal items in his desk and cabinets, and was not in violation of policy in doing so.

2. It depends. When the employer's search is work-related, the search must be reasonable under the circumstances.

DISCUSSION: The Court recognized that employees may develop a reasonable expectation of privacy in government workplaces. Justice Scalia stated "[c]onstitutional protection against unreasonable searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer." The operational realities of the workplace, however, may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement officer.

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

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

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

*****

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

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

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

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

DISCUSSION: Prisoners are afforded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration (to be free from racial discrimination and cruel and unusual punishment, to petition for redress of grievances, certain First Amendment religious and speech protections, due process). However, imprisonment also entails a series of personal deprivations. One of those deprivations, rationally and logically, is the loss of person privacy. The Court held that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."

*****

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

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

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

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

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

Nor did the Court consider the purchase of the magazines a seizure (defined as a "meaningful interference with an individual's possessory interests" in United States v. Jacobsen). The defendant "voluntarily transferred any possessory interest he may have had in the magazines to the purchaser upon the receipt of the funds." Therefore, these actions cannot be deemed a Fourth Amendment seizure.

*****

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

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

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

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

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

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

*****

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

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

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

HELD: Yes. The defendant did not surrender his reasonable expectation of privacy in the contents of a container by placing it in an overhead bin accessible by the public.

DISCUSSION: A search is defined as a government intrusion on a reasonable expectation of privacy. The government argued that the defendant did not have a reasonable expectation of privacy because he exposed his container to the public. The defendant could not have prevented any other member of the public from handling the container. Therefore, he should not have the ability to complain when the government does. The Court acknowledged that persons do not maintain a reasonable expectation of privacy in things that can be viewed from public places.

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

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

FACTS: The defendant's behavior aroused the suspicion of law enforcement officers as he waited in line at the Miami International Airport to purchase a ticket to New York's LaGuardia Airport. The officers approached the defendant and requested and received identification. There was a discrepancy in the name given by the defendant and the baggage tags. The defendant gave permission to the officers to open his luggage. As the defendant's flight was about to leave, the officers decided not to search his luggage and allowed the defendant to depart. They called DEA in New York and relayed their information. Upon the defendant's arrival in New York, two DEA agents approached him and said that they believed he might be

carrying narcotics. When he refused to consent to a search of his luggage, one of the agents told him they were going to take the luggage to a federal judge to obtain a search warrant. The agents took the luggage to Kennedy Airport where it was subjected to a "sniff test" by a drug dog. The dog reacted positively to one of the suitcases. At this point, ninety minutes had elapsed since the seizure of the luggage. The agents obtained a search warrant and opened the luggage. They discovered cocaine inside.

ISSUE: Whether the "sniff test" was a search within the meaning of the Fourth Amendment?

HELD: No. The drug dog sniffs air surrounding the bag, an area in which the suspect has no reasonable expectation of privacy.

DISCUSSION: Subjecting luggage to a "sniff test" by a narcotics dog is not a search under Fourth Amendment. The dog is sniffing the air that surrounds the container and the defendant has no reasonable expectation of privacy in this air.

When officers reasonably suspect that a traveler is carrying luggage that contains contraband, the principles of Terry permit the officer to detain the luggage temporarily to investigate the circumstances that aroused the officer's suspicion, provided that the investigative stop is properly limited in scope. However, in this case, the extended duration of the detention of defendant's luggage was unreasonable as a Terry seizure. Therefore, the evidence was suppressed.

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1. Open Fields

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

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

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

HELD: No. The Fourth Amendment protection of the house does not extend to "open fields."

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

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

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

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

HELD: Yes. The officers' observations were made from an area in which the defendant had no reasonable expectation of privacy.

DISCUSSION: Steps taken to protect privacy, such as planting the marijuana on secluded land and erecting fences

and "No Trespassing" signs around the property, do not necessarily establish an expectation of privacy in an open field. Open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government intrusion or surveillance.

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

FACTS: DEA agents discovered that Carpender had bought large quantities of chemicals and equipment used to make controlled substances. The agents placed beepers in some of this equipment and followed it to the defendant's ranch. The ranch was completely encircled by a perimeter fence, and contained several interior barbed wire fences, including one around the house approximately fifty yards from the barn, and a wooden, corral fence enclosing the front of the barn. The barn had an open overhang and locked, waist high gates. Agents, without a warrant, climbed over the perimeter fence, several of the barbed wire fences, and the wooden fence in front of the barn. They were led there by the smell of chemicals, and while there, could hear a motor running inside. They shined a flashlight inside and observed a drug lab. Using this information, the agents obtained and executed a search warrant.

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

HELD: Yes. The defendant's privacy interest was not offended by the officers' actions.

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

1) proximity of the area to the home;

2) whether the area is within an enclosure that also surrounds the home;

3) nature and use to which the area is put; and,

4) steps taken by the resident to protect the area from observation by passers-by.

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

*****

2. Abandoned Property

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

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

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

HELD: No. The defendant does not have a reasonable expectation of privacy in garbage left for collection outside the curtilage of his home.

DISCUSSION: The defendant can only establish a reasonable expectation of privacy in garbage bags left at the curb outside his curtilage if he manifested a subjective expectation of privacy that society accepts as objectively reasonable. That the defendant exposed his garbage to the public sufficiently defeats this claim. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, the defendant placed his trash at the curb for the express purpose of conveying it to a third party, the trash collector. The trash collector might have sorted through the trash or permitted others, such the police, to do so. Accordingly, the defendant has no reasonable expectation of privacy in the items discarded. What a person knowingly exposes to the public, even in his own home or office, does not enjoy Fourth Amendment protection.

*****

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

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

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

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

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

3. Foreign Searches

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

FACTS: The defendant was a citizen and resident of Mexico. A federal court issued a warrant for his arrest for narcotic-related offenses. He was arrested by Mexican officials and turned over to U.S. Marshals in California. Following the arrest, a DEA Agent in concert with Mexican law enforcement searched the defendant's residences located in Mexico. The agent believed the searches would reveal evidence of defendant's narcotics trafficking and his involvement in the torture-murder of a DEA Agent. Arrangements were made with appropriate Mexican officials who authorized the searches. One search uncovered a tally sheet that the government believed reflected the quantities of marijuana smuggled by defendant into the United States.

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

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

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

The Fifth and Sixth Amendment rights are different from Fourth Amendment rights. They are fundamental trial rights; a violation occurs only at trial. A violation of the Fourth Amendment is fully accomplished at the time of an unreasonable intrusion by government agents. Therefore, any possible Fourth Amendment violation occurred in Mexico.
The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment warrant requirement should not apply abroad.

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4. Private Intrusions

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

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

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

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

DISCUSSION: A "search" under the Fourth Amendment occurs when the government intrudes on an area where an

individual has a reasonable expectation of privacy. The Constitution and its amendments do not apply to the activities of private individuals not acting as agents of the government. Here, the initial invasion by the two employees was not subject to the Fourth Amendment. And, once an individual's original expectation of privacy is destroyed, the Fourth Amendment does not prohibit governmental use of the now non-private information. The additional intrusion of the field test was also determined to be reasonable.

*****

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

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

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

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

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

contained therein, it is especially important that this requirement be scrupulously observed.

Some circumstances -- for example, if the results of the private search are in plain view when materials are turned over to the government (see United States v. Jacobsen) -- may justify the government's re-examination of the materials. However, the government may not exceed the scope of the private search unless it has the right to make an independent search. The nature of the contents of the films was indicated by descriptive material on their individual containers. This did not allow the Government's unauthorized screening of the films absent consent, exigency or a warrant. The screening constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances. Therefore, the intrusion of viewing the films with a projector was unreasonable.

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5. Third Party Control

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

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

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

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

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

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

*****

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

FACTS: The victim of a robbery began receiving phone calls from the person who claimed to be the robber. The police installed a pen register, without a warrant, at the central telephone system in order to determine the identity of the numbers that a suspect, the defendant, was dialing. After the police discovered that the defendant had called the victim, they charged him with robbery.

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

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

DISCUSSION: The Court found that the defendant did not have a legitimate expectation of privacy regarding the numbers he dialed on his phone since those numbers were automatically

turned over to a third party, the phone company. Even if the defendant did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation was not one that society was prepared to recognize as "reasonable." Therefore, the Court concluded that installation of the pen register was not a "search" and no warrant was required.

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

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III. WHAT IS A SEIZURE?

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

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

ISSUE: Whether the defendant was "seized" at the time he dropped the controlled substance?

HELD: No. The government had not seized him at the time he abandoned the controlled substance.

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

1) The application of force however slight; or

2) Submission to an officer's "show of authority" to restrain the subject's freedom of movement.

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

Assuming that the officer's pursuit constituted a "show of authority" requesting the defendant to halt, the defendant did not submit. He therefore was not seized until he was tackled.

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

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

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

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

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

occur. In this case, that is exactly what the officers did. The defendant was seized under the Fourth Amendment.

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

FACTS: Police officers riding in a marked car observed the defendant standing on a street corner. When he saw the police car approaching, the defendant began to run. The officers followed him, driving next to him as he ran. While they drove alongside, the officers did not activate their siren or flashing lights, order the defendant to stop, display any weapons, or use the vehicle to try to block the defendant's path. As the officers observed him, the defendant threw a number of small packets. One of the officers retrieved the packets and identified the contents as a controlled substance. The defendant was arrested and a search of his person revealed other drugs and a hypodermic needle.

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

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

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

Brendlin v. California
127 S. Ct. 2400 (2007)

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

ISSUE: Whether a passenger in a stopped motor vehicle has been "seized?"

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

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

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

FACTS: As part of a drug interdiction effort, police officers routinely boarded passenger buses at scheduled stops and

asked travelers for permission to search their luggage. Two officers boarded the bus that the defendant was riding. Without articulable suspicion, the officers questioned the defendant and asked for his consent to search his luggage for drugs. They advised the defendant of his right to refuse and he granted his consent. The officers found cocaine and arrested the defendant.

ISSUE: Whether the encounter constituted a "seizure" within the meaning of the Fourth Amendment?

HELD: No. A person is "seized" when their freedom of movement is restricted by government action.

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

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

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

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

FACTS: Three police officers boarded a bus as part of a routine drug and weapons interdiction effort. One officer knelt on the driver's seat, facing the rear of the bus, while another officer stayed in the rear, facing forward. The third officer worked his way from back to front, speaking with individual passengers as he went. To avoid blocking the aisle, this officer stood next to or just behind each passenger with whom he spoke. He testified that passengers who declined to cooperate or who chose to exit the bus at any time would have been allowed to do so, that most people are willing to cooperate, and that passengers often leave the bus for a break while officers are on board. The officer approached the defendant and his traveling companion, who were seated together, and identified himself. Speaking just loud enough for them to hear, he declared that he was looking for drugs and weapons and asked if the defendants had any bags. Both of them pointed to a bag overhead. The officer asked if they minded if he checked it. The traveling companion agreed, but the search did not reveal anything. The officer then asked the companion whether he minded if the officer checked his person. The companion agreed and the officer felt hard objects similar to drug packages. The officer arrested the companion. The officer then asked the defendant, "Mind if I check you?" When the defendant agreed, a pat-down revealed objects similar to those found on the companion, and the officer arrested the defendant.

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

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

DISCUSSION: The Court previously held in Florida v. Bostick that the Fourth Amendment allows officers to approach

bus passengers at random to ask questions and request their consent to search. The limitation to this authority is that a reasonable person must feel free to decline the requests or otherwise terminate the encounter. Applying Bostick's rationale to this case demonstrates that the officers did not seize the defendants. The officers gave the passengers no reason to believe that they were required to answer questions. They did not display weapons or make any intimidating movements, and they left the aisle free so that the defendants could exit. The communicating officer spoke to the defendants one by one and in a polite, quiet voice. The Court held that if this encounter occurred on a public street, no seizure would have occurred. The fact that an encounter takes place on a bus does not transform it into a seizure.

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

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

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

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

DISCUSSION: The Court held that the forcible removal of the trailer home from the park was a "seizure" of the home within the meaning of the Constitution's Fourth Amendment. This was true although the officers did not enter the home or

rummage through the homeowner's possessions and did not interfere with the homeowner's liberty during the eviction. The Court cited precedents indicating that the Fourth Amendment protects against unreasonable seizures of property regardless of whether the seizure is the outcome of a search, and protects pure property interests even in a setting other than law enforcement.

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A. ARRESTS

1. Premises

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

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

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

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

DISCUSSION: Arrest in the home involves not only the invasion associated to all arrests, but also an invasion of the sanctity of the home. The law has long held that this is too

substantial an invasion to allow without a warrant or exigent circumstances.

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

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

FACTS: Police officers had probable cause that the defendant committed a murder but they did not have a warrant. The officers went to his apartment to arrest him. When they arrived, they knocked on the door and displayed their guns and badges. The defendant did not consent to their request but the officers entered nonetheless. They read the defendant his Miranda rights and he agreed to answer questions. The defendant admitted his guilt, was arrested, taken to the station house, and was again informed of his Miranda rights. There, he signed a written statement.

ISSUE: Whether the officers could entry the defendant's home to arrest him based on probable cause alone?

HELD: No. The officers needed to have an arrest warrant, the defendant's consent, or some exigency to enter his home to arrest him.

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

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

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

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

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

ISSUE: Whether the government is justified in entering a premises to affect an arrest without consent, a warrant or exigent circumstance?

HELD: No. Officers need consent, an arrest warrant or an exigent circumstance to enter a premises for the purpose of making an arrest

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

2. Third Party Premises

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

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

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

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

HELD: Yes. An arrest warrant for a suspect does not imply the authority to enter a third-party's home to effect the arrest. Consent or an exigency is necessary to do so.

DISCUSSION: The Fourth Amendment has drawn a firm line at the entrance to a dwelling, and, absent exigent circumstances or consent, that threshold may not be crossed without a warrant. The purpose of a warrant is to allow a neutral and detached magistrate to assess whether the government has probable cause to make an arrest or conduct a search.

An arrest warrant authorizing police to deprive a person of his liberty also authorizes a limited invasion of that person's privacy when it is necessary to arrest him in his home. However, the arrest warrant does not authorize the police to deprive a third person of his liberty, nor can it embody any derivative authority to deprive that person of their interest in the privacy of their home. Absent exigent circumstances or consent, law enforcement officers cannot search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant.

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

FACTS: The defendant, a physician and proprietor of a clinic, provided medical services to welfare recipients. He was indicted by a grand jury for fraudulently accepting payments from state welfare agencies. During the grand jury investigation, subpoenas were issued for two of his employees. When the employees failed to appear, arrest warrants were issued for their arrest. When two Deputy Sheriffs attempted to serve the warrants at the defendant's clinic, he barred the door and refused to let them enter the private part of the clinic. Police officers, whom the defendant had called, appeared and told him to allow the Deputy Sheriffs to enter. The defendant continued to refuse. The Deputy Sheriffs then called the

County Prosecutor, who instructed the Deputy Sheriffs to "go in and get" the employees. The door was chopped down with an axe. The Deputy Sheriffs entered but were unable to find the two employees.

Although the defendant was acquitted of the fraud charges, he was prosecuted and convicted for obstruction of justice. He then filed a 42 U.S.C. § 1983 lawsuit against the county and others alleging that his Fourth and Fourteenth Amendment rights had been violated. His theory was that, absent exigent circumstances, the Fourth Amendment prohibited police from searching an individual's home or business without a search warrant even to execute an arrest warrant for a third person.

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

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

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

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3. Arrest Warrants

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

FACTS: A sheriff received information that the defendant had broken into a building and stolen some property. The sheriff filed a complaint that did not mention nor corroborate this information. It merely contained the officer's conclusion that the defendant had committed the crime. Based on this complaint, the magistrate issued an arrest warrant and the defendant was arrested.

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

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

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

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

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

FACTS: A reliable informant told a Postal Inspector that the defendant had provided the informant with a stolen credit card. The Inspector later verified that the card had been stolen. The informant also told the Inspector that the defendant had agreed to furnish additional stolen credit cards. A meeting was arranged between the informant and the defendant in a public place. Upon receiving a signal from the informant that the defendant was in possession of additional stolen credit cards,

Postal Officers made a warrantless arrest of the defendant. When a search of his person failed to turn up the additional cards, the defendant consented to a search of his nearby vehicle. Prior to consenting to the vehicle search, the defendant was told that if anything was found, "it was going to go against [him]." Two credit cards in the name of other persons were found in the vehicle.

ISSUES:

1. Whether the warrantless arrest of the defendant was a violation of the Fourth Amendment, in that the officers had time to obtain a warrant, but failed to do so?

2. Whether the defendant's consent to search the vehicle was coerced?

HELD:

1. No. The officers had probable cause to arrest for the felony and, because the arrest occurred in public, they could do so without first obtaining a warrant.

2. No. There was no evidence to indicate that the defendant's consent was coerced from him.

DISCUSSION: Nothing in the Fourth Amendment requires a warrant before an officer can make an arrest for a felony offense in a public place. Further, cases interpreting the Fourth Amendment have traditionally followed the common law approach, which permitted officers to make warrantless arrests for misdemeanors or felonies that were committed in the officer's presence, as well as for felonies not committed in the officer's presence, but for which probable cause existed. Finally, the arrest of the defendant was based upon a Federal statute that authorized Postal Service officers performing their official duties to make warrantless arrests for Federal felony offenses if probable cause existed. While it might be preferable for officers to obtain an arrest warrant if practicable, it is not constitutionally required. "The necessary inquiry, therefore, was not whether there was a warrant or whether there was time to get one, but whether there was probable cause for the

arrest." Based on the facts, the officers had probable cause for the arrest in this case.

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

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

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

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

HELD: No. The Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine.

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

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

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

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

HELD: Yes. A limited protective sweep, in conjunction with an in-home arrest, is permitted when the

searching officer possesses a reasonable belief that the area to be swept harbors an individual posing a danger to those on the arrest scene.

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

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

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

B. STOPS

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

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

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

ISSUES: 1. Whether the detective's actions amounted to a seizure?

2. Whether the detective's actions amounted a search?

HELD: 1. Yes. Detective McFadden "seized" the defendant when he grabbed him.

2. Yes. Detective McFadden "searched" the defendant when he put his hands on the defendant's person.

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

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

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

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

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

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

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

DISCUSSION: While the State has an interest in ensuring the safety of its roadways, an individual still retains a reasonable expectation of privacy in a vehicle, despite significant governmental regulation of vehicles. If an individual was subjected to unrestricted governmental intrusion every time he or she entered a vehicle, the Fourth Amendment prohibition against unreasonable searches and seizures would be severely undermined. Instead, "except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the vehicle are unreasonable under the Fourth Amendment."

*****

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

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

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

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

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

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

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

ISSUE: Whether the seizure of the defendant was unreasonable, tainting his consent?

HELD: Yes. Consent granted during an illegal seizure is typically found to be the product of coercion.

DISCUSSION: Investigative detentions must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Investigative methods employed should be the least intrusive means reasonably available to verify or dispel reasonable suspicion in a quickest time possible. Officers did not do that here as they failed to return his ticket and license. They did not have probable cause to either arrest the defendant or search his suitcases. Consent granted during an illegal seizure will typically be held to be invalid.

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

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

ISSUE: Whether the seizures met the Fourth Amendment's requirement of brevity governing detentions on less than probable cause?

HELD: Yes. The seizures were reasonable under the Fourth Amendment

DISCUSSION: In evaluating the reasonableness of an investigative stop, this Court examines "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances that justified the interference in the first place." In assessing whether a

detention is too long to be justified as an investigative stop, it is appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.

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

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Illinois v. Caballes
543 U.S. 405, 125 S. Ct. 769 (2005)

FACTS: The defendant was stopped for speeding. During the routine traffic encounter, a second police officer appeared at the scene with a drug-detection dog. He walked his dog around the defendant's vehicle and the dog alerted to the presence of a controlled substance in the trunk. The officers opened the trunk and discovered evidence inside.

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

HELD: No. No suspicion is required to use a drug-detecting dog during a traffic stop if its use did not exceed the length of time normally associate with conducting such a stop.

DISCUSSION: The Court stated "[I]n our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy." A canine sniff discloses only the existence or absence of a controlled substance, in which a suspect has no legitimate privacy interest. "Accordingly, the use of a well-trained narcotics-detection dog–one that 'does not expose noncontraband items that otherwise would remain hidden from public view,' Place, 462 U.S., at 707–during a lawful traffic stop, generally does not implicate legitimate privacy interests."

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

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

ISSUES:

1. Whether the officer's order to get out of the car during a lawful traffic stop was reasonable under the Fourth Amendment?

2. Whether the frisk of the defendant was lawful under the Fourth Amendment?

HELD: 1. Yes. The officer's order to get out of the car did not violate the Fourth Amendment, since the interest in the officer's safety outweighed what was, at most, a mere inconvenience to the driver.

2. Yes. The frisk of the defendant, conducted when the officer observed a bulge under the defendant's jacket, was lawful under the Fourth Amendment.

DISCUSSION: The key to any Fourth Amendment analysis is whether the challenged conduct was reasonable. The reasonableness of conduct depends on "a balance between the public interest and the individual's right to personal security free from arbitrary interference by police officers." With regard to the first issue, the safety of a police officer is a legitimate and weighty concern (officer will not have to stand near traffic flow, etc.) that outweighs the minimal intrusion suffered by a driver who is asked to get out of a lawfully stopped car. With regard to the second issue, the Court's decision in Terry v. Ohio was controlling. "The bulge in the defendant's jacket permitted the officer to conclude that the defendant was armed and thus posed a serious and present danger to the safety of the officers."

*****

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

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

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

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

DISCUSSION: The touchstone of all Fourth Amendment analysis is whether the government's invasion of a person's personal security was reasonable. Reasonableness depends on striking a balance between the public's interest in conducting the search or seizure and the individual's interest in preserved privacy. Here, the public has a great interest in preserving the safety of the officer. The officer must maintain an awareness of the driver and any passengers, any of whom can pose a threat, during the encounter. The passenger is only minimally intruded upon. The only change in their circumstance is that they will be outside the vehicle, where they cannot access concealed weapons found in the vehicle. Therefore, it is reasonable for officers to order passengers of lawfully stopped vehicles out of the conveyance.

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

FACTS: Six days after an armed robbery, a police officer received reliable information that the defendant had been involved as the getaway driver. The officer immediately issued a "wanted flyer" to other police departments in the area, containing the defendant's name, as well as the date and location of the robbery. The flyer also stated that the defendant was wanted for investigation of an armed robbery and cautioned that he was considered to be armed and dangerous. Approximately six days later, an officer from a nearby police department stopped the defendant while driving a vehicle, based on the "wanted flyer." The officer was unable to confirm whether a warrant had been issued for the defendant's arrest

before approaching the vehicle. The officer ordered the defendant and a passenger out of the vehicle. Another officer arrived on the scene and observed, through the open passenger door of the vehicle, the butt of a revolver. The passenger, a convicted felon, was arrested. Two other weapons were found during the ensuing search and the defendant was arrested.

ISSUES:

1. Whether a Terry stop for a crime that has already been completed is lawful under the Fourth Amendment?

2. Whether a Terry stop can be based on a "wanted flyer" issued by officers who had a reasonable suspicion that the suspect has committed an offense?

HELD:

1. Yes. There is no limitation that the suspect stopped be either in the process of committing, or about to commit, a crime.

2. Yes. The validity of the "wanted flyer" rests on the issuing officer's reasonable suspicion to stop the suspect.

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

Whether the officers who actually stopped the defendant had knowledge of the facts that gave rise to reasonable suspicion is immaterial. What is key is whether the officers who issued the "wanted flyer" had reasonable suspicion to conduct a Terry stop. If so, the suspect may be stopped on the basis of the flyer to "check identification, pose questions to the person, or to detain the person briefly while attempting to obtain further

information." Here, the officers who stopped the defendant did so lawfully, in that the officer who issued the flyer had reasonable suspicion for a stop. Because the initial stop was lawful, all evidence seized in plain view or incident to the arrest that followed was admissible.

*****

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

FACTS: The defendant was the primary suspect in a burglary. The police reasonably suspected the defendant was involved. Without a warrant, the police went to his home to obtain fingerprints. Arriving at the home, the police spoke to the defendant on his front porch. When he expressed reluctance to go with the police to the station, one officer said that they would arrest him. The defendant, stating he would rather go to the station than be arrested, went with the officers and was fingerprinted. When the police determined that his prints matched those taken at the scene of the crime, he was arrested.

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

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

DISCUSSION: When the police forcibly remove a person from his home and transport him to the station, the suspect has been seized. The Court refused to characterize this seizure, as brief as it may have been, as an investigative stop. The seizure was comparable to the acts of a traditional arrest. Therefore, the Court held that this seizure, where not under

judicial supervision, is sufficiently like an arrest to require probable cause.

*****

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

FACTS: The defendant traveled to Los Angeles on a direct flight from Columbia. A Customs Inspector noticed from her passport that the defendant had made approximately eight recent trips from Columbia to either Miami or Los Angeles. The Inspector knew that Bogota was a source city for drugs. The Inspector discovered that the defendant spoke no English and had no family or friends in the United States. She carried $5,000 in cash, primarily in $50 bills, and claimed that she had come to the United States to buy goods for her husband's store in Bogota. However, she had not set up any meetings with retailers. She did not have hotel reservations. She could not remember how her airline ticket was purchased, and had only four changes of clothing. The defendant only possessed the shoes (high-heeled) she was wearing. She had no checks, credit cards, waybills, or letters of credit, although she did have old receipts and waybills, and a Colombian business card. Based upon these facts and his experience, the Inspector suspected the defendant was a "balloon swallower," one who attempts to smuggle drugs into the country through her alimentary canal.
A female Inspector moved the defendant into a private area and conducted a pat-down and strip search. Nothing was found, but a "firm fullness" was noted in the defendant's abdomen area. She was also wearing two pair of underpants with a paper towel lining the crotch area. The defendant was told she was suspected of smuggling drugs in her alimentary canal. When asked to be x-rayed, the defendant agreed, but stated she was pregnant. She agreed to a pregnancy test prior to the x-ray, but later withdrew her consent to the x-ray. For approximately sixteen hours, the defendant refused to eat or drink anything or use the toilet facilities. Customs officials sought a court order authorizing a pregnancy test, an x-ray, and a rectal examination. A Federal magistrate authorized the rectal

examination and an involuntary x-ray, provided the doctor considered the defendant's claim of pregnancy. At a local hospital, the defendant's pregnancy test was negative. During the rectal examination, a balloon was found containing an unknown substance. The defendant was then formally arrested. Over the next four days, the defendant passed a total of 88 balloons containing 528 grams of cocaine.

ISSUES:

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

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

HELD:

1. Yes. To detain a traveler at the border beyond the scope of a routine customs search and inspection, reasonable suspicion must exist.

2. No. Under the circumstances of this case, the sixteen-hour detention was reasonable and thus did not violate the Fourth Amendment.

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

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

*****

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

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

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

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

DISCUSSION: The Court held that the Border Patrol's routine stopping of vehicles at a permanent checkpoint located on a major highway away from the Mexican border for brief questioning of the vehicle's occupants is consistent with the Fourth Amendment. These stops and subsequent questioning may be made at reasonably located checkpoints with no individualized suspicion that the particular vehicle contains illegal aliens. To require that such stops always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car necessary to identify it as a possible carrier of illegal aliens. The Court based its conclusion on the fact that while

the need to make routine checkpoint stops is great, the intrusion on privacy interests is limited. The Court contrasted the level of intrusion at a checkpoint stop (none required) with that of a roving patrol (reasonable suspicion required) and cited relatively low expectation of privacy in an automobile.

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

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

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

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

DISCUSSION: The government could not justify the search on the basis of any case law applicable to automobile searches, as probable cause was lacking. Nor could the government justify the search by analogy with a border inspection, as the officers had no reason to believe that the defendant had crossed the border (nexus with the border). Nor did the government have the defendant's consent to conduct the search. The Court

explained that travelers may be stopped in crossing an international boundary (nexus) because of national self protection. However, the search of the defendant's automobile on a road lying at all points at least 20 miles north of the Mexican border, was different. Those lawfully within the country and entitled to the use of public highways have a right of free passage without interruption or search.

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IV. LEVELS OF SUSPICION

A. PROBABLE CAUSE

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

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

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

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

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

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

defined) as known facts and circumstances sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found. Each case must be determined on its own facts. "The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause (underline added)."

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

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

ISSUE: Whether the agents had probable cause when they searched the defendant's vehicle?

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

DISCUSSION: While packages had been stolen, that fact did not make every person seen carrying a package subject to arrest and search. It also did not make every package subject to

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

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

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

ISSUES:

1. Whether hearsay evidence that is not legally admissible in a criminal trial can be used in developing probable cause for an arrest?

2. Whether the officer had probable cause to arrest the defendant?

HELD:

1. Yes. Probable cause for an arrest can be established through hearsay evidence.

2. Yes. The information given to the agent was sufficient to establish probable cause.

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

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

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

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

trial, there was nothing to show that the officer's safety was a potential justification for the intrusion into the defendant's pocket.

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

HELD: No. The officer was unable to establish probable cause that the defendant was in possession of a controlled substance.

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

*****

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

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

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

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

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

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

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

FACTS: After stopping a vehicle for speeding in an early morning hour, a police officer obtained consent from the owner-operator to search. The officer found $763 in the glove compartment and five small bags containing a controlled substance behind the back-seat armrest. The officer asked all three occupants of the vehicle who owned the drugs and money.

When all three denied ownership he placed them under arrest. Ultimately, the defendant admitted to committing the crime.

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

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

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

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

B. REASONABLE SUSPICION

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

FACTS: In the early morning hours in a high crime neighborhood, a reliable informant told a police officer that the defendant was seated in a nearby car and possessed narcotics and a weapon. The officer approached the car and asked the defendant to get out. The defendant rolled down the window instead. When he did so, the officer reached into the car and removed the gun from the defendant's waistband. While the gun was not visible from outside the car, it was in the specific location identified by the reliable source. The defendant was arrested for unlawful possession of a firearm. The subsequent search incident to the arrest uncovered a substantial quantity of heroin.

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

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

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

officer ample reason to fear for his safety and justified the limited intrusion required to obtain the weapon.

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

FACTS: A Texas statute made it a crime for any person to refuse to give his name and address to an officer "who has lawfully stopped him and requested the information." Two police officers observed the defendant and another man walk away from one another in an alley located in an area known for drug trafficking. While the men were separated when first observed, both officers believed the two had been meeting, or were about to meet, until the officers approached. Because the situation "looked suspicious" and the officers had never seen him in that area before, the defendant was stopped to ascertain his identity. The defendant was not suspected of any specific misconduct, nor were there any facts to indicate the defendant was armed. Upon being stopped, the defendant refused to identify himself. He was arrested and convicted for violating the Texas statute.

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

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

DISCUSSION: When the defendant was stopped by the officers for the purpose of obtaining his identity, he was "seized" within the meaning of the Fourth Amendment. Whether this seizure was reasonable depends on a balancing between society's interest and an individual's interest in being free from random interference by law enforcement officers. In order for an investigatory stop to be lawful, the officer must have reasonable suspicion, based on articulable facts, that the

suspect is involved in criminal activity. Here, the officers did not have reasonable suspicion. While the defendant may have "looked suspicious," the officers could not articulate facts to support this conclusion. The officer conceded that the purpose of the stop was simply to ascertain the defendant's identity. Standing alone, the fact that the defendant was in a drug trafficking area is insufficient to conclude he was engaged in criminal conduct. Because the stop was unlawful, application of the Texas statute to these facts was unconstitutional. Of note, the Court did not decide whether an individual who was lawfully stopped could be compelled to identify himself.

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

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

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

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

DISCUSSION: The government's substantial interest in effectively deterring illegal aliens from entering this country outweighs the minimal intrusion of a brief stop and questioning of a vehicle and its occupants at the border. However, the Court held that stops made by "roving" patrols on a random basis were unreasonable under the Fourth Amendment. Only

"when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, may he stop the car briefly and investigate the circumstances that provoke suspicion." Similarly, the Fourth Amendment prohibits detaining individuals for questioning about their citizenship unless reasonable suspicion exists that the individual is an illegal alien.

Here, the only basis for stopping the vehicle and questioning the occupants was the fact the occupants appeared to be of Mexican ancestry. Standing alone, this does not furnish reasonable suspicion to believe the occupants were illegal aliens. Facts that Border Patrol agents may rely upon to establish reasonable suspicion include (1) the location of the area where the vehicle was encountered, including its proximity to the border, the usual patterns of traffic on the road, and previous experience with alien traffic; (2) information about recent border crossings in the area; (3) the driver's behavior, such as erratic driving or obvious attempts to evade officers; and (4) aspects of the vehicle itself, such as its size, the number of passengers, and whether it appears heavily loaded.

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

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

search warrant, and found controlled substances in his luggage.

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

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

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

*****

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

FACTS: Police received an anonymous telephone tip that the defendant would be leaving an apartment complex at a certain time, driving a brown Plymouth station wagon with a broken right taillight lens. The anonymous source stated the defendant would drive to a specific motel and would be in possession of approximately one ounce of cocaine in a brown attaché case. The police did not know if the anonymous caller was reliable or how the caller knew this information. The officers went to the apartment complex and located a Plymouth station wagon with a broken right taillight in the parking lot. The officers observed the defendant leave the building and enter the station wagon. The officers followed her as she drove to the motel identified by the anonymous source. The officers stopped

her. After obtaining the defendant's consent to search the vehicle, the officers found a locked brown attaché case. The defendant provided the combination to the case and upon opening it the officers found marijuana. The defendant was arrested. During processing, the officers found cocaine in her purse.

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

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

DISCUSSION: The Court held that the totality of the circumstances approach for determining probable cause is also relevant for determining reasonable suspicion. While the tip provided in this case does not, by itself, give rise to reasonable suspicion, the corroboration of significant aspects of the tip by independent police investigation provided the indicia of reliability. The Court found it to be critical that the tipster was able to predict the defendant's future behavior. This showed the tipster possessed "inside information - a special familiarity with the defendant's affairs" that most members of the general public would not have. The corroboration of much of the tipster's information gave reason to believe that he was "honest" and "well informed." Based on these facts, "it is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations made by the caller."

*****

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

FACTS: The police received a tip from an anonymous caller, who reported that a young black male standing at a particular

bus stop and wearing a plaid shirt was carrying a gun. Officers went to the bus stop and saw three black males, one of whom, the defendant, was wearing a plaid shirt. The officers had no reason to suspect any of the three of illegal conduct other than the anonymous report. One officer frisked the defendant and seized a gun from his pocket. The officers arrested the defendant for carrying a concealed firearm without a license and possessing a firearm while under the age of 18.

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

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

DISCUSSION: An officer, for the protection of himself and others, may conduct a frisk for weapons of persons engaged in unusual conduct where the officer reasonably suspects the person is armed and presently dangerous. Here, the officer's suspicion that the defendant was carrying a weapon did not develop from his own observations but solely from a call made from an unknown location by an unknown caller. The Court held that this tip lacked sufficient indicia of reliability to provide reasonable suspicion to conduct a frisk. The tip did not provide predictive information that left the police without means to test the informant's knowledge or credibility. Reasonable suspicion to conduct stops and frisks requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a person.

*****

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

FACTS: The defendant fled upon seeing a caravan of police vehicles converge on an area known for heavy narcotics trafficking. Seeing the defendant run, police officers pursued him. They caught the defendant and conducted a frisk. The

officers testified that in their experience there were usually weapons near narcotics transactions. They discovered a handgun on the defendant and arrested him.

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

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

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

*****

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

FACTS: A Border Patrol Agent received information that a vehicle sensor had been triggered in a remote area. The agent suspected that the vehicle could be attempted to evade a checkpoint as the timing corresponded with a shift change, leaving the area unpatrolled. The agent located the vehicle, a minivan. He obtained a visual vantage point by pulling off to the side of the road at an angle so he could see the oncoming vehicle as it passed by. The agent observed (1) the vehicle slow considerably as it approached his position, (2) the driver appear stiff and rigid, (3) the driver seemed to pretend the agent was not there, (3) the knees of the passengers (children) in the very

back seat were unusually high (as if their feet were elevated by something on the floor). The agent followed the vehicle for a short distance and observed (4) the children, while facing forward, wave at the agent in an abnormal fashion, (5) the strange waving continued intermittently for four to five minutes, (6) the driver signaled for a turn, turned the signal off, then suddenly signaled and turned the vehicle, (7) the turn was the last that would allow the vehicle to avoid the checkpoint, (8) the road is rough and usually utilized by four-wheel-drive vehicles, (9) the vehicle did not appear to be part of the local traffic and (10) there were no recreation areas associated with this road. The agent requested vehicle registration information via the radio and learned that (11) the vehicle was registered to an address four blocks north of the border in an area known for alien and narcotics smuggling. At this point, the agent decided to conduct a traffic stop.

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

HELD: Yes. Reasonable suspicion is determined by the "totality of the circumstances."

DISCUSSION: The Court stated that "[W]hen discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." In doing so, it is imperative that the officer be allowed to use "their own experience and specialized training to make inferences" about a circumstance. Otherwise innocent actions, considered together, may warrant a further look by a law enforcement officer.

V. SEARCH WARRANTS

A. PROBABLE CAUSE

1. Required

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

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

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

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

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

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

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

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

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

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

2. Establishing P.C. in the Affidavit

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

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

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

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

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

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United States v. Grubbs
126 S. Ct. 1494 (2006)

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

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

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

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

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

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

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

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

DISCUSSION: In passing on the validity of a search warrant, a reviewing court may consider only the information brought to a magistrate's attention. A requesting officer must establish facts for a magistrate judge to consider whether probable cause

exists or not. The Fourth Amendment does not deny law enforcement the support of usual inferences that reasonable persons may draw from evidence. It does, however, require such inferences be drawn by a neutral and detached magistrate instead of an officer engaged in the competitive enterprise of ferreting out crime.

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

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

FACTS: The FBI had tracked the defendant, a known bookie and gambler, for five days. The agents had seen him drive from East St. Louis into St. Louis and park in an apartment house lot. They observed him enter a particular apartment in that building. The apartment that the defendant entered had two telephone lines. A confidential informant told the agents that the two phone lines were being used for a gambling operation. However, the informant did not personally observe the defendant at work as a bookmaker, nor had the informant ever place any bets with the defendant. The informant came by his information indirectly, and did not explain why his sources were reliable. The agents obtained a search warrant but did not execute it until the defendant was observed leaving the apartment, locking the door and entering the hallway. At this

point, they arrested the defendant, demanded his key and searched the apartment.

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

HELD: No. The agents were not able to establish probable cause on this information.

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

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

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

> "Roosevelt Harris has had a reputation with me for over 4 years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information [sic] from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this

period of time. This date, I have received information from a person who fears for their [sic] life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past two weeks, has knowledge of a person who purchased illicit whiskey within the past 2 days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in the outbuilding known as and utilized the 'dance hall' and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons."

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

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

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

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

an offense. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility.

*****

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

FACTS: Police received an anonymous letter that included statements that the defendants, husband and wife, were selling drugs. The letter indicated Mrs. Gates would drive the Gates' car to Florida on May 3rd to be loaded with drugs, and Mr. Gates would fly down a few days later to drive the car back; that the car's trunk would be loaded with drugs; and that defendants presently had over $100,000 worth of drugs in their basement. A police officer located the Gates' address and learned that Mr. Gates made a reservation for a May 5th flight to Florida. Arrangements for surveillance of the flight where made with a DEA agent. The surveillance disclosed that Mr. Gates took the flight, stayed overnight in a motel room registered in Mrs. Gates name, and left the following morning with a woman in a car bearing an Illinois license plate issued to Mr. Gates, heading north on an interstate highway. A search warrant for defendants' residence and automobile was then obtained based the anonymous letter and the government's corroboration.

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

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

DISCUSSION: The facts failed to meet the "two-pronged test" of (1) revealing the informant's "basis of knowledge" and (2) providing sufficient facts to establish either the informant's "veracity" or the "reliability" of the informant's report. However, the Court held that the overly rigid Aguilar-Spinelli test should be set aside when a common-sense test is more useful in

determining whether "probable cause" exists. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. The duty of a reviewing court is to ensure that the magistrate has a substantial basis for concluding that probable cause existed. Therefore, the Court created the "totality of the circumstances" test to replace (or supplement) the Aguilar-Spinelli test. In this case, the totality of the circumstances indicated that the information was truthful and created probable cause for the issuance of a search warrant.

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3. Neutral and Detached Magistrate

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

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

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

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

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

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

FACTS: A police investigator purchased two reels of film from the defendant's "adult" bookstore. Upon viewing them, he concluded that they violated local obscenity law. He took them to a town justice who viewed both films in their entirety. The justice concluded the films were obscene.

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

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

ISSUE: Whether the magistrate was neutral and detached?

HELD: No. The magistrate did not remain neutral and detached from the criminal investigation.

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

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4. With Particularity

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

FACTS: A fraud unit began an investigation of suspicious real estate settlement activities. The defendant was an attorney specializing in real estate settlements. During the fraud unit's investigation, his activities came under scrutiny, particularly in connection with a transaction involving Lot 13T in a subdivision. An extensive investigation disclosed that the defendant, acting as the settlement attorney, had defrauded the purchaser of Lot 13T. When the purchaser confronted the defendant with this information, he responded by issuing, as an agent of a title insurance company, a title policy guaranteeing clear title to the property.

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

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

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

DISCUSSION: All items in a set of "files" may be examined during a search, provided that a description for identifying the evidence sought is listed in the search warrant - - and followed by the investigators. "We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable." In searches for papers, it is likely that some innocuous documents will be examined, in order to determine whether they are among those papers authorized to be seized. Similar dangers are present in executing a warrant for the "seizure" of telephone conversations. In both kinds of searches, responsible officials, including judicial officials, must take care to assure that the search is conducted in a manner that minimizes unwarranted intrusions upon privacy.

*****

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

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

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

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

DISCUSSION: The Fourth Amendment prohibits general warrants that give police permission to search where and to seize what they please. The indiscriminate sweep of a search warrant's language renders it invalid under the Fourth Amendment where the warrant authorizes the seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operation of the Communist Party in Texas." The warrant lacked particularity.

*****

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

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

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

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

DISCUSSION: The Court held that "[T]he warrant was plainly invalid." As state in the Fourth Amendment "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized (underline added." While the oversight in the warrant might appear to be superficial, and the items to be seized are clearly described in the application, the search warrant serves an important function for the person whose privacy is being intruded upon. It provides notice. The Court stated that the Fourth Amendment does not prohibit warrants from cross referencing other documents if the warrant "uses appropriate words of incorporation, and if the supporting document accompanies the warrant." Here, the warrant did not incorporate by reference any other document. The Court held that the purpose of the Fourth Amendment's particularity requirement is to (1) limit general searches and (2) assure the person whose property is being seized that the officer has authority to conduct a search, the need to search, and the bounds of that search.

*****

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

FACTS: Police officers obtained and executed a warrant to search the person of Lawrence McWebb and "the premises known as 2036 Park Avenue third floor apartment." After an exterior examination and an inquiry of a utility company, the officer who obtained the warrant reasonably concluded that there was only one apartment on the third floor and that it was occupied by McWebb. When police officers executed the warrant, they fortuitously encountered McWebb in front of the building and used his key to gain admittance to the first floor hallway and to the locked door at the top of the stairs to the

third floor. As they entered the vestibule on the third floor, they encountered the defendant, who was standing in the hallway area. The police could see into the interior of both McWebb's apartment to the left and the defendant's to the right. Only after the defendant's apartment had been entered and heroin, cash and drug paraphernalia had been found, did any of the officers realize that the third floor contained two apartments. As soon as they became aware of that fact, they discontinued their search. All of the officers believed that they were searching McWebb's apartment.

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

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

DISCUSSION: The Court held that the police officers acted reasonably when: (1) the warrant authorized a search of "the premises known as 2036 Park Avenue third floor apartment," (2) the objective facts available to the officers at the time of the search suggested no distinction between the named person's apartment and the entire third floor premises, (3) the officers discovered that the third floor was in fact divided into two separate apartments--only after they entered and found contraband in the apartment of the tenant not named in the warrant, and (4) they discontinued the search as soon as they made this discovery. Under these circumstances, the officers' failure to realize the ambiguity of the warrant is objectively reasonable, and their execution of the warrant was proper whether the warrant is interpreted as authorizing a search of the entire third floor or a search limited to the named person's apartment. The constitutionality of the officers' conduct must be judged in the light of the information available to them at the time they request the warrant.

*****

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

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

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

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

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

DISCUSSION: The Court held that the description of the building indicated the officers intended to search the whole building. The evidence left no doubt that although the building had two numbers, the garage business covering the first floor, and the storage business above were so related to the elevator that there was no real division of the building. The Court considered the fact that the search did not "go too far." The places searched were all rooms connected with the garage by the elevator.

B. SERVING THE WARRANT

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

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

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

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

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

DISCUSSION: The government agents had no basis for assuming that the defendant was armed or might resist arrest, or that the cooperating carrier was in any danger. The agents had made no independent investigation of the defendant prior to setting the stage for his arrest with narcotics in his possession. Therefore, the agents had to comply with § 3109 (requiring the announcement of presence and notice of authority or purpose before the agents may break down any door). The Court identified the opening of a closed but unlocked door, lifting a latch, turning a door knob, unhooking a chain, pushing open a hasp, or pushing open a closed door of entrance to a house, even a closed screen door, as a "breaking" with respect to § 3109.

*****

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

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

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

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

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

NOTE: The burden that may result from an illegal entry is limited to a civil liability claim and not the loss of evidence through the exclusionary rule. See Hudson v. Michigan.

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Hudson v. Michigan
126 S. Ct. 2159 (2006)

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

ISSUE: Whether a violation of the "knock-and-announce" rule requires the suppression of all evidence found in the search.

HELD: No.

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

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

*****

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

FACTS: Officers executed a drug search warrant at the defendant's motel room. To gain entry, one officer hoped to fool

the defendant by wearing a maintenance uniform. He knocked on the defendant's hotel room door, which the defendant opened. When the defendant saw a uniformed officer in the hallway, he slammed the door shut. The officers immediately kicked the door open and apprehended the defendant, who was attempting to climb out the window. They found contraband in the room.

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

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

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

*****

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

FACTS: Shelby was a dangerous, escaped convict. An ATF agent learned from a reliable confidential informant that Shelby was probably staying at the defendant's home, also a convicted felon. Based on this information, Deputy U.S. Marshals obtained a search warrant and permission to enter the premises without complying with 18 U.S.C. § 3109 from a magistrate. The informant also stated that the defendant might have a stash of weapons in his garage. Early in the morning, the Deputy Marshals used a loud speaker to announce that they had a search warrant. At the same moment one Deputy Marshal broke a window in the garage. He pointed a gun at the opening to discourage a rush for the weapons feared to be inside. The defendant believed people were burglarizing his

home and fired a shot into the ceiling of his garage. Moments later, he realized that the persons attempting to enter his home were law enforcement officers and he submitted to their authority. Shelby was not found. However, the officers found weapons in the premises. The defendant was charged with possession of firearms by a felon.

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

HELD: No. Law enforcement officers' entries during the execution of warrants must only be "reasonable."

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

*****

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

FACTS: Law enforcement officers went to the defendant's home around 2 P.M. with a search warrant for a controlled substance. It was unclear whether anyone was at home at the time. The officers called out "police, search warrant" and knocked on the front door loudly enough to be heard by officers at the back door. The officers waited fifteen to twenty seconds and did not obtain a response. They then broke open the front

door and entered the home. The defendant was in the shower and later testified that he heard nothing until the breaking of the door.

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

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

DISCUSSION: The Supreme Court has held that how law enforcement officers go about their search must meet the Fourth Amendment's reasonableness standard. See Wilson v. Arkansas (1995). The length of time an officer must wait before using force to enter a home with a warrant is determined by the "totality of the circumstances." The Court stated that it has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." There is "no formula for determining reasonableness."

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

NOTE: This opinion does not state law enforcement officers must wait fifteen to twenty seconds before using force with a warrant. The Court's opinion here is that, under these factors, fifteen to twenty seconds was enough time to wait before using force. A shorter amount of time could have been acceptable to

the Court. In other circumstances, a longer period may be required.

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2. Persons at the Premises

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

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

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

HELD: Yes. It was reasonable to detain the suspect while they executed the search warrant.

DISCUSSION: The Court states three reasons supporting the defendant's seizure:

1) The law enforcement interest in preventing flight in the event that incriminating evidence is found.

2) The interest in minimizing the risk of harm to the police and occupants. The execution of a search warrant for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence.

3) The orderly completion of the search may be facilitated if the residents are present, i.e. to open locked doors or

locked containers to avoid the use of force that not only is damaging to property but may also delay the completion of the task at hand.

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

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

*****

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

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

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

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

DISCUSSION: In Michigan v. Summers (1981), the Supreme Court authorized the detention of "occupants of the premises while a proper search is conducted" where the search was for a controlled substance. The detention of the defendant her was permissible under the standards set out in Summers. The Court also held that the Summers' "authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention." In this case, the officers' use of handcuffs and placing the defendant in the garage of the premises is reasonable because the "governmental interests outweigh the marginal intrusion." A search warrant for weapons involves inherently dangerous situations, but also the need to control "multiple occupants made the use of handcuffs all the more reasonable." The fact that the defendant was not a suspect in the investigation was not significant to the Court.

*****

Los Angeles County v. Rettele
127 S. Ct. 1989 (2007)

FACTS: The police conducted a four month investigation of four African-Americans, suspected of committing fraud and identity theft. One of the suspects was known to be armed. The officers obtained search warrants for two homes where the suspects were believed to be living. Unknown to the officers, three months earlier, one of the homes had been sold to Mr. Rettele, who occupied the premises with his girlfriend and her son. They were all Caucasian. The officers executed the search warrant and, with guns drawn, encountered the three new occupants of the home. Mr. Rettele and his girlfriend were unclothed and not permitted to cover themselves for the first two minutes of the encounter. Within five minutes, the officers realized their mistake, apologized for the error and departed the premises. Mr. Rettele brought a lawsuit for the deprivation of his Fourth Amendment protections.

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

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

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

*****

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

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

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

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

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

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

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

The officer's justification for the search of the defendant rested on a state statute permitting a police officer, in the execution of a search warrant, to reasonably detain and search any person on the premises to either protect himself from attack, or to prevent the disposal or concealment of anything particularly described in the warrant. This statute offends the Fourth Amendment where:

1) No probable cause existed at the time the search warrant was issued for the authorities to believe that any person found in the tavern other than the employee would be violating the law;

2) There was no probable cause to search the defendant at the time the warrant was executed;

3) The customers in the tavern maintained their own protection against an unreasonable search or seizure which was separate and distinct from that possessed by the proprietor of the tavern or by the employee, and;

4) The initial frisk of the customer was not supported by a reasonable suspicion that he was armed and dangerous.

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

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

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

HELD: No. The brief seizure, given the circumstances, was permissible under the Fourth Amendment.

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

3. Associated Issues

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

FACTS: At about 1:30 p.m., March 28, two 12-pound packages, each insured for $10,000, were deposited "airmail registered" at a post office in Mount Vernon, WA, near the Canadian border. The mailer declared that they contained coins. One package was addressed to a post office box in Van Nuys, CA, and the other to a post office box in Nashville, TN. The postal clerk told a policeman that he was suspicious of the packages. The policeman at once noticed that the return address on the packages was a vacant housing area and the license plates of the mailer's car were from British Columbia. The policeman contacted the Canadian police, who called Customs in Seattle. Ninety minutes later, Customs learned that one addressee was under investigation in Van Nuys for trafficking in illegal coins. Due to the time differential, Customs was unable to reach Nashville until the following morning when they were advised that the second addressee was also being investigated for the same crime. A search warrant was issued at 4 p.m. and executed at 6:30 p.m., on the following day. The packages were opened, inspected, resealed, and promptly sent on their way.

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

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

DISCUSSION: The nature and weight of a 12-pound "airmail registered" package, the mailer's fictitious return address and Canadian license plates, and the knowledge that the addressee is under investigation for trafficking in illegal coins, constituted probable cause for the issuance of a warrant to search the packages. Twenty-nine hours is not "unreasonable" within the

meaning of the Fourth Amendment, where officials in the distant destination could not be reached sooner because of the time differential.

*****

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

FACTS: Two people were arrested for being in possession of a controlled substance. They told the agents that they had purchased the cocaine from the defendant. A U.S. Attorney told the agents to arrest the defendant. The agents were also told that a search warrant for the defendant's apartment probably could not be obtained until the following day but to secure the apartment in the meantime to prevent the destruction of evidence.

The agents arrested the defendant in the lobby of his apartment building, took him to the apartment, knocked on his door, and when it was opened by Colon, entered the apartment without requesting or receiving permission. The agents conducted a limited security check of the apartment and in the process, observed in plain view various drug paraphernalia. Colon was arrested and he and the defendant were taken into custody. Two agents remained in the apartment awaiting the warrant, but because of administrative delay, the warrant was not issued until nineteen hours after the initial entry. In the search pursuant to the warrant, the agents discovered cocaine and records of narcotics transactions.

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

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

DISCUSSION: A seizure affects possessory interests. A search affects privacy interests. Therefore, a warrantless

seizure of a person's property can be reasonable on the basis of probable cause but a warrantless search might be unreasonable.

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

As a secondary point, the exclusionary rule suppresses evidence not only obtained as a direct result of an illegal search or seizure, but also evidence later found to be derivative of that illegal venture. However, evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the illegal taint. Therefore, whether the initial entry was legal is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized. None of the information on which the warrant was secured was based on the initial entry into the defendant's apartment.

*****

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

FACTS: A magistrate issued a search warrant on July 6th and it was not executed until after the ten day limit had expired.

ISSUE: Whether the warrant was still valid?

HELD: No. Search warrants must be served within ten days of their issue.

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

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

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

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

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

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

DISCUSSION: Federal Criminal Procedure Rule 41 specifically requires that search warrants be served in the daytime (6 a.m. to 10 p.m.) unless a special need to search at night is shown. The government did not make that showing here. However, the Supreme Court ruled that 21 U.S.C. § 879 governed this search as it involved a controlled substance. This statute permits a nighttime search without any special showing by the government. The statute provides that officers may serve a warrant at any time of the day or night if the issuing judge is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time. Title 21 U.S.C. § 879(a) requires no special showing for need of a nighttime search, other than a showing that the contraband is likely to be on the property or person to be searched. The government meets this showing where an affidavit submitted by a police officer suggests that there was a continuing traffic of drugs from the suspect's apartment, and a prior purchase through an informant had confirmed that drugs were available.

*****

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

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

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

HELD: Yes. Without specifically stating this authority, a Title III order implies the authority to enter the target premises to install the necessary equipment to engage in surreptitious recordings.

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

*****

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

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

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

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

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

*****

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

FACTS: Deputy U.S. Marshals attempted to execute an arrest warrant for Dominic Wilson, at his last know place of residence. Unbeknownst to the Deputy Marshals, the address was actually that of his parents. The arrest team invited a newspaper photographer and reporter to accompany them on the execution of the arrest warrant. The Deputy Marshals entered Wilson's parents' home in a futile effort to arrest him. The reporter and photographer also entered the home, and the photographer took many pictures of the event. After learning that the subject of the warrant was not at the premises, the Deputy Marshals and the newspaper reporter and photographer left the premises. The Wilsons sued the Deputy Marshals in a Bivens action for violating their Fourth Amendment right to be free from unreasonable searches and seizures.

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

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

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

*****

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

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

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

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

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

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VI. SEARCH WARRANT EXCEPTIONS - NEED P.C.

A. PLAIN VIEW

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

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

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

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

HELD: No. The discovery of evidence of crime under the plain view doctrine does not have to be inadvertent.

DISCUSSION: An essential and initial predicate to a valid plain view seizure is that the officer did not violate the Fourth

Amendment in arriving at the place from which the evidence was plainly viewed. The officer must be lawfully present in the area in which the item is seized. Second, the incriminating character of the object must also be "immediately apparent."

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

*****

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

FACTS: A bullet was fired through the floor of defendant's apartment, injuring a man in the apartment below. Police officers arrived and entered the defendant's apartment to search for the shooter, victims, and weapons. They found and arrested two combatants and seized some weapons.

During this engagement, an officer noticed two sets of expensive stereo components, "which seemed out of place in the squalid and otherwise ill-appointed apartment." Suspecting that they were stolen, he picked up some of the components, read and recorded their serial numbers. The officer then reported by phone to his headquarters. After being told that one of the components had been stolen in an armed robbery, he immediately seized it. It was later determined that some of the other serial numbers matched those on other stereo equipment taken in the same armed robbery, and a warrant was obtained to seize that equipment as well.

ISSUE: Whether the evidence seized was obtained under the plain view doctrine?

HELD: No. The evidence could not be seized under the plain view doctrine because the evidence was not

immediately apparent to be evidence of a crime at the time of the seizure.

DISCUSSION: The officer's moving of the equipment constituted a "seizure" separate from the search for the shooter, victims, and weapons that were the lawful objectives of his entry into the apartment. The state conceded that the officer did not have probable cause, but only reasonable suspicion to move the stereo components. Absent special operational necessity, any seizure that is unrelated to the original exigency that justified the officer's warrantless entry must be supported by probable cause. As the officer did not have probable cause at the time he seized the stereo components, the "plain view" doctrine cannot apply.

*****

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

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

ISSUE: Whether the evidence was obtained in plain view?

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

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

*****

B. MOBILE CONVEYANCES

Carroll v. United States
267 U.S. 132, 45 S. Ct. 280 (1925)

FACTS: Undercover prohibition agents met with the defendant and two accomplices to buy illegal whiskey. The defendant left to get the whiskey but could not do so because his source was not in. One of his accomplices informed the undercover agents they would deliver it the next day. The officers observed the vehicle and registration number the

defendant and his accomplices were using during these negotiations.

The defendant did not make the arranged deliver the following day. A week later, while patrolling a highway commonly used to smuggle whiskey into the country the agents saw the defendant in the same car as before. They gave pursuit but lost the car. Two months after that, the agents again saw the defendant in the same car on the same road. The agents believed they had probable cause because the highway was much used in the illegal transportation of liquor, and they had information previously obtained by them that the car and its occupants were engaged in the illegal business of "bootlegging." The agents stopped the defendant, searched the car, and found sixty-eight bottles of illegal whiskey.

ISSUE: Whether the search of the defendant's automobile without a warrant violated the Fourth Amendment?

HELD: No. If an officer stops a car based on probable cause and conducts a search in order to preserve evidence due to the automobile's mobility, the search may be conducted without a warrant.

DISCUSSION: The guarantee of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed as recognizing a necessary difference between a search of a structure (whereby a warrant can readily be obtained) and a search of a vehicle (where it is not practical to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought). Therefore, contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant if the agent has probable cause to believe the vehicle contains contraband.

*****

Chambers v. Maroney
399 U.S. 42, 90 S. Ct. 1975 (1970)

FACTS: Two men, each of whom carried and displayed a gun, robbed a gas station. Two witnesses, who had earlier noticed a blue compact station wagon circling the block in the vicinity of the station, then saw the station wagon speed away from a parking lot close to the station. About the same time, they learned that the station had been robbed. They reported to the police that four men were in the station wagon and each was wearing a green sweater. The station attendant reported that one of the men who robbed him was wearing a green sweater and the other a trench coat. A description of the car and the two robbers were broadcast over the police radio. Within an hour, a light blue compact station wagon meeting the description and carrying four men was stopped by the police about two miles from the station. The defendant was one of the men in the station wagon. He was wearing a green sweater and there was a trench coat in the car. The occupants were arrested and the car was driven to the police station where it was thoroughly searched without a warrant. The search revealed two .38 caliber revolvers in a compartment under the dashboard and other evidence related to the robbery.

ISSUE: Whether the warrantless search of the automobile and the seizure of the evidence was lawful?

HELD: Yes. A warrantless search of a vehicle is valid despite the fact that a warrant could have been procured without endangering the preservation of evidence.

DISCUSSION: Automobiles and other conveyances may be searched without a warrant, provided there is probable cause to believe that the car contains articles that the officers are entitled to seize. Having established that contraband concealed in a vehicle may be searched for without a warrant, the Court considered the circumstances under which such search may be made.

The Court saw no distinction in seizing and holding a car before presenting probable cause to a magistrate, and carrying out an immediate search without a warrant. Given probable cause to search, the Court held that either course is reasonable under the Fourth Amendment. The light blue station wagon could have been searched on the spot where it was stopped since there was probable cause to search. Thus, the warrantless search that took place was reasonable.

*****

United States v. Ross
456 U.S. 798, 102 S. Ct. 2157 (1982)

FACTS: A reliable informant telephoned the police and provided them with probable cause that the defendant was selling narcotics from the trunk of his vehicle. The informant also said that he just observed the defendant complete a sale, and that the defendant told him of additional narcotics in the trunk. The informant gave a detailed description of the defendant and the car.

Officers immediately drove to the area and found a car matching the informant's description. A check of the license plate disclosed that the car was registered to the defendant. The driver fit the informant's description of the defendant.

The officers told the defendant to get out of the car. A search revealed a bullet on the car's front seat. The officer searched the interior of the car and found a pistol in the glove compartment. The defendant was then arrested and handcuffed. Another officer searched the trunk of the car and found a closed brown paper bag that contained heroin. The car was moved to the police station where it was again searched. In the trunk the officer found a zippered red leather pouch that contained $3,200 in cash.

ISSUE: Whether officers, who have lawfully stopped an automobile and have probable cause to believe that

contraband is concealed somewhere within it, may conduct a search of compartments and containers within the vehicle whose contents are not openly visible?

HELD: Yes. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

DISCUSSION: Since the police lawfully stopped the automobile and had probable cause to believe that contraband was contained in it, they could conduct a warrantless search of the vehicle. The search could be as thorough as one authorized by a warrant issued by a magistrate. Every part of the vehicle where the contraband might be stored could be searched. This includes all receptacles and packages that could possibly contain the object of the search.

****

Michigan v. Thomas
458 U.S. 259, 102 S. Ct. 3079 (1982)

FACTS: The defendant was the front-seat passenger of a lawfully stopped vehicle. The officers noticed a bottle of alcohol between the defendant's feet and arrested him for being in possession of open intoxicants in a motor vehicle. The driver of the car was cited for not having an operator's license. A tow truck was summoned and an officer, pursuant to departmental policy, searched the vehicle as it was being impounded. He found marijuana in the glove compartment. Based on this discovery, he continued his search and found a gun in an air vent.

ISSUE: Whether the officer was entitled to search under the mobile conveyance exception after conducting an inventory search?

HELD: Yes. The officer was reasonable in conducting a mobile conveyance search even after conducting an inventory search.

DISCUSSION: It was reasonable for the officers to search the motor vehicle under the inventory policy, as they were responsible for the contents therein. This led to the discovery of marijuana, giving the officers probable cause that other contraband could be found in the car. The Court held that once the officers established probable cause, they were entitled to search despite the fact that the car had previously been searched through the inventory policy. This led to the lawful discovery of the handgun in the air vent. The fact that the car was immobilized for want of an operator was inconsequential.

*****

Florida v. Myers
466 U.S. 380, 104 S. Ct. 1852 (1984)

FACTS: The defendant was charged with sexual battery. At the time of his arrest, police officers searched his automobile and seized several items. A wrecker subsequently towed the automobile where it was impounded in a locked and secure area. Eight hours later, a police officer went to the compound and, without obtaining a warrant, searched the car again. Additional evidence was seized.

ISSUE: Whether a search conducted under the mobile conveyance doctrine, conducted after a search incident to an arrest and after the automobile was impounded and in police custody, violates the Fourth Amendment?

HELD: No. A warrantless search of an automobile impounded and in police custody conducted eight hours after a valid initial search is proper as a mobile conveyance search if the officers have probable cause.

DISCUSSION: In Michigan v. Thomas, the Court upheld a warrantless search of an automobile even though the automobile was in police custody and a prior inventory search of the car had already been made. That case specifically rejected the argument that the justification to conduct a warrantless search vanishes once the car has been taken into police custody and impounded. The justification for the initial warrantless search did not vanish once the car had been immobilized. To conduct a mobile conveyance search, the government only needs to establish probable cause that the evidence sought it located in the mobile conveyance.

*****

United States v. Johns
469 U.S. 478, 105 S. Ct. 881 (1985)

FACTS: Pursuant to an investigation of a suspected drug smuggling operation, officers observed two pickup trucks as they traveled to a remote, private landing strip, and the arrival and departure of two small airplanes. The officers smelled the odor of marihuana as they approached the trucks and observed packages wrapped in dark green plastic and sealed with tape, a common method of packaging marihuana. The officers arrested the defendant and took the pickup trucks to their headquarters. Three days later, without obtaining a search warrant, the agents opened some of the packages and took samples that proved to be marihuana.

ISSUE: Whether a warrantless search of the packages three days after they were removed from vehicles is justified under the mobile conveyance exception to the warrant requirement?

HELD: Yes. The Supreme Court held that if the officers have probable cause to look for evidence in a mobile conveyance, they do not need to obtain a warrant.

DISCUSSION: The warrantless search of the packages was not unreasonable merely because it occurred three days after

the packages were seized. The Ross case established that the officers could have searched the packages when they were first discovered in the trucks at the airstrip. Moreover, there is no requirement that a Carroll search of a vehicle occur contemporaneously with its lawful seizure.

Because the officers had probable cause to believe that the trucks and packages contained contraband, any expectation of privacy in the vehicles or their contents was subject to the officers' authority to conduct a warrantless search. The warrantless search was not unreasonable merely because the officers returned to headquarters and placed the packages in storage rather than immediately open them.

*****

Pennsylvania v. Labron
518 U.S. 938, 116 S. Ct. 2485 (1996)

FACTS: Police observed the defendant engage in a drug transaction. They pulled him over and arrested him. The police searched his car and found cocaine in the trunk. The Supreme Court of Pennsylvania suppressed the cocaine because the officers could have obtained a search warrant before they searched the defendant's car under the Carroll doctrine.

ISSUE: Whether the officers need to establish exigent circumstances before searching a car under the mobile conveyance exception to the Fourth Amendment's warrant requirement?

HELD: No. Once the officers establish exigent probable cause to search a car under the mobile conveyance exception, they do not need to obtain a warrant.

DISCUSSION: The Supreme Court established the mobile conveyance exception to the warrant requirement of the Fourth Amendment because of the necessity of coping with rapidly disappearing objects. However, the Court has shifted the focus

of this exception from the exigency of the speed of the vehicle to the fact that persons have only a reduced expectation of privacy in an automobile. The Court discarded the original requirement that the government establish that the automobile searched was in immediate danger of disappearing. The Court stated "if a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more."

*****

Maryland v. Dyson
527 U.S.465, 119 S. Ct. 2013 (1999)

FACTS: A Deputy Sheriff received a tip from a reliable informant that the defendant was about to transport cocaine from New York. The informant stated that the defendant had rented a red Toyota Corolla and provided the license plate number for the transportation. The deputy verified that the defendant, a known drug dealer, rented such a vehicle. Several hours later, law enforcement officers stopped this vehicle and searched it. They found cocaine in the trunk. The Maryland appellate court found the officers had probable cause but suppressed the evidence because the officers had time to secure a search warrant but failed to do so.

ISSUE: Whether officers must obtain a search warrant for a mobile conveyance, after developing probable cause, if they have the time to secure one?

HELD: No. Officers are not required to obtain a search warrant for a mobile conveyance even if they have time to secure one.

DISCUSSION: Generally, the Court requires a search warrant to conduct a search under the Fourth Amendment. However, the Supreme Court has offered a variety of exceptions to the warrant requirement. One of these exceptions is the mobile conveyance, or automobile, exception. The Supreme Court originally created the automobile exception to the warrant requirement because of the exigency caused by their mobility.

In an earlier line of cases, the Supreme Court held that if the government had time to secure a warrant, it must do so. However, in 1982 (Ross v. United States) the Supreme Court discarded this principle. Under this principle of law, the government may conduct a search of an automobile if it has probable cause and the item searched is immediately mobile (an automobile).

*****

California v. Carney
471 U.S. 386, 105 S. Ct. 2066 (1985)

FACTS: The DEA had information that the defendant was exchanging marijuana for sex in a motor home parked in a lot in downtown San Diego. DEA agents stopped a youth, who had entered and then left the motor home. He stated he had received marijuana in return for allowing the defendant sexual contact. The youth, at the agent's request, went back to the motor home, knocked on the door, and the defendant stepped out. The agent went inside and observed marijuana. A subsequent search revealed additional marijuana. The motor home was the defendant's residence.

ISSUE: Whether a motor home used as a residence is a motor vehicle for purposes of the motor vehicle exception?

HELD: Yes. A motor home is treated as a vehicle, rather than a dwelling, if it is immediately mobile.

DISCUSSION: When a vehicle is being used on highways or is capable of that use and is found stationary in a place not regularly used for residential purposes, two justifications for the vehicle exception to the warrant requirement came into play. First, that the vehicle is readily mobile. Second, there is a reduced expectation of privacy stemming from the pervasive regulation of vehicles. Under these circumstances, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become mobile.

In this case, the defendant's vehicle possessed many attributes of a home. However, the vehicle falls clearly within the scope of the automobile exception since the defendant's motor home was readily mobile. While the vehicle is capable of functioning as a home, to distinguish between a motor home and a typical car would require that the mobile conveyance exception be applied depending upon the size of the vehicle and the quality of its appointments. The Court was not willing to make this distinction. Therefore, under the mobile conveyance exception to the warrant requirement, the search of the defendant's motor home was reasonable.

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California v. Acevedo
500 U.S. 565, 111 S. Ct. 1982 (1991)

FACTS: The police made a controlled delivery of marijuana. The dealer took the packages to his apartment. The police then observed the defendant enter the dealer's apartment, where he stayed for about ten minutes. The defendant then reappeared carrying a brown paper bag that appeared full. The bag was the size of one of the wrapped marijuana packages. The defendant placed the package in the trunk of his car and began to drive away. Fearing the loss of evidence, police officers, without a warrant, stopped him, opened the trunk and the bag, and found the marijuana.

ISSUE: Whether the Fourth Amendment requires the police to obtain a warrant to open a container found in a vehicle?

HELD: No. In a search extending to a container located in an automobile, police may search the container without a warrant where they have probable cause to believe that it holds contraband or evidence.

DISCUSSION: The Court in Ross took the critical step of holding that closed containers in vehicles can be searched without a warrant because of their presence within that vehicle.

The Court saw no principled distinction between the paper bag found by the police in Ross and the paper bag found by the police here.

Ross now applies to all searches of containers found in an automobile; i.e., the police may search an automobile and the containers within it if they have probable cause to believe that contraband or evidence is located inside. "The scope of a warrantless search of an automobile . . . is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found." However, the Court reaffirmed the principle that "probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab."

*****

Wyoming v. Houghton
526 U.S. 295, 119 S. Ct. 1297 (1999)

FACTS: The defendant was one of two female passengers in a lawfully stopped automobile. While the law enforcement officer was questioning the driver, David Young, he noticed a syringe in Young's shirt pocket. The officer asked Young to step out of the car and asked why he had a syringe. Young stated the syringe was used to take drugs. The officer conducted a search of the automobile, in search of contraband. On the back seat of the automobile, he found a purse, which was claimed by the defendant. Inside the purse the officer located a wallet containing her driver's license, a brown pouch and a black, wallet-type container. The defendant admitted that the black wallet belonged to her but denied ownership of the brown pouch. The officer found contraband in both containers.

ISSUE: Whether a law enforcement officer is justified in searching passengers' containers under the mobile conveyance exception to the Fourth Amendment's warrant requirement?

HELD: Yes. The mobile conveyance exception to the Fourth Amendment's warrant requirement allows the officers to search passengers' containers.

DISCUSSION: The Supreme Court stated that the officer's probable cause to search the automobile was incontestable. Once the Court found probable cause existed, it limited its discussion to determining the scope of the search. Citing United States v. Ross (1982), the Supreme Court stated that "[I]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." In the case at hand, the Court held that this would include containers that belong to passengers. In doing so, the Court rejected ownership as a factor to be considered by the officer before conducting an automobile search. While the Court held that the containers of passengers were subject to a search of the mobile conveyance, this same rationale could not be applied to the body of the passengers because of the significantly heightened protection traditionally provided to one's person.

*****

C. DESTRUCTION OF EVIDENCE

Cupp v. Murphy
412 U.S. 291, 93 S. Ct. 2000 (1973)

FACTS: The defendant's wife was murdered by strangulation. Soon thereafter, the defendant and his attorney voluntarily went to the police station for questioning. The police noticed a dark spot on the defendant's finger. Suspecting that the spot might be dried blood and knowing that evidence of strangulation is often found under an assailant's fingernails, the police asked the defendant if they could take a scraping sample from his fingernails. He refused, put his hands behind his back and appeared to rub them together. The defendant then put his hands in his pockets and appeared to be cleaning them. Without a warrant, the police forcefully took the samples, which turned out to contain traces of skin and blood, and fabric from the victim's nightgown.

ISSUE: Whether the warrantless search of the defendant's fingernails was an unreasonable search?

HELD: No. The Court found that the existence of probable cause and the very limited intrusion undertaken at the station to preserve the readily destructible evidence was a reasonable search.

DISCUSSION: The search of the defendant's fingernails went beyond observing the physical characteristics constantly exposed to the public. It constituted the type of severe, though brief, intrusion upon personal security that is subject to the Fourth Amendment.

Even though the defendant was not arrested, he was sufficiently apprised of his suspected role in the crime to motivate him to attempt to destroy what evidence he could. His actions of putting his hands behind his back and then into his pockets were a sufficient indication of the likelihood of the destruction of evidence. While a full Chimel search incident to arrest would not be justified (the defendant had not been placed under arrest) the Court held that a limited intrusion to preserve evidence is warranted. These actions by the defendant, along with the existence of probable cause, justified the limited intrusion undertaken by the police to preserve the evidence under the defendant's fingernails.

NOTE: This case is often cited as a "search incident to arrest" case, and justifiably so. However, it is placed in this section to serve as an example of the urgency brought about by the possibility of the destruction of evidence. As the Court stated "On the facts of this case, considering the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence, we cannot say that this search violated the Fourth and Fourteenth Amendments (underline added)."

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Schmerber v. California
384 U.S. 757, 86 S. Ct. 1826 (1966)

FACTS: The defendant was involved in an accident. Police officers arrested him at a hospital for driving an automobile while under the influence of intoxicating liquor. At the direction of a police officer, a physician at the hospital took a blood sample from the defendant's body. The chemical analysis of the sample indicated that the defendant was intoxicated at the time of the accident.

ISSUE: Whether the warrantless, nonconsensual blood sample taken from the defendant violated the Fourth Amendment right to be free from unreasonable searches and seizures?

HELD: No. The Fourth Amendment does not prohibit the government from conducting minor intrusions into an individual's body under stringently limited conditions.

DISCUSSION: The police had probable cause to arrest the defendant and charge him with driving an automobile while under the influence of intoxicating liquor. The officer who arrived at the scene shortly after the accident smelled liquor on the defendant's breath and testified that the defendant exhibited symptoms of intoxication. The officer believed that he was confronted with an exigency. The Court stated "[T]he officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,'" citing Preston v. United States, (1964). Therefore, the attempt to secure evidence of blood-alcohol content in this case was appropriate.

The test chosen to measure the defendant's blood-alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. The quantity of blood extracted is minimal and the procedure involves virtually no

risk, trauma, or pain. Finally, the test was performed in a reasonable manner. The blood was taken by a physician at a hospital according to accepted medical practices. Therefore, there was no violation of the defendant's rights under the Fourth Amendment.

*****

D. HOT PURSUIT

Warden v. Hayden
387 U.S. 294, 87 S. Ct. 1642 (1967)

FACTS: A man robbed the office of a cab company and ran. Two cab drivers, attracted by the shouts of "holdup," followed the man to a residence. One driver notified the company dispatcher by radio, giving a description of the man and the address he entered. The dispatcher relayed this information to the police who arrived at the scene within five minutes. The officers entered the house without a warrant, and spread out through the first and second floors and the cellar in search of the robber. The defendant was found in an upstairs bedroom feigning sleep. He was arrested.

Meanwhile, an officer was attracted to an adjoining bathroom by the noise of running water, and discovered a shotgun and a pistol in a flush tank. Another officer who "was searching the cellar for a man or the money" (and the Court said it should be noted that he was also looking for weapons), found a jacket and trousers in a washing machine of the type the fleeing man was said to have worn. A clip of ammunition for the pistol and a cap were found under the mattress of the defendant's bed. Ammunition for the shotgun was found in a bureau drawer in the defendant's room. At the time these searches were made, the officers did not know that the defendant had been arrested. All these items of evidence were introduced against the defendant at his trial.

ISSUE: Whether the entry into the house, without a warrant, and the search for the robber and for weapons, was reasonable?

HELD: Yes. The hot pursuit doctrine allows officers to make warrantless entries into zones of privacy for suspected persons and weapons.

DISCUSSION: The officers acted reasonably when they entered the house and began to search for a man and for weapons that might be used against them. Neither the entry without a warrant to search for the robber, nor the search for him or his weapons was invalid as there were exigent circumstances. The officers acted reasonably when they entered the house and began to "search for the man... and for weapons which he had used in the robbery and might use against them (emphasis added)." "Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape." "The permissible scope of search must, therefore, at the least, be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape."

*****

Welsh v. Wisconsin
466 U.S. 740, 104 S. Ct. 2091 (1984)

FACTS: A witness observed a car driving erratically that swerved off the road and came to a stop in an open field. No damage to any person or property occurred and the driver walked away from the scene. The police arrived a few minutes later and were told by the witness that the driver was either inebriated or sick. The police checked the car's registration then went to the defendant's house. After entering his home, the police arrested the defendant for driving under the influence of an intoxicant. The penalty for a first offense under this statute was a non-criminal violation subject to a civil forfeiture proceeding for a maximum fine of $200.

ISSUE: Whether the Fourth Amendment allows the police to make a warrantless entry of a person's house in

order to arrest the person for a non-jailable traffic offense?

HELD: No. The exigent circumstances exception in the context of a home entry is limited to the investigation of serious crimes. Misdemeanors typically do not justify a warrantless entry.

DISCUSSION: Before officers may invade the sanctity of the home, the government must demonstrate exigent circumstances that overcome the presumption of unreasonableness that is inherent in all warrantless entries. An important factor to be considered is the gravity of the underlying offense for which the arrest is being made.

Probable cause to believe that a serious crime has been committed does not, by itself, create an exigency. Even a finding of an exigency rarely sanctions an intrusion if only a minor offense has been committed.

The defendant's warrantless arrest in his home for a non-criminal traffic offense cannot be justified on the basis of the hot pursuit doctrine because there was no immediate or continuous pursuit of the defendant from the scene of the crime. Also, his arrest cannot be justified on the basis of public safety because the defendant had already arrived home and had abandoned his car at the scene of the accident. Finally, the defendant's warrantless arrest cannot be justified as an emergency simply because evidence of the defendant's blood-alcohol level might have dissipated while the police obtained a warrant. Therefore, the defendant's arrest was invalid.

*****

United States v. Santana
427 U.S. 38, 96 S. Ct. 2406 (1976)

FACTS: Police officers had probable cause to believe that the defendant possessed marked money that had earlier been

used in an undercover heroin buy. Upon arriving at the defendant's residence, but without a warrant, officers observed her standing in the doorway to her home holding a paper bag. They got out of their vehicle, shouted "police," and displayed their identification. The defendant turned and ran into the entryway of her home, where the officers pursued and seized her. The defendant struggled to escape the officers, at which time "two bundles of glazed paper packets with a white powder" fell out of the paper bag onto the floor. During a search of the defendant's person, some of the marked money was discovered. The powder was later identified as heroin.

ISSUE: Whether the officers' warrantless entry into the defendant's home was justified under the Fourth Amendment?

HELD: Yes. The officers' entry into the defendant's home was justified because the officers were in "hot pursuit" of the defendant.

DISCUSSION: The Fourth Amendment is not violated when officers make a warrantless arrest in a public place for a felony offense. The question here is whether the defendant was in a public place. She was standing in her doorway when the officers first attempted to arrest her. "She was not merely visible to the public, but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." Once the defendant ran into her home, the officers were in "hot pursuit" of her. Had the officers failed to act quickly in this case, "there was a realistic expectation that any delay would result in the destruction of evidence." For that reason, the warrantless entry into the defendant's home was reasonable under the Fourth Amendment. After her lawful arrest, the search that produced the drugs and the marked money was incident to that arrest and, thus, lawful.

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E. EMERGENCY SCENES

Michigan v. Tyler
436 U.S. 499, 98 S. Ct. 1942 (1978)

FACTS: A fire broke out in the defendant's furniture store and the local fire department responded. When the fire chief arrived two hours later, the discovery of plastic containers of flammable liquid was reported to him. The chief summoned a detective to investigate possible arson. The detective took pictures but stopped the investigation because of the smoke. Two hours later, the fire was extinguished and the firefighters departed. The fire chief and detective removed the containers and left. There was neither consent nor a warrant for any of these entries or for the removal of the containers. Four hours later, the chief and his assistant returned for a cursory examination of the building and removed more pieces of evidence. Three weeks later, a state police officer took pictures at the store and made an inspection where further evidence was collected. Further entries were also made, all without warrants.

ISSUE: Whether all warrantless governmental intrusions were reasonable?

HELD: No. Official entries to investigate the cause of a fire must adhere to the warrant procedures of the Fourth Amendment, unless the entry falls within one of the exceptions to the warrant requirement.

DISCUSSION: A Fourth Amendment search occurs whenever the government intrudes on a reasonable expectation of privacy. All entries are presumed illegal if no warrant is obtained. The Court has recognized several exceptions to this rule. A burning building presents an emergency of sufficient proportions to render a warrantless entry under the Fourth Amendment. Once firefighters are inside a building, they may remain there for the duration of the emergency. While there, the government may investigate the cause of the fire and may seize evidence of arson that is in plain view. In this case, no Fourth Amendment violation occurred by the firefighters' entry

to extinguish the fire at the defendant's store, nor by the chief's removal of the plastic containers. Similarly, no warrant was required for the re-entries into the building and for the seizure of evidence after the departure of the fire chief and other personnel since these were a continuation of the first entry that was temporarily interrupted by smoke.

However, if investigating officials require further access after the emergency ceases, they must obtain a warrant. To secure a warrant to investigate the cause of a fire, an official must show more than the bare fact that a fire has occurred. The government must establish probable cause that arson was committed. As this was not done for the non-emergency entries, they were considered unreasonable under the Fourth Amendment.

*****

Michigan v. Clifford
464 U.S. 287, 104 S. Ct. 641 (1984)

FACTS: The defendant's house caught fire. Local firefighters went to his house and extinguished the blaze. The fire had been doused and all fire officials and police left the premises at 7:04 a.m. Arson investigators entered the defendant's residence without consent or a warrant about 1:30 p.m. When the investigators arrived at the scene, a work crew was boarding up the house and pumping water out of the basement. Firefighters who fought the blaze found a fuel can in the basement and placed it in the driveway where the arson investigators seized it. In the basement, where the fire had originated, the arson investigators found two more fuel cans and a suspiciously positioned crock-pot. The investigators then made an extensive and thorough search of the rest of the house, calling in a photographer to take pictures.

ISSUE: Whether the arson investigators needed a warrant to search the contents of the dwelling?

HELD: Yes. Once the emergency presented by the fire was terminated, the government needed consent or a warrant to intrude.

DISCUSSION: Non-consensual entries onto fire-damaged premises normally turns on several factors, including whether there are legitimate privacy interests in the fire-damaged property that are protected by the Fourth Amendment, whether exigent circumstances justify the government intrusion regardless of any reasonable expectations of privacy, and whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity. In this case, the defendant retained reasonable privacy interests in his fire-damaged home.

The firefighters' initial entry was valid as an emergency scene exception to the warrant requirement of the Fourth Amendment. However, by the time the arson investigators arrived at the dwelling, the emergency was no longer in existence. This was not merely a continuation of the earlier valid entry by firefighters.

Where a warrant is necessary to search a fire-damaged premises, an administrative warrant suffices if the primary object of the search is to determine the cause and origin of the fire. A criminal search warrant, obtained with probable cause, is required if the primary object of the search is to gather evidence of criminal activity. While the evidence found inside the home by the arson investigators was unreasonably seized, the fuel can seized in the driveway by the arson investigators was admissible whether seized in the basement by firefighters or in the driveway by arson investigators.

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Mincey v. Arizona
437 U.S. 385, 98 S. Ct. 2408 (1978)

FACTS: Narcotics agents raided the defendant's apartment for narcotics. During the raid, an officer was shot and killed.

The defendant was wounded, as were two other persons in the apartment. The narcotics agents, pursuant to a police department directive that stated that police officers should not investigate incidents in which they are involved, made no further investigation. Homicide detectives arrived on the scene and proceeded to conduct a four-day warrantless search of the defendant's apartment.

ISSUE: Whether the evidence from the warrantless search of the defendant's apartment was lawfully obtained under a "murder scene" exception?

HELD: No. The "murder scene" exception does not exist. The fact that a homicide occurs does not, by itself, give rise to exigent circumstances to justify a warrantless search.

DISCUSSION: When the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. The police may also seize any evidence that is in plain view during the course of their legitimate emergency activities. But such a warrantless search must be strictly limited by the emergency that justifies its initiation.

In this case, all the persons in the defendant's apartment had been located before the investigating homicide officers arrived and began their search. There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Therefore, the four-day search of the defendant's apartment was unreasonable under the Fourth Amendment.

*****

Thompson v. Louisiana
469 U.S. 17, 105 S. Ct. 409 (1984)

FACTS: The defendant shot her husband and ingested a quantity of pills in a suicide attempt. She then called her adult daughter, informed her of the situation and requested help.

The daughter immediately called emergency services. Several deputies arrived at the defendant's home in response to this information. The deputies entered the house, made a cursory search and discovered the defendant's deceased husband. The defendant was lying unconscious in another bedroom due to an apparent drug overdose.

The officers immediately transported the defendant to the hospital and secured the scene. Thirty-five minutes later, two members of the homicide unit arrived and conducted a follow-up investigation of the homicide and attempted suicide.

The deputies conducted a search of the house and found, among other things, a pistol inside a chest of drawers in the same room as the deceased body, a torn up note in a wastepaper basket in an adjoining bathroom, and another letter (alleged to be a suicide note) folded up inside an envelope containing a Christmas card on the top of a chest of drawers.

ISSUE: Whether these discoveries are admissible under the "murder scene" exception to the search warrant?

HELD: No. There is no "murder scene" exception to the Fourth Amendment's warrant requirement.

DISCUSSION: Although the homicide investigators in this case had probable cause to search the premises, it is undisputed that they did not have a warrant. Therefore, for the search to be valid, it must fall within one of the narrowly and specifically delineated exceptions to the warrant requirement. In Mincey v. Arizona, the Supreme Court unanimously rejected the existence of a murder scene exception. The Court noted that the police may make warrantless entries on premises where they reasonably believe that a person within is in need of immediate aid, and that they may make a prompt warrantless search of the area to see if there are other victims or a killer is on the premises.

Likewise, the warrantless search and seizure conducted at the home of the defendant by investigators who arrived at the scene

thirty-five minutes after the woman was sent to the hospital is not valid on the ground that there was a diminished expectation of privacy in the woman's home. The woman's call for medical help cannot be seen as an invitation to the general public that would have converted her home into the sort of public place for which no warrant to search would be necessary. Therefore, the warrantless search after the defendant was taken to the hospital was unreasonable.

*****

Flippo v. West Virginia
528 U.S. 11, 120 S. Ct. 7 (1999)

FACTS: In response to an emergency telephone call, police officers went to a state park. They found the defendant sitting outside a cabin with apparent injuries. They went into the cabin and found the body of a woman with fatal head wounds. Some officers took the defendant to a hospital. Others closed off the area and searched the cabin and the area around it. They spent more than 16 hours inside the cabin, took photographs, collected evidence, and searched through the contents of the cabin. During the search, the officers found and opened a closed briefcase. The briefcase contained evidence that incriminated the woman's husband, the defendant.

ISSUE: Whether the discovery of a body authorized the officers to engage in the warrantless search of the defendant's cabin?

HELD: No. After a homicide crime scene is secured for police investigation, the police are not entitled to make a warrantless search of anything within the crime scene area.

DISCUSSION: The Court held that after a homicide crime scene is secured for police investigation, the police are not entitled to make a warrantless search of the crime scene area. The Court reaffirmed its long held position that there is no such "homicide crime scene" exception. In Mincey v. Arizona, the

Court noted that police may make warrantless entries into premises if they reasonably believe a person is in need of immediate aid and may make prompt warrantless searches of a homicide scene for possible other victims or a killer on the premises. However, the Court explicitly rejected any general "murder scene," "homicide scene," or "crime scene" exception to the Fourth Amendment's warrant requirement. The officers would have been entitled to remove the victims for medical attention, secure the premises, and then obtain a warrant to conduct a search.

*****

Brigham City v. Stuart
126 S. Ct. 1943 (2006)

FACTS: Police officers responded to a complaint regarding a loud party at a residence. At the scene, they heard shouting from inside and observed juveniles drinking alcohol in the backyard. The officers went into the backyard and observed a physical disturbance occurring in the kitchen of the home. A juvenile suspect punched an adult victim in the face. An officer opened the screen door to the kitchen and announced his presence, though nobody noticed. The officer entered the kitchen and again stated his presence, at which time the altercation ceased. The officers arrested several adults for contributing to the delinquency of a minor, disorderly conduct, and intoxication.

ISSUE: Whether the officers may gain access to the premises under the emergency scene exception if their subjective intent was to enter for the purposes of affecting an arrest?

HELD: Yes. The officers' subjective intent for entering the premises is irrelevant.

DISCUSSION: It is a "basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant

are presumptively unreasonable." However, this rule is subject to a set of narrowly defined exceptions. "One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury." The Court, therefore, held that "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." The officers' intent in obtaining access to the premises is irrelevant in determining the reasonableness of the entry. "It therefore does not matter here--even if their subjective motives could be so neatly unraveled--whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence." The Court stated that "[T[he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties…"

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VII. SEARCH WARRANT EXCEPTIONS - P.C. NOT NEEDED

A. FRISKS

Arizona v. Johnson
129 S. Ct. 781 (2009)

FACTS: Members of a police gang task force stopped a car for a suspended registration. While one officer was getting information from the driver, the other two officers each spoke with one of the two passengers. The rear-seat passenger looked back and kept his eyes on the police as they approached. He was wearing clothing consistent with Crips gang membership, and he was from a town known to be home to a Crips gang. He told police that he had served time in prison for burglary and had been out for a year. He had a scanner in his pocket. Scanners are not normally carried in that way except to evade the police. An officer asked him to step from the car to speak with him away from the other passenger in hopes of gaining gang-related intelligence. She patted down the defendant for her safety. During the pat down, she felt the butt of a gun near the defendant's waist. Police recovered the gun after a struggle.

ISSUE: Whether police can pat down a passenger in a car stopped for a traffic violation if that passenger is suspected of being armed and dangerous?

HELD: Yes. During a lawful traffic stop, police may frisk a passenger if they have a reasonable suspicion that the individual is armed and dangerous.

DISCUSSION: The Fourth Amendment is not violated when police search a passenger who is reasonably believed to be armed and dangerous during a lawful traffic stop. During a traffic stop, passengers, like the driver, are seized because a reasonable passenger would not feel free to leave until the traffic stop is concluded. Given concerns for officer safety, police may order passengers to step from a car during a traffic stop, and they may frisk any passenger reasonably believed to be armed and dangerous. Police inquiries into anything other than the reason for the stop do not convert the stop into an unlawful seizure so long as they do not measurably extend the duration of the stop.

*****

Michigan v. Long
463 U.S. 1032, 103 S. Ct. 3469 (1983)

FACTS: Police officers observed a vehicle driving erratically and speeding. They watched as the vehicle swerved off the road into a ditch. As the officers stopped to investigate, the defendant got out, leaving the driver's side door open, and met the officers near the rear of the vehicle. The officers noted that the defendant appeared to be under the influence of either alcohol or drugs. The defendant initially failed to provide his license, although he complied following a second request. When asked to produce the vehicle's registration, the defendant again failed to comply and, after a second request, began walking towards the open door of the vehicle. Both officers followed him and observed a large knife on the floorboard of the vehicle. Stopping the defendant, the officers conducted a frisk

of his person, although no weapons were recovered. One of the officers shined his flashlight into the vehicle's passenger compartment to search for other weapons. When the officer noticed something sticking out from under the armrest, he lifted it and found an open pouch containing what appeared to be marijuana inside. The defendant was arrested for possession of marijuana.

ISSUE: Whether police officers can conduct a frisk of the passenger compartment of a vehicle following a lawful investigatory stop of the vehicle?

HELD: Yes. Officers may frisk the passenger compartment of a vehicle, limited to those areas in which a weapon may be found, if the officers reasonably believe that the suspect is dangerous and may gain immediate control of weapons.

DISCUSSION: The Court's decision in Terry v. Ohio does not restrict frisks to the body of the suspect. "Past cases indicate that (1) the protection of police officers, as well as others, may justify protective searches when police have a reasonable belief that the suspect poses a danger; (2) roadside encounters between police and suspects are especially hazardous; and (3) danger may arise from the possible presence of weapons in the area surrounding a suspect." The frisk of a passenger compartment of an automobile, restricted to those areas in which a weapon may be placed or hidden, is reasonable if the officers can articulate a reasonable belief that the suspect is armed and dangerous.

*****

Minnesota v. Dickerson
508 U.S. 366, 113 S. Ct. 2130 (1993)

FACTS: Police officers developed reasonable suspicion that the defendant was recently involved in a drug transaction. They frisked him but did not find any weapons. However, the officer conducting the frisk felt a small lump in the defendant's jacket

pocket. The officer believed it to be a lump of crack cocaine upon examining it further with his fingers. He reached into the defendant's pocket and retrieved a small bag of cocaine.

ISSUE: Whether the intrusion into the defendant's pocket was reasonable?

HELD: No. The police may seize contraband detected through the sense of touch during frisks only if the evidence is immediately apparent to be such at the moment it was touched.

DISCUSSION: In Terry v. Ohio the Supreme Court permitted officers to conduct brief stops of persons whose suspicious conduct leads an officer to conclude that criminal activity may be afoot. The Supreme Court authorized a frisk for weapons if the officer reasonably suspects that the person may be armed and presently dangerous. Frisks are not meant to discover evidence of crime, but must be strictly limited to that which is necessary for the discovery of weapons. If the protective search intrudes beyond what is necessary to learn if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed.

However, once an officer has lawfully frisked a suspect, and the officer feels an object whose contour or mass makes its identity "immediately apparent," there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. If the object is contraband, its warrantless seizure is justified.

Application of these principles to this case does not demonstrate that the officer conducting the frisk had probable cause (immediately apparent) to believe that the lump in the defendant's jacket was contraband. He decided that it was contraband only after he squeezed, slid, and otherwise manipulated the pocket's contents. While Terry entitled him to place his hands on the defendant's jacket and to feel the lump in the pocket, his continued manipulation of the pocket after he concluded that it did not contain a weapon was unrelated to the

Terry frisk. Therefore, his intrusion into the defendant's jacket was unreasonable.

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B. SEARCHES INCIDENT TO ARREST

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

FACTS: Police officers developed probable cause that the defendant was transporting a controlled substance in a footlocker. They placed him under arrest and seized the footlocker. The footlocker remained under the exclusive control of law enforcement officers at all times. The agents did not have any reason to believe that the footlocker contained explosives or other inherently dangerous items or that it contained evidence that would lose its evidentiary value unless the footlocker was opened immediately. An hour and a half after the men were arrested, the agents opened the footlocker without a search warrant or consent. Large amounts of marijuana were found in the footlocker.

ISSUE: Whether a search incident to an arrest is reasonable significantly after the arrest?

HELD: No. Searches incident to arrest must occur at about the same time as the arrest.

DISCUSSION: The search cannot be justified as a search incident to an arrest if the search is remote in time or place from the arrest. When an arrest is made, it is reasonable for police to conduct a prompt, warrantless search of the arrestee's person and the area in which the arrestee might gain possession of a weapon or destructible evidence. However, warrantless searches of a footlocker or luggage seized at the time of an arrest cannot be justified as incident to that arrest if the search is remote in either time or place from that arrest or no exigency exists. Here, there were no exigent circumstances.

1. Premises

Go-Bart Importing Co. v. United States
282 U.S. 344, 51 S. Ct. 153 (1931)

FACTS: Government agents obtained an arrest warrant for the defendants. In serving the warrant, the agents entered the defendants' business premises, falsely claiming they possessed a search warrant. The agents then secured a series of papers through these searches located throughout the business.

ISSUE: Whether the government is reasonable in conducting a search of the premises in which a lawful arrest has occurred?

HELD: No. The Court does not recognize a general right of the government to search the premise in which an arrest takes place.

DISCUSSION: The Court found the government's search ancillary to the arrests to be "a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found." This illegal search was not be confused with one in which officers secured evidence that was "visible and accessible and in the offender' immediate custody. There was no threat of force or general search or rummaging of the place."

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Chimel v. California
395 U.S. 752, 89 S. Ct. 2034 (1969)

FACTS: Three officers arrived at the defendant's home with an arrest warrant. They knocked on the door, identified themselves to the defendant's wife, and asked if they could come inside. She let the officers in the house where they waited for the defendant to return home from work. When the defendant entered the house, an officer handed him the arrest

warrant. One of the officers asked the defendant if he could look around. He said no, but was advised that on the basis of the lawful arrest the officers would nonetheless conduct a search.

The officers, accompanied by the defendant's wife, searched the entire house. In the master bedroom, the officers directed the wife to open drawers and to physically move their contents from side to side so that they might view any items that would have come from the crime. The officers seized numerous items that constituted evidence of the crime.

ISSUE: Whether the warrantless search of the defendant's entire house can be conducted incident to his arrest?

HELD: No. The warrantless search of the defendant's entire house, incident to his arrest, was unreasonable as it extended beyond the defendant's person and the area under his immediate control.

DISCUSSION: When an arrest is made, it is reasonable for an officer to search the person arrested to remove any weapons that the arrestee might use to resist arrest. It is also reasonable for an officer to search and seize any evidence on the arrestee's person to prevent its concealment or destruction and for the means of committing an escape.

The area that an officer may search is that area within an arrestee's immediate control; the area that the person might gain possession of a weapon, means of escape, or destructible evidence. There is, however, no justification for routinely searching any room other than that in which an arrest occurs, or for that matter, for searching through desk drawers or other closed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.

The search in this case went beyond the defendant's person and the area that he might have obtained a weapon, a means of

escape, or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond the area from which the defendant was arrested.

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Agnello v. United States
269 U.S. 20, 46 S. Ct. 4 (1925)

FACTS: The defendant was arrested after retrieving controlled substances from his home and selling them an agent of the government. The defendant was transported to the police station and several officers entered his home. They searched for, and found, other controlled substances.

ISSUE: Whether the defendant's home could be entered and searched incident to his arrest?

HELD: No. The officers exceeded the lawful scope of a search incident to arrest.

DISCUSSION: The lawful scope of a search incident to an arrest is stated as limited to the body and "the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody." However, the Court refused to extend this search to other areas. The Court stated "[T]he search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws." The existence of probable cause alone does not permit the search of a home. The Court held "[B]elief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

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Shipley v. California
395 U.S. 818, 89 S. Ct. 2053 (1969)

FACTS: Police officers, informed that the defendant was involved in a robbery, went to his residence. The defendant was not at home but his wife allowed the officers to enter the home and examine her possessions. They found some rings taken by the robbers. The officers then "staked out" the house. When the defendant arrived he parked 15 or 20 feet from the house. The officers arrested him as he got out of his car. They searched the defendant's car, and without permission or a warrant, again searched the house. They found a jewelry case stolen in the robbery, which was admitted into evidence at the defendant's trial.

ISSUE: Whether the second search of the defendant's house was authorized as a search incident to arrest?

HELD: No. The public arrest of the defendant does not justify a search of his home.

DISCUSSION: The Court has consistently held that a search "can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." Stoner v. California (1964). The Court has never construed the Fourth Amendment to allow the police, in the absence of an exigency, to arrest a person outside his home and then take him inside for the purpose of conducting a warrantless search. On the contrary, "it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein." Agnello v. United States.

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Vale v. Louisiana
399 U.S. 30, 90 S. Ct. 1969 (1970)

FACTS: Police officers, armed with an arrest warrant for the defendant, were watching the house where he resided. They

observed what they suspected was a narcotics exchange between a known addict and the defendant outside the house. They arrested the defendant at the front steps and announced that they would search the house. Their search of the then-unoccupied house disclosed narcotics in a bedroom.

ISSUE: Whether the house could be searched incident to the defendant's arrest?

HELD: No. The arrest of the defendant does not justify a search of his home.

DISCUSSION: The Court stated that even if holding that the warrantless search of a house can be justified as incident to a lawful arrest, the search must be confined to the area within the arrestee's reach (the area from within which he might gain possession of a weapon or destructible evidence). A search may be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. If a search of a house is to be upheld as incident to an arrest, that arrest must take place inside the house, not somewhere outside. Belief, however well founded, that evidence sought is concealed in a dwelling furnishes no justification for a search of that place without a warrant. A warrantless search of a dwelling is constitutionally valid only in "a few specifically established and well-delineated exceptions," none of which the government had shown here.

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2. Persons

United States v. Robinson
414 U.S. 218, 94 S. Ct. 467 (1973)

FACTS: An officer learned that the defendant's license had been revoked. Four days later, he observed the defendant driving an automobile. He stopped the car and informed the defendant that he was under arrest for driving with a revoked

license. The officer conducted a search incident to arrest. During the search, he felt an object in the defendant's coat but could not determine what it was. The officer reached into the pocket and pulled out the object, a crumpled up cigarette package. He opened the package and found capsules he believed to be heroin.

ISSUE: Whether a full body search of a suspect for items other than evidence of the crime for which a suspect is arrested is within the scope of the search incident to an arrest?

HELD: Yes. During a lawful arrest, a full search of the person may be made by virtue of the lawful arrest.

DISCUSSION: A lawful arrest that establishes the authority to search. It is immaterial that the officer did not fear or suspect that the defendant was armed. Having discovered the crumpled package of cigarettes, the officer was entitled to search it as well as to seize it when the search revealed the heroin capsules.

*****

United States v. Edwards
415 U.S. 800, 94 S. Ct. 1234 (1974)

FACTS: Shortly after 11 p.m. the defendant was lawfully arrested and placed in jail for attempting to break into a post office. The attempted entry into the post office had been made through a window, leaving paint chips on the windowsill and wire mesh screen. Because the defendant was arrested late at night, no clothing was available to replace what he was wearing. The following morning, trousers and a shirt were purchased for him to replace the clothing he had been wearing since his arrest. The clothing removed from him contained paint chips matching samples that had been taken from the post office window. The clothing was seized and held as evidence.

ISSUE: Whether the clothing seized from the defendant on the morning following his arrest was obtained lawfully as a search incident to his arrest?

HELD: Yes. The delay in seizing the defendant's clothes under the circumstances was reasonable.

DISCUSSION: One of the exceptions to the warrant requirement of the Fourth Amendment is the warrantless search incident to a lawful arrest. There is no doubt "that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis or that the test results are admissible at trial. In taking the defendant's clothing, the police did no more than take from him the effects in his immediate possession that constituted evidence of a crime." Such action is incidental to custodial arrest. A reasonable delay [the defendant did not have replacement clothing] in conducting the search does not change the fact that the defendant was no more imposed upon than he could have been at the time and place of the arrest. "When it became apparent that the articles of clothing were evidence of the crime for which the defendant was being held, the police were entitled to take, examine, and preserve them for use as evidence, just as they are normally permitted to seize evidence of crime when it is lawfully encountered."

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3. Vehicles

Arizona v. Gant
129 S. Ct 1710 (2009)

FACTS: Defendant was arrested for driving on a suspended license. He was handcuffed and locked in the back of a patrol car. There were five police officers on scene and two other suspects who had already been arrested, handcuffed, and locked in patrol cars. Police searched the defendant's vehicle incident to his arrest. They found a gun and cocaine in the pocket of a jacket in the back seat.

ISSUE: Whether police may search a vehicle incident to arrest when the arrestee has been secured and no longer has access to weapons or evidence?

HELD: No. The justifications for searching a vehicle incident to arrest are (1) officer safety, and (2) evidence preservation. Once an arrestee is secured and can no longer access his vehicle, there is no longer any risk that he will access weapons or evidence contained therein. However, police may search a vehicle incident to arrest after the arrestee has been secured when it is reasonable to believe that evidence related to the crime of arrest may be found within.

DISCUSSION: Officer safety and evidence preservation have been the long-standing rationales behind the search-incident-to-arrest exception to the Fourth Amendment warrant requirement. Although it had become commonplace for police to search a vehicle incident to the arrest of one of its occupants regardless of whether the suspect had been secured, the Supreme Court in this case held that such searches are unconstitutional when the suspect can no longer access the vehicle. If the suspect is secured and he can no longer access weapons or evidence contained in the vehicle then the rationales for the exception do not apply. The Court further clarified that circumstances unique to the vehicle context justify a search incident to arrest when it is "reasonable to believe" that evidence of the crime of arrest may be found within. When the defendant is secured in a locked police car, and the crime of arrest is driving on a suspended license for which no evidence could reasonably found in the vehicle, none of the exceptions justify a search incident to arrest.

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Preston v. United States
376 U.S. 364, 84 S. Ct. 881 (1964)

FACTS: The defendant, along with two others, was arrested while sitting in a parked vehicle. He was searched for weapons and taken to the police station. The vehicle, which was not searched at the time of the arrest, was towed to a garage. Shortly after the defendant had been booked at the police station, officers went to the garage, without a warrant, to search the car. They found evidence indicating that the defendant and his companions were preparing for a robbery. All three individuals were convicted of conspiracy to rob a bank, largely on evidence obtained from the search of the vehicle.

ISSUE: Whether the search of the vehicle at the garage was reasonable under the Fourth Amendment as a "search incident to arrest?"

HELD: No. The evidence obtained from the car was inadmissible because the warrantless search was too remote in time or place to be treated as incidental to the arrest.

DISCUSSION: Courts permit searches that are reasonable. "When a person is lawfully arrested, the police have the right, without a warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. This rule is justified by the need to seize weapons and other things that might be used to effect an arrest, as well as by the need to prevent the destruction of evidence of the crime. However, these justifications are absent where a search is remote in time or place from the arrest. Once a defendant is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest (underline added)."

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Cooper v. California
386 U.S. 58, 87 S. Ct. 788 (1967)

FACTS: Police officers arrested the defendant and seized his car for a narcotics violation in which the car was used. A state law directed any officer making an arrest for a narcotics violation to seize and deliver any vehicle used to store, conceal, transport, sell, or facilitate the possession of narcotics. "Such vehicle to be held as evidence until a forfeiture has been declared or a release order issued." A search of the automobile a week later revealed evidence used in trial against the defendant.

ISSUE: Whether the warrantless search of the defendant's automobile, seized by the authority of a forfeiture statute, made a week after his arrest, and not incidental thereto, was reasonable by Fourth Amendment standards?

HELD: Yes. Law enforcement officers are permitted to search a car that they are going to retain for a significant period of time.

DISCUSSION: Evidence showed that the car had been used to carry on his narcotics possession and transportation activities. A state statute required police in such circumstances to seize the vehicle and hold it as evidence until forfeiture was declared or a release ordered. A warrantless search of an arrested person's automobile, made a week after his arrest and not incident to that arrest, is reasonable where the vehicle is seized for forfeiture.

It is not a defense that the police could have obtained a search warrant. The relevant test is not whether it is reasonable to procure a search warrant, but whether it is reasonable to search. Under the circumstances of this case, it was reasonable under the Fourth Amendment to search the defendant's car validly held by officers for use as evidence in a forfeiture proceeding.

New York v. Belton
453 U.S. 454, 101 S. Ct. 2860 (1981)

FACTS: A police officer stopped a car for speeding in which the defendant and four other men were riding. None of the men owned the car or were related to its owner. The officer smelled marijuana and saw an envelope on the floor of the car that he suspected contained marijuana. The officer picked up the envelope and found marijuana inside. He ordered the men out of the car and arrested them. He searched the men and the passenger compartment of the car. On the back seat of the car the officer found a black jacket that belonged to the defendant. He unzipped one of the pockets of the jacket and discovered cocaine.

ISSUE: Whether the scope of a search incident to an arrest includes the containers located in the passenger compartment of the automobile in which the arrestee was riding?

HELD: Yes. Once a lawful arrest of an occupant of an automobile is made, the officer may examine the contents of any containers found within the passenger compartment, including open or closed containers.

DISCUSSION: When a police officer makes a lawful arrest, the officer may, incident to that arrest, search the arrestee and the immediate surrounding area. Such searches are valid because of the need to remove any weapons the arrestee might access to resist arrest and to prevent the destruction or concealment of evidence. However, the scope of the search may not stray beyond the area within the immediate control of the arrestee.

Articles inside the relatively narrow area of the automobile passenger compartment are generally within the area into which an arrestee might reach in order to grab a weapon or evidentiary item. Therefore, once a police officer has made a lawful arrest of the occupant of an automobile, the officer may,

incident to that arrest, search the passenger compartment of that automobile.

It follows that an officer may examine the contents of any containers found within the passenger compartment. If the passenger compartment is within the reach of the arrestee, so are containers within it. Such a container may be searched whether it is open or closed. The justification for the search is not that the arrestee has no privacy interest in the container. It is the lawful arrest that justifies the infringement of any privacy interest the arrestee may have.

In this case, the defendant was the subject of a lawful arrest. His jacket, located in the passenger compartment of the car, was within the immediate control of the defendant. The subsequent search of the defendant's jacket was a lawful search incident to his arrest.

*****

Thornton v. United States
541 U.S. 615, 124 S. Ct. 2137 (2004)

FACTS: Before a police officer had the opportunity to stop the defendant for a license plate violation, the defendant pulled into a parking lot, parked, and got out of his vehicle. He was walking away from his parked vehicle as the officer pulled in behind him. The officer stopped him and asked for his driver's license. During this encounter, the officer obtained the defendant's consent to pat him down for weapons and narcotics. He found a controlled substance and placed the defendant, a convicted felon, under arrest. The officer then opened the defendant's vehicle and searched. There he found a weapon.

ISSUE: Whether the Belton Bright-Line rule (a lawful, custodial arrest of the occupant of an automobile allows a search of the passenger compartment of that automobile) allows the officer to search the passenger's compartment of a vehicle the arrestee has walked away from?

HELD: Yes. The law enforcement officer has the same safety concerns about a suspect either in or near a motor vehicle.

DISCUSSION: The Court held that the arrest of a defendant who is near a vehicle presents the same safety and destruction of evidence concerns as an arrest of a defendant who is inside a vehicle. The stresses associated with an arrest, the Court determined, are not lessened by the fact that the arrestee exited the vehicle before an officer initiated the contact. Therefore, the Belton Bright-Line rule is extended to include "occupants" and "recent occupants" of motor vehicles.

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Knowles v. Iowa
525 U.S. 113, 119 S. Ct. 484 (1998)

FACTS: The defendant was lawfully stopped and issued a citation for speeding. Under Iowa law, the officer could have either arrested him or followed the more traditional route of issuing a traffic citation. Another section of Iowa law stated that the issuance of a citation in lieu of an arrest does not defeat the officer's authority to conduct an otherwise lawful search as if the arrest had occurred. The Iowa Supreme Court interpreted this statute as providing law enforcement officers the ability to search any automobile that has been lawfully stopped for a traffic violation. The search conducted pursuant to the defendant's traffic stop yielded contraband.

ISSUE: Whether law enforcement officers are justified in conducting searches of automobiles based solely on the fact that it has been stopped for a traffic violation.

HELD: No. Law enforcement officers are not justified in conducting searches incident to traffic citations.

DISCUSSION: The Supreme Court called the Iowa Supreme Court's interpretation of its statute a "search incident to citation," a derivative of a search incident to arrest. The Supreme Court stated that a search incident to arrest was a valid exception to the Fourth Amendment's warrant requirement because of the need to disarm the suspect and to preserve evidence for later use at trial.

The Court dismissed the consideration of officer's safety in allowing a search incident to citation because it did not believe the issuance of a citation is as dangerous as an arrest. The officer will not spend as much time with the defendant while issuing a citation, stress levels are not as great, and the outcome is not as uncertain as during an arrest. The Supreme Court also held that the second rationale for a search incident to arrest, to secure evidence for latter use, is not logical because it is unlikely the law enforcement officer will find additional evidence of the traffic violation by searching the automobile.

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C. CONSENT

United States v. Mendenhall
446 U.S. 544, 100 S. Ct. 1870 (1980)

FACTS: The defendant arrived at the Detroit airport from Los Angeles. As she disembarked, she was observed by two DEA agents to fit a "drug courier profile." The agents approached the defendant, identified themselves as federal agents, and asked to see her identification and airline ticket. Her driver's license identified her as Sylvia Mendenhall. Her airline ticket, however, was issued to "Annette Ford." The defendant explained that she just felt like using that name and that she had been in California for two days. After one agent specifically identified himself as a federal narcotics agent, the defendant became shaken, extremely nervous and had difficulty speaking.

After returning the airline ticket and driver's license to her, the agent asked the defendant if she would accompany him to the

airport DEA office located about fifty feet away. Without a verbal response, she did so. The agent asked her if he could search her person and handbag and told her that she had the right to decline the search if she so desired. She responded, "go ahead." He found an airline ticket issued to "F. Bush" three days earlier for a flight to Los Angeles. She acknowledged that this was the ticket she used for her flight to California. A policewoman asked the defendant to consent to a search of her person, and she agreed. The policewoman asked her to disrobe, and she said that she had a plane to catch. The policewoman assured her that if she were not carrying narcotics, there would be no problem. She began to disrobe without further comment, handing over two small packets, one of which contained heroin.

ISSUE: Whether the defendant voluntarily consented to the search?

HELD: Yes. Consent is based on the voluntary actions of the consenter.

DISCUSSION: Not every encounter between a police officer and a citizen is an intrusion requiring justification. A person is seized only when, by means of physical force or a show of authority, his freedom of movement is restrained. As long as the person remains free to disregard the questions and walk away, there has been no constitutional intrusion upon the person's liberty.

Some examples of circumstances that might indicate a seizure are: the threatening presence of several officers, the display of a weapon by an officer, some physical touching of a person, or the use of language or tone of voice indicating that compliance might be compelled. In this case no seizure occurred. The events took place in the public concourse; the agents wore no uniforms and displayed no weapons; they did not summons the defendant to their presence, but instead, approached her and identified themselves as federal agents; they requested, but did not demand, to see her identification and ticket.

The final question is whether the defendant acted voluntarily. The Court considered the facts that she was twenty-two years old, had not graduated from high school, was a black female, and the officers were white males. While the facts were relevant, they were not decisive. The Court found her consent to be voluntarily granted.

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Schneckloth v. Bustamonte
412 U.S. 218, 93 S. Ct. 2041 (1973)

FACTS: A police officer stopped a car when he observed that its license plate light and a headlight were inoperable. Six men, including the defendant, were in the car. After the driver failed to produce a driver's license, the officer asked if any of the other five men had any identification. One of them produced a license and explained that he was the brother of the car's owner, from whom the car had been borrowed. After the six men had stepped out of the car at the officer's request, and after two more police officers had arrived, the officer who had stopped the car asked the owner's brother if he could search the car. He replied "Sure, go ahead." The owner's brother helped in the search by opening the trunk and the glove compartment. The officers found some stolen checks under a seat.

ISSUE: Whether the owner's brother could grant consent to the search of the car?

HELD: Yes. The validity of consent to search is determined by the totality of the circumstances.

DISCUSSION: For consent to be valid, it must be proven from the totality of the circumstances that the consent was freely and voluntarily given. Consent cannot result from duress or coercion, expressed or implied. The consenter's ignorance of his right to refuse consent is only one factor to be considered in ascertaining the validity of the consent. The Fourth Amendment requires that consent to search not be coerced, by explicit or implicit means, by implied threat or covert force.

Ohio v. Robinette
519 U.S. 33, 117 S. Ct. 417 (1996)

FACTS: The defendant was lawfully stopped for a speeding violation. After the law enforcement officer gave the defendant a verbal warning, the officer asked him if he had any illegal drugs in his car. The defendant said no and gave the officer consent to search the car. The officer found a controlled substance in a film container located inside the automobile.

ISSUE: Whether the officer must inform the detainee that he had a right to leave before attempting to obtain his voluntary consent to search the automobile?

HELD: No. Whether the detainee knew that he had a right to leave is only one factor in determining if his consent was voluntary.

DISCUSSION: The key to all Fourth Amendment issues is whether the officer acted in a reasonable manner. The Court stated that this question is usually answered after reviewing the facts that surround the situation at hand. Therefore, the Court prefers to avoid the establishment of bright-line rules in Fourth Amendment areas. In Schneckloth v. Bustamonte, the Supreme Court rejected a comparable bright-line rule that would have required a consenter to be informed of their right to refuse consent before their choice would be considered voluntary. While a reviewing court should consider whether a detainee knew of his right to leave at the time his consent is requested, the Court did not find this fact alone to be decisive. The voluntariness of consent is to be determined by a consideration of all the circumstances.

*****

Frazier v. Cupp
394 U.S. 731, 89 S. Ct. 1420 (1969)

FACTS: The defendant and co-defendant were arrested for murder. Police asked the co-defendant for consent to search a

duffle bag used by both defendants. He consented and evidence was found incriminating the defendant.

ISSUE: Whether a joint user of a container has the authority to consent to a search?

HELD: Yes. Persons with a reasonable expectation of privacy in a container can grant consent to search it.

DISCUSSION: The defendant and the co-defendant were using the duffle bag jointly. Since the co-defendant was a co-user of the bag, he had authority to consent to its search. The defendant, in allowing the co-defendant to use the bag and in leaving it in his house, assumed the risk that the co-defendant would allow someone else to look inside.

*****

Georgia v. Randolph
126 S. Ct. 1515 (2006)

FACTS: The police went to the defendant's home to investigate a domestic dispute. The defendant and his wife accused each other of abusing controlled substances. The defendant's wife told the officers that criminal evidence could be found within the premises that would substantiate her claims. An officer asked the defendant for permission to search the house. He refused. The officer then asked the defendant's wife for consent. She readily agreed. The ensuing search revealed evidence of the defendant's criminal activity.

ISSUE: Whether the officers may rely on consent obtained in the face of a co-tenant's present refusal to grant that consent?

HELD: No. Consent obtained from one co-tenant refuted by another co-tenant who is present destroys the consent.

DISCUSSION: The Court held that a co-tenant "wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant…." The police, then, have "no better claim to reasonableness in entering than the officer would have in the absence of any consent at all." The presence and objection of the defendant in this case preclude the government's use of the co-tenant's consent to enter the premises. "[I]f a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out."

The Court also stated that "this case has no bearing on the capacity of the police to protect domestic victims." The police may make entry "to protect a resident from domestic violence." The nature of the intrusion (to quell an emergency) validates a co-tenant's consent despite the defendant's objection.

*****

United States v. Matlock
415 U.S. 164, 94 S. Ct. 988 (1974)

FACTS: The defendant was arrested in front of the home in which he rented a room and removed him from the immediate area. Several people lived in the home, including Ms. Graff. The officers approached Ms. Graff, who stated she shared a bedroom with the defendant in the home. The officers obtained Ms. Graff's consent to search the house for money and a gun. They found these items in the bedroom shared by Ms. Graff and the defendant.

ISSUE: Whether Mrs. Graff had the ability to grant consent to the search?

HELD: Yes. If a third party and the defendant have joint authority over the premises, then the third-party's consent to a search will be binding on the defendant.

DISCUSSION: When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it may show that permission was obtained from a third party who possessed common authority over the item. Common authority cannot be implied from the mere property interest that a third-party has in the property. The authority that justifies the third-party consent rests on mutual use of the property by persons having joint access or control. Any of the co-inhabitants have the right to permit an inspection and that the others have assumed the risk that any of their co-inhabitants might permit the common area to be searched.

*****

Chapman v. United States
365 U.S. 610, 81 S. Ct. 776 (1961)

FACTS: The defendant's landlord summoned the police after detecting the odor of whiskey mash on the premises. Police officers, acting without a warrant but with the consent of the landlord, entered the defendant's rented house in his absence through an unlocked window. They found an unregistered still and a quantity of mash.

ISSUE: Whether the landlord had the authority to grant consent to search the house?

HELD: No. The landlord, while owner of the property, may not authorize law enforcement officers to enter the defendant's home.

DISCUSSION: Belief, however well founded, that an article sought is concealed in a dwelling is not justification for a search of that place without a warrant, consent or exigency. Such searches are unreasonable even with undeniable facts probable cause. The officers did not obtain a warrant, despite having time to do so. The landlord did not have authority to forcibly enter the property without the defendant's consent. No exigency was engaged. Therefore, the intrusion was unreasonable and the evidence suppressed.

Stoner v. California
376 U.S. 483, 84 S. Ct. 889 (1964)

FACTS: Officers suspected the defendant had committed a robbery and was presently located in a hotel room. They went to the hotel. The officers had neither search nor arrest warrants. They obtained the consent of the hotel clerk to enter and search the defendant's room. After doing so, they located evidence of the defendant's participation in the robbery.

ISSUE: Whether the hotel clerk had the authority to grant consent to search the defendant's hotel room?

HELD: No. The clerk did not have the authority to waive the defendant's constitutional protection of the Fourth Amendment.

DISCUSSION: The Court held that it was important to bear in mind that it was the defendant's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent. While the night clerk clearly and unambiguously consented to the search, there is nothing to indicate that the police had any basis to believe that the night clerk had been authorized by the defendant to permit the police to search his room.

*****

Illinois v. Rodriguez
497 U.S. 177, 110 S. Ct. 2793 (1990)

FACTS: A witness told police that the defendant had beaten her. She also told police that the defendant was in "our" apartment, and that she had clothes and furniture there. Officers went with her to the apartment without an arrest or search warrant. She opened the door with a key and gave officers permission to enter. Once inside, the officers saw drugs and paraphernalia in plain view. At that time, the defendant

was asleep in the apartment. However, it became evident that the witness was no longer a resident of the apartment, having moved out weeks earlier.

ISSUE: Whether a warrantless entry is valid under the Fourth Amendment when it is based upon the consent of a third party that the police reasonably believe to possess authority over the premises, but in fact does not?

HELD: Yes. A consent search will be valid if a person whom the police reasonably, but mistakenly, believe has the authority to grant consent.

DISCUSSION: The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched, or from a third party who possesses common authority over the premises.

The Fourth Amendment prohibits "unreasonable" searches and seizures. Where the police make a factual determination about a search, their reasonable mistake on the issue of authority to consent does not transform the search into an unreasonable one. To satisfy the reasonableness requirement of the Fourth Amendment, law enforcement officers must not always be correct, but they must always act reasonably.

This is not to say that the police may always act on someone's invitation to enter the premises. Even if the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could be such that a reasonable person would doubt its truth.

In this case, the witness did not have the common authority over the apartment that was necessary to give the officers valid permission to enter or search the apartment. She was an "infrequent visitor" rather than a "usual resident." However, the

police were reasonably mistaken in their belief that the witness had authority to consent. Their search based on that apparent authority was reasonable.

*****

Bumper v. North Carolina
391 U.S. 543, 89 S. Ct. 1788 (1968)

FACTS: Police officers went to the house of a grandmother to investigate a rape in which her grandson was suspected. The officers falsely asserted that they had a search warrant and the grandmother consented to a search. The officers did not tell her anything about the crime they were investigating or that her grandson was suspected. Police found a rifle used in the rape.

ISSUE: Whether the grandmother's consent was voluntarily given if the police falsely stated that they had a search warrant?

HELD: No. Where officers falsely assert that they have a search warrant and then procure "consent," the consent is invalid.

DISCUSSION: The government has the burden of proving that consent was freely and voluntarily given. The grandmother's consent was not voluntarily given because it had been procured through a wrongful claim of authority. A search cannot be justified as lawful on the basis of consent where that consent has been given only after the official conducting the search has wrongfully asserted that he possessed a warrant. When a law enforcement officer claims authority to search a home pursuant to a warrant, they announce in effect that the occupant has no right to resist the search.

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Lewis v. United States
385 U.S. 206, 87 S. Ct. 424 (1966)

FACTS: An undercover narcotics agent telephoned the defendant's home about the possibility of purchasing marijuana. The agent misrepresented his identity to the defendant and was invited to the defendant's home on two occasions where he subsequently bought marijuana.

ISSUE: Whether the consent granted was voluntary when a government agent, by misrepresenting his identity, is invited into a defendant's home?

HELD: Yes. Where a defendant invites an undercover government agent into his home for the specific purpose of executing the felonious sale of narcotics, the agent's misrepresentation of his identity does not offend the Fourth Amendment.

DISCUSSION: The government is entitled to use decoys and to conceal the identity of its agents in the detection of many types of crimes. A rule prohibiting the use of undercover agents in any manner would severely hamper the government in ferreting out those organized criminal activities that are characterized by crimes that involve victims who either cannot or do not protest.

The home is accorded the full range of Fourth Amendment protection. However, when the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater protection than if it were carried on in a store, garage, car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises as long as it is for the purpose contemplated by the occupant and the entry is not used to conduct a general search for incriminating materials.

In this case, the defendant invited the undercover agent into his home for the purpose of executing a felonious sale of narcotics.

The agent did not commit any acts that were beyond the scope of the business, such as conducting a surreptitious search, for which he had been invited into the house. Thus, the defendant's Fourth Amendment rights were not violated.

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Florida v. Jimeno
500 U.S. 297, 111 S. Ct. 1801 (1991)

FACTS: An officer overheard the defendant arrange what appeared to be a drug transaction over a public telephone. The officer followed the defendant and observed his failure to obey a traffic control device. The officer then pulled him over to the side of the road to issue him a traffic citation. The officer told the defendant that he had been stopped for a traffic infraction, but went on to explain that he had reason to believe that the defendant was transporting narcotics in the car, and asked permission to search. The officer told the defendant that he did not have to consent to a search of the car. The defendant stated that he had nothing to hide, and gave permission to search the car. The officer found a folded brown paper bag on the floorboard on the passenger side of the car. He opened it and found cocaine inside.

ISSUE: Whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine containers therein?

HELD: Yes. The officer's request to search the car for narcotics reasonably included containers in which narcotics could be found.

DISCUSSION: The Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open a particular container within the automobile. The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all searches, only those which are unreasonable.

The Court has long approved consensual searches because it is reasonable for the police to conduct a search once they have been permitted to do so. However, the scope of a search is generally limited by its expressed object. A suspect may limit the scope of the search to which he consents. In this case, the terms of the authorization to search were simple. The defendant granted the officer permission to search his car and did not place any express limitation on the scope of the search. The officer had informed the defendant that he would be looking for narcotics in the car. Therefore it was reasonable for the police to conclude that the general consent to search the car included consent to search containers within that car that might contain drugs.

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D. INVENTORIES

South Dakota v. Opperman
428 U.S. 364, 96 S. Ct. 3092 (1976)

FACTS: The defendant's car was impounded for violations of municipal parking ordinances. At the impound lot, an officer noticed a watch on the dashboard of the car and other personal items on the backseat and back floorboard. The police opened the car. Following standard procedures, the officer inventoried the contents of the car including the contents of the unlocked glove compartment. The officer found marijuana in the glove compartment and the defendant was arrested.

ISSUE: Whether the Fourth Amendment allows the police to conduct an inventory search of a car lawfully impounded, without a warrant or probable cause?

HELD: Yes. Law enforcement officers are entitled to make an inventory of items in their custody for reasons of accountability.

DISCUSSION: When vehicles are impounded, the police routinely follow care-taking procedures by securing and

inventorying the car's contents. These procedures developed in response to three distinct needs: (1) to protect the owner's property while it remains in police custody, (2) to protect the police against claims of lost or stolen property, and (3) to protect the police from potential danger due to the contents of the car.

In this case, the police were engaged in a care taking search of a lawfully impounded automobile. The reasonableness of the search was enhanced by the fact that the owner was not present at the time of impoundment to claim his property, and by the fact that a watch was visible to the police through the window before they made a search. The police followed standard procedures, and therefore, their conduct was reasonable under the Fourth Amendment.

*****

Harris v. United States
390 U.S. 234, 88 S. Ct. 992 (1968)

FACTS: The defendant's car was seen leaving the site of a robbery. The car was traced and the defendant was arrested as he was entering the vehicle near his home. After a quick search of the car, an officer took the defendant to the police station. He impounded the car as evidence. A police regulation stated that an impounded vehicle had to be searched in order to remove all valuables from it. Pursuant to this regulation and without a warrant, an officer searched the car. While he was securing the window, however, he saw and seized the registration card with the name of the robbery victim on it.

ISSUE: Whether the officer discovered the registration card by means of an illegal search?

HELD: No. The discovery of the registration card occurred as a result of reasonable measures taken to protect the car while it was in police custody.

DISCUSSION: The Fourth Amendment does not require the police to obtain a warrant for standard inventories. Once the door of the car had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure.

*****

Colorado v. Bertine
479 U.S. 367, 107 S. Ct. 738 (1987)

FACTS: Police arrested the defendant for driving under the influence of alcohol. They called a tow truck, searched the defendant's car and inventoried its contents in accordance with police procedures. An officer opened a closed backpack in which he found a controlled substance, paraphernalia, and a large amount of cash.

ISSUE: Whether the police can enter a closed container during an inventory?

HELD: Yes. A warrantless inventory search of an impounded vehicle may include places where personal items can be found, including a search of the contents of closed containers found inside the vehicle.

DISCUSSION: Inventories are a well-defined exception to the warrant requirement. However, two conditions must be met before an inventory search of an impounded vehicle is lawful. First, the police must act in good faith; that is, they were not conducting the inventory to advance a criminal investigation. Second, that the police must follow standardized procedures so that the searching officer does not have unbridled discretion to determine the scope of the search.

In this case, the police were responsible for the property taken into custody. By securing the property, the police were protecting the property from unauthorized access. Also,

knowledge of the precise nature of the property helped guard against claims of theft, vandalism, or negligence. This knowledge also helped to avert any danger to police or others that may have been presented by the potential danger of the property.

*****

Illinois v. Lafayette
462 U.S. 640, 103 S. Ct. 2605 (1983)

FACTS: The defendant was arrested for disturbing the peace and taken to the police station. Without obtaining a warrant and in the process of booking him and inventorying his possessions, the police removed the contents of his shoulder bag. They found amphetamine pills.

ISSUE: Whether it is reasonable for the police to inventory the personal effects of a person under lawful arrest as part of the procedure at a police station house?

HELD: Yes. Consistent with the Fourth Amendment, it is reasonable for police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police station incident to booking and jailing the suspect.

DISCUSSION: The justification for these searches does not rest on probable cause. Therefore, the absence of a warrant is immaterial to the reasonableness of the search. However, in determining whether an inventory search is reasonable under the Fourth Amendment, government interests are balanced against the intrusion on an individual's Fourth Amendment interests. The government has a legitimate interest in protecting the owner's property from theft or false claims of theft by persons employed in police activities. A standardized procedure for making an inventory as soon as is reasonable after reaching the station house protects the owner's property while it is in police custody. The fact that the protection of an

arrestee's property might have been achieved by less intrusive means does not, in itself, render an inventory search unreasonable.

*****

Florida v. Wells
495 U.S. 1, 110 S. Ct. 1632 (1990)

FACTS: The defendant was arrested for DUI. During an inventory search of the car, the officer found a locked suitcase in the trunk. The officer opened the suitcase and found a garbage bag containing marijuana.

ISSUE: Whether a container found during an inventory search may be opened where there is no police policy regarding the opening of containers?

HELD: No. Absent a routine police policy regarding the opening of containers found during an inventory search, a container may not be opened.

DISCUSSION: An established routine must regulate inventory searches. This is to ensure that an inventory search is not a ruse for a general rummaging of the car in order to discover incriminating evidence. Policies governing inventory searches should be designed to produce an inventory.

In this case, there was no evidence of any policy on the opening of containers found during inventory searches. Therefore, absent such a policy, the inventory was not sufficiently regulated to satisfy the Fourth Amendment, and the seizure of the marijuana was unlawful. The Court also stated that if a standard inventory policy permitted officers to inventory the contents of locked containers, the inventory of such would be reasonable.

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E. INSPECTIONS

See v. City of Seattle
387 U.S. 541, 87 S. Ct. 1737 (1967)

FACTS: The defendant refused to allow a city representative to enter and inspect the defendant's locked commercial warehouse without a warrant and without probable cause to believe that a violation of any municipal ordinance existed. The inspection was part of a routine, periodic city-wide canvass to obtain compliance with the fire code. After the defendant refused the inspector access, he was arrested.

ISSUE: Whether a search warrant is required to conduct inspections of municipal fire, health, and housing inspection?

HELD: No. Legitimate government inspections are an exception to the Fourth Amendment's warrant requirement, though an inspection warrant may be required.

DISCUSSION: The search of private commercial property, as well as the search of private houses, is presumptively unreasonable if conducted without a warrant. An administrative agency's demand for access to commercial premises for inspection under a municipal fire, health, or housing inspection program is measured against a flexible standard of reasonableness. However, administrative entry, without consent, into areas not open to the public, may only be compelled with an inspection warrant.

Business premises may reasonably be inspected in many more situations than private homes. Any constitutional challenge to the reasonableness of inspection of business premises, such as for licensing purposes, can only be resolved on a case-by-case basis under the Fourth Amendment. While a search warrant is not required, the government must obtain an inspection warrant or consent to conduct the inspection.

Camara v. Municipal Court
387 U.S. 523, 87 S. Ct. 1727 (1967)

FACTS: An inspector entered an apartment building to make a routine annual inspection for possible violations of the City's housing code. The building manager informed the inspector that the defendant, a lessee of the ground floor, was using the rear of his leasehold as a personal residence. The defendant refused to allow the inspector to enter his residence. The defendant was charged with the criminal violation of the code section which punished obstruction to inspect.

ISSUE: Whether inspectors can make warrantless entries to carry out their duties?

HELD: No. Inspectors must rely on consent, an exigency, or an inspection warrant to enter a premises to conduct an inspection.

DISCUSSION: At one time, the Supreme Court authorized warrantless entries for the purpose of conducting safety inspections. However, the Court altered its position because: 1) the occupant does not know if his or her premises is covered by the inspection authority, 2) the occupant does not know the inspector's authority, and 3) the occupant does not know if the inspector is acting under proper authority.

Typically, most entries can be obtained with consent from an occupant. Some entries can be justified by the exigency posed to public health (such as putrid food conditions). However, the remaining entries must be supported by a warrant.

The primary principle of the Fourth Amendment was to prohibit unreasonable searches. This usually means that searches must be supported by a warrant. "The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest." In criminal cases, the government must establish probable cause of criminal activity. For inspection warrants, the government's burden will depend on the type of inspection contemplated.

"This is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. . . Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained [citing Frank v. Maryland, 359 U.S. 360]." In some instances, the passage of time may justify an inspection warrant.

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Marshall v. Barlow's Inc.
436 U.S. 307, 98 S. Ct. 1816 (1978)

FACTS: An OSHA inspector entered the customer service area of Barlow's, Inc., an electrical and plumbing installation business. Mr. Barlow, president and general manager, was on hand. The OSHA inspector informed Mr. Barlow that he wished to conduct a search of the working areas of the business. Mr. Barlow inquired whether any complaint had been received about his company. The inspector said no, but that Barlow's, Inc., had simply turned up in the agency's selection process. The inspector again asked to enter the nonpublic area of the business. Mr. Barlow asked whether the inspector had a search warrant. The inspector did not. Mr. Barlow refused the inspector admission to the employee area of his business. Three months later, the Secretary of Labor petitioned the United States District Court to issue an order compelling Mr. Barlow to admit the inspector.

ISSUE: Whether a District Court order to allow an inspection of nonpublic areas of a business without sufficient reason is reasonable under the Fourth Amendment?

HELD: No. The law that authorized inspections without an inspection warrant or its equivalent was unconstitutional in these circumstances.

DISCUSSION: A statute empowered agents of the Secretary of Labor to search the work area of any employment facilities within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations. OSHA inspectors were also given the authority "to review records required by the Act and regulations published in this chapter, and other records which are directly related to the purpose of the inspection," with a warrant.

" . . .[P]robable cause justifying the issuance of a warrant may be based on not only specific evidence of an existing violation, but also on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment; a warrant showing that a specific business has been chosen for a search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of search in any of the lesser divisions of the area, will protect an employer's Fourth Amendment rights."

" . . . [T]he Act is unconstitutional insofar as it purports to authorize inspections without a warrant or its equivalent . . . . Without a warrant the inspector stands in no better position than a member of the public. What is observable by the public is observable, without a warrant, by the government inspector as well." Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861; 94 S. Ct. 2114 (1974).

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Donovan v. Dewey
452 U.S. 594, 101 S. Ct. 2534 (1980)

FACTS: A federal mine inspector attempted to inspect the premises of a stone quarry operator under authority granted by federal law. The pertinent statute provided that federal mine inspectors are to inspect all mines at set intervals to insure compliance with health and safety standards and to make

follow-up inspections to determine whether previously discovered violations had been corrected. Mine inspectors were authorized to inspect any mine without having to obtain a warrant. In this case, the inspection was a follow-up to one that uncovered numerous safety and health violations. The quarry operator refused to allow the inspection to be completed because the inspector did not have a search warrant.

ISSUE: Whether a statute can authorize the government to engage in a non-consensual inspection without a search warrant?

HELD: Yes. Under specific circumstances, such intrusions are reasonable.

DISCUSSION: The Court held that there are certain situations in which the government can engage in warrantless inspections. The Court stated "[T]he greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections."

Determining when an inspection warrant is required to conduct these types of searches rests on whether (1) Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and (2) the regulatory practices are sufficiently comprehensive and defined that the commercial operator cannot help but be aware that his business will be subject to episodic inspections for explicit purposes.

The warrantless inspections here were justified because the statute (1) notified the operator that inspections will be performed on a regular basis, (2) informed the operator of what health and safety standards must be met, thus curtailing the discretion of government officials to determine what facilities to search and what violations to search for, and (3) prohibited forcible entries. Should entry to perform an inspection be

denied, the government was compelled to file a civil action in federal court to obtain an injunction against future refusals.

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New York v. Burger
482 U.S. 691, 107 S. Ct. 2636 (1987)

FACTS: The defendant operated a wrecking yard that dismantled automobiles and sold their parts. Pursuant to a state statue authorizing warrantless inspections of automobile junkyards, police officers entered his junkyard and asked to see his license and records as to automobiles and parts. The defendant did not have the license. The officers conducted an inspection of the junkyard and discovered stolen vehicles and parts.

ISSUES:

1. Whether the warrantless search of an automobile junkyard, conducted pursuant to a statute authorizing such a search, falls within the exception to the warrant requirement for administrative inspections of pervasively regulated industries?

2. Whether an otherwise proper administrative inspection is unconstitutional because the inspection may disclose violations not only of the regulatory statute but also of criminal statutes?

HELD:

1. It depends. Business owners do not command the same level of reasonable expectation of privacy that private individuals expect.

2. No. Law enforcement officers are entitled to recover evidence of crime they observe while lawfully present in a location.

DISCUSSION: The warrantless search of an automobile junkyard, conducted pursuant to a statute authorizing such a search, may fall within the exception to the warrant requirement. A business owner's expectation of privacy in commercial property is attenuated with respect to commercial property employed in a "closely regulated" industry. Where the owner's privacy interest is weakened and the government's interest in regulating particular businesses is heightened, a warrantless inspection of commercial premises is reasonable. This warrantless inspection, even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met:

1) There must be a "substantial" government interest. Because of the auto theft problem, the state has a substantial interest in regulating the auto dismantling industry.

2) The warrantless inspections must be "necessary to further [the] regulatory scheme."

3) The statute's inspection program, in terms of certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.

The Court found that this statute provided a constitutionally adequate substitute for a warrant. It informed a business operator that regular inspections will be made, and also sets forth the scope of the inspection, notifying him of how to comply with the statute and who is authorized to conduct the inspection. However, the time, place, and scope of the inspection is limited to impose appropriate restraints upon the inspecting officers' discretion. The administrative scheme is not unconstitutional simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes, in addition to violations of regulations.

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Michigan v. Sitz
496 U.S. 444, 110 S. Ct. 2481 (1990)

FACTS: The Michigan State Police established a sobriety checkpoint program pursuant to advisory committee guidelines. Checkpoints could be set up at selected sites along state roads. During operation of the checkpoints, all vehicles would be briefly stopped and the drivers examined for signs of intoxication. If such signs were detected, the individual would be taken out of the flow of traffic and have their driver's license and registration checked. If necessary, additional sobriety tests would be performed. If officers found the driver to be intoxicated, the driver would be arrested. If not, the driver would be immediately allowed to resume his or her journey. A checkpoint was set up under these guidelines. One hundred twenty six vehicles passed through, with an average delay of approximately 25 seconds per vehicle. Two drivers were detained for additional field sobriety testing, and one of the two was arrested. A third driver drove through the checkpoint and was ultimately stopped and arrested for driving under the influence.

ISSUE: Whether the government's use of highway sobriety checkpoints was a violation of the Fourth Amendment?

HELD: No. In balancing the interests of the state in eradicating drunk driving with the minimal intrusion upon individual motorists, the checkpoints were reasonable under the Fourth Amendment.

DISCUSSION: Whenever a vehicle is stopped at a checkpoint, a "seizure" under the Fourth Amendment occurs. In Brown v. Texas, the Court outlined a balancing test that applied in this case. Here, the test consisted of "balancing the State's interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual's privacy caused by the checkpoints." Applying this test, the sobriety

checkpoints were constitutional. The States have a substantial interest in eradicating the problem of drunk driving. Alternatively, the intrusion on individual motorists was slight. "In sum, the balance of the State's interest in preventing drunk driving, the extent to which the system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the State program."

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City of Indianapolis v. Edmond
531 U.S. 32, 121 S. Ct. 447 (2000)

FACTS: The City of Indianapolis operated vehicle checkpoints to interdict unlawful drug use and transportation. At each checkpoint, the police stopped a predetermined number of vehicles. Pursuant to written directives, an officer advised the driver that he or she was being stopped at a drug checkpoint and asked the driver to produce a license and registration. The officer looked for signs of impairment and conducted an open-view examination of the vehicle from the outside. Meanwhile, a narcotics-detection dog walked around the outside of each stopped vehicle.

ISSUE: Whether the checkpoint seizures without any suspicion were reasonable?

HELD: No. Previously approved suspicion-less checkpoints were approved for traffic reasons. See Michigan v. Sitz.

DISCUSSION: The Court has approved very few warrantless, suspicion-less searches and seizures. When it has done so, it was always with great uneasiness. For example, this Court has upheld brief, suspicion-less seizures at a fixed checkpoint designed to intercept illegal aliens, United States v. Martinez-Fuerte, and at a sobriety checkpoint aimed at removing drunk drivers from the road, Michigan v. Sitz. The Court has also

suggested that a similar roadblock to verify drivers' licenses and registrations would be permissible to serve a highway safety interest. Delaware v. Prouse. These checkpoints were designed to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety.

Here, the Court was concerned that this checkpoint program's primary purpose was indistinguishable from the general interest in crime control. In determining whether individualized suspicion is required to accompany a seizure, the Court considers the nature of the interests threatened and their connection to the law enforcement practice. The Supreme Court is particularly reluctant to create exceptions to suspicion requirements where governmental authorities are primarily pursuing general crime control. As the Court has never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing, they found the seizures here to be unreasonable.

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Illinois v. Lidster
540 U.S. 419, 124 S. Ct. 885 (2004)

FACTS: Police officers set up a highway checkpoint a week after a fatal hit-and-run accident in an effort to garner information about the perpetrator. As each vehicle approached the checkpoint, an officer would stop the vehicle for 10 to 15 seconds, ask the occupants if they had any information about the offense, and hand the driver an informational flyer. The defendant drove his vehicle in an erratic manner toward the checkpoint. When stopped, the officer detected the odor of alcohol on the defendant's person, asked him to perform a field sobriety test, and arrested him for driving under the influence of alcohol.

ISSUE: Whether a checkpoint to gather information from potential witnesses to a crime violates the Fourth Amendment?

HELD: No. As the government minimized the disruptive features of a checkpoint seizure and had a compelling reason for seeking the information, their seizure was reasonable.

DISCUSSION: In City of Indianapolis v. Edmond, the Supreme Court held that traffic checkpoints designed for general crime control purposes were unconstitutional. However, the checkpoint in this case is appreciably different as its primary purpose was to seek information from the public about a serious crime that was committed by someone else.

Specialized governmental interests can justify traffic checkpoints that are not supported by individualized suspicion. See Michigan v. Sitz (1990); United States v. Martinez-Fuerte (1976). In a situation in which the government is seeking information from the public, individualized suspicion is irrelevant to the government's purpose. Also, such brief government-public encounters are unlikely to provoke anxiety or become intrusive. The government is not apt to ask questions that make members of the public uncomfortable or incriminate themselves. The checkpoint "advanced this grave public concern to a significant degree. The police appropriately tailored their checkpoint stops to fit important criminal investigatory needs. The stops took place about one week after the hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night. And police used the stops to obtain information from drivers, some of whom might well have been in the vicinity of the crime at the time it occurred." Based on these factors, the Court held the minimal intrusion of the checkpoint was reasonable.

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United States v. Biswell
406 U.S. 311, 92 S. Ct. 1593 (1972)

FACTS: The defendant was federally licensed to deal in sporting weapons. An ATF inspector inspected the defendant's

books and requested entry into his locked gun storeroom. The defendant asked the inspector if he had a search warrant. The inspector explained that the Gun Control Act, 18 U.S.C. § 921, authorized such searches, known as compliance checks. After the search, the inspector seized two sawed-off rifles that the defendant was not licensed to possess.

ISSUE: Whether the search of the business premises was reasonable?

HELD: Yes. Compliance checks are reasonable because the defendant chose to engage in "pervasively regulated" business and to accept a federal license. In doing so, he acknowledged that his business records, firearms, and ammunition would be subject to effective inspection.

DISCUSSION: It is plain that inspections for compliance with the Gun Control Act, 18 U.S.C. § 923, pose only limited threats to the dealer's justifiable expectations of privacy. When a person chooses to engage in a "pervasively regulated" business such as dealing in firearms and accepts a federal license, he must do so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. The government annually furnishes each licensee with a revised compilation of ordinances that describe his obligations and define the inspector's authority.

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Wyman v. James
400 U.S. 309, 91 S. Ct. 381 (1971)

FACTS: A state's Aid to Families with Dependent Children (AFDC) program stressed "close contact" with beneficiaries, requiring home visits by caseworkers as a condition for assistance. This rule prohibited visitation with a beneficiary outside working hours, as well as forcible entry. The defendant, a beneficiary under the AFDC program, refused to permit a caseworker to visit her home after receiving several days'

advance notice. She received notice that the government would consequently cancel her assistance.

ISSUE: Whether a home visitation is an unreasonable search and, when not consented to or supported by a warrant based on probable cause, would violate the defendant's Fourth Amendment rights?

HELD: No. The home visitation provided for by law concerning the AFDC program is a reasonable administrative tool and does not violate any right guaranteed by the Fourth Amendment.

DISCUSSION: The Court held, assuming that the home visit has some of the characteristics of a traditional search, the state's program was reasonable. The Court found multiple reasons for concluding the intrusion was reasonable. The home visit served the needs of the dependent child, it enabled the government to detect that the intended objects of the benefits were receiving them, the program stressed privacy by not unnecessarily intruding on the beneficiary's rights in her home, provided the government with essential information not obtainable through other sources, was conducted, not by a law enforcement officer, but by a caseworker, and was not a criminal investigation. Finally, the consequence of refusal to permit a home visitation, which does not involve a search for violations, is not a criminal prosecution but only the cancellation of benefits.

*****

United States v. Knights
534 U.S. 112, 122 S. Ct. 587 (2001)

FACTS: The defendant was on probation for a drug offense. He signed a probation order stating he would "[s]ubmit his … person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law

enforcement officer." A police officer became suspicion of the defendant's activities, and, aware of his probation conditions, searched his apartment. He found evidence of criminal activity (arson) inside.

ISSUE: Whether the condition of probation limits subsequent searches to the defendant's probation status only?

HELD: No. Police officers can conduct criminal evidence searches based on diminished expectations of privacy and conditions of probation.

DISCUSSION: Probationers do not enjoy the freedoms that other citizens enjoy. In this particular defendant's probation, the sentencing judge determined the search provision was necessary. This condition effectively diminished the defendant's reasonable expectation of privacy.

To intrude on this diminished expectation of privacy, the government relied on a search condition of probation. The Court stated "[I]t was reasonable to conclude that the search condition would further the two primary goals of probation–rehabilitation and protecting society from future criminal violations." Therefore, an officer is entitled to conduct a search when (1) probationer is subject to a search condition and (2) he or she establishes reasonable suspicion that the probationer engaged in criminal activity (note that a probation officer may search under less stringent standards for probation-related reasons).

*****

Samson v. California
126 S. Ct. 2193 (2006)

FACTS: The defendant was placed on parole with the condition that he "shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or

without cause." A police officer observed the defendant walking along a public street. Without suspicion and based solely on defendant's status as a parolee, the officer searched him. The officer found a controlled substance in the defendant's person.

ISSUE: Whether a condition of release can reasonably contain the condition that the defendant is subject to warrantless, suspicionless searches?

HELD: Yes. Parolees' legal status is such that it is reasonable to subject them to warrantless, suspicionless searches.

DISCUSSION: Parolees are effectively serving their terms of incarceration through a system of intensive supervision. As such, the Court noted that a parolee has even less of an expectation of privacy than a probationer (such as the one in Knights). Also, parolees accept the condition of their release with a clear understanding of the conditions that they will face. Finally, the government maintains an overwhelming interests in controlling prisoners it has released on parole as they are more likely, statistically, to commit future crimes. Based on these three reasons, warrantless, suspicionless searches of parolees is reasonable under the Fourth Amendment.

*****

Skinner v. Railway Labor Executives' Association
489 U.S. 602, 109 S. Ct. 1402 (1989)

FACTS: Upon learning that alcohol and drug abuse by railroad employees had caused or contributed to a number of significant train accidents, the Federal Railroad Administration (FRA) promulgated regulations under the Secretary of Transportation's authority to adopt safety standards for the industry. The regulations required blood and urine tests of covered employees to be conducted following certain major train accidents or incidents and authorized, but did not require, railroads to administer breath or urine tests to covered

employees who violate certain safety rules. The Railway Labor Executives' Association and members of labor organizations brought suit in the Federal court to enjoin the regulations.

ISSUE: Whether the regulations were so overly intrusive as to constitute an unreasonable search of the employees' persons?

HELD: No. The government has a special need in protecting the public from intoxicated operators of the railway system that warrants suspicion-less, warrantless searches.

DISCUSSION: Though those conducting the testing were not government employees, the Fourth Amendment is applicable to drug and alcohol testing mandated or authorized by the FRA regulations. A railroad that complies with the regulations does so by compulsion of sovereign authority and therefore must be viewed as an agent of the government. Similarly, even though some of the regulations do not compel railroads to test, such testing is not primarily the result of private initiative. Specific features of the regulations combine to establish that the government has actively encouraged, endorsed, and participated in the testing.

The collection and analysis of the samples required or authorized by the regulations constitute searches. The Court has long recognized that a compelled intrusion into the body for blood to be tested for alcohol content constitutes a search. Similarly, subjecting a person to the breath test authorized by the regulations is deemed a search, since it requires the production of "deep lung" breath and thereby implicates concerns about bodily integrity. Although the collection and testing of urine under the regulations do not entail any intrusion into the body, they nevertheless constitute searches since they intrude upon expectations of privacy as to medical information.

The mandate of the Fourth Amendment is that all searches be reasonable. The drug and alcohol tests regulations are

reasonable under the Fourth Amendment even though there is no requirement of a warrant or a reasonable suspicion that any particular employee may be impaired, since the government has a compelling interest that outweighs employees' privacy concerns. The government's interest in regulating the conduct of railroad employees engaged in safety-sensitive tasks in order to ensure the safety of the traveling public and of the employees themselves justifies prohibiting such employees from using alcohol or drugs while on duty or on call for duty. The proposed tests are not an unduly extensive imposition on an individual's privacy. The government's interest presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements.

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National Treasury Employees Union v. Von Raab
489 U.S. 656, 109 S. Ct. 1384 (1989)

FACTS: The U.S. Customs Service, which had one of its primary enforcement missions the interdiction and seizure of illegal drugs smuggled into the country, implemented a drug-screening program requiring urinalysis tests of employees seeking transfer or promotion to a position that has either a direct involvement in drug interdiction or requiring the incumbent to carry firearms or to handle "classified" material. Among other things, the program required that an applicant be notified that selection is contingent upon successful completion of drug screening, set forth procedures for collection and analysis of samples, and limited the intrusion on employee privacy. The test results could not be turned over to any other agency, including criminal prosecutors, without the employee's written consent.

ISSUE: Whether the government's program constituted and an unreasonable intrusion into its employees' privacy?

HELD: No. The program constituted a reasonable effort that met the government's special interests.

DISCUSSION: The program's intrusions are searches that must meet the reasonableness requirement of the Fourth Amendment. However, the government's testing program is not designed to serve the ordinary needs of criminal evidence collection. The purposes of the program are to deter drug use among those eligible for promotion to sensitive positions and to prevent the promotion of drug users to those positions. Therefore, the Court balanced the public interest in the program against the employee's privacy concerns. The government's compelling interest is that certain employees must be physically fit and have unimpeachable integrity and judgment. It also has a compelling interest in preventing the risk to the life of the citizenry posed by the potential use of deadly force by persons suffering from impaired perception and judgment.

The Court held that a warrant is not required here. Such a requirement would serve only to divert valuable agency resources from the government's primary mission that would be compromised if warrants were necessary in connection with routine, yet sensitive, employment decisions. Furthermore, a search or inspection warrant would provide little or no additional protection of personal privacy, since the government's program defines narrowly and specifically the circumstances justifying testing and the permissible limits of such intrusions. Affected employees know that they must be tested, are aware of the testing procedures that the government must follow, and are not subject to the discretion of officials in the field. The government's testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry firearms, is reasonable despite the absence of probable cause or some other level of individualized suspicion.

*****

Ferguson v. City of Charleston
532 U.S. 67, 121 S. Ct. 1281 (2000)

FACTS: Staff members at a public hospital became concerned about an apparent increase in the use of cocaine by

patients who were receiving prenatal treatment. The staff offered to cooperate with the city in prosecuting mothers whose children tested positive for drugs at birth. A task force consisting of hospital representatives, police, and local officials developed a policy which set forth procedures for identifying and testing pregnant patients suspected of drug use.

ISSUE: Whether the policy-imposed drug tests constituted an unreasonable search?

HELD: Yes. These drug tests conducted for criminal investigatory purposes were searches and not justified without consent, exigency or a warrant.

DISCUSSION: A state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is a search. The interest in using the threat of criminal sanctions to deter pregnant women from using cocaine does not justify a departure from the general rule that a search is unconstitutional if not authorized by a valid warrant, or warrant exception.

This case differed from the previous cases in which the Court considered whether comparable drug tests fit within the closely guarded category of constitutionally permissible suspicionless searches. Those cases employed a balancing test weighing the intrusion on the individual's privacy interest against the "special needs" of the government that supported the program. In previous cases, there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties (such as prosecutors). The critical difference lies in the nature of the "special need" asserted. In each of the prior cases, the "special need" was one divorced from the government's general law enforcement interest.

While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes. Given that

purpose and given the extensive involvement of law enforcement officials at every stage of the policy, this case did not fit within the closely guarded category of "special needs."

*****

Board of Education v. Earls
536 U.S. 822, 122 S. Ct. 822 (2002)

FACTS: A public school district required all students that want to participate in extracurricular activities to submit to drug testing. The students were to take a drug test before participation and then submit to random testing while participating in the activity. The tests were limited to detecting the use of illegal drugs.

ISSUE: Whether the government drug testing of students that engage in extracurricular activities is reasonable?

HELD: Yes. The government (school system) is responsible for providing a safe learning environment, and students that choose to participate in extracurricular activities have accepted a reduced expectation of privacy.

DISCUSSION: The Court held that "[A] student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety." This means that, in certain circumstances, the government can exert greater control than would otherwise be appropriate for adults. Focusing a drug test on those students that involve themselves with extracurricular activities is fitting as some of these activities "require occasional off-campus travel and communal undress." Perhaps, more importantly, all of the activities impose requirements that do not apply to non-participating students. Participation reduces the students' expectation of privacy. The Court held that "[G]iven the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant." Therefore,

the Court concluded that "the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District's interest in protecting the safety and health of its students."

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Chandler v. Miller
520 U.S. 305, 117 S. Ct. 305 (1997)

FACTS: A state law required candidates for specific state offices to certify that they had taken a drug test and the results were negative. The test date is scheduled by the candidate anytime within 30 days prior to ballot qualification.

ISSUE: Whether the government's process is designed to pursue the "special needs" set out in the statute?

HELD: No. The process the government attempted to implement is too inefficient to constitute an effective test.

DISCUSSION: The Court held that "[W]hen such 'special needs'--concerns other than crime detection--are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context specific inquiry, examining closely the competing private and public interests advanced by the parties." Where the public interests are substantial (as in Skinner, Vernonia and Von Raab), such warrantless, suspicionless searches are reasonable. However, each of these cases was warranted by a "special need." In the case at hand, the Court noted that "Georgia's certification requirement is not well designed to identify candidates who violate antidrug laws." Candidates subject to the statute have notice of when the drug test is taking place. In fact, the candidates themselves schedule the drug tests. The government's claim that these warrantless, suspicionless, special needs searches deters drug users from gaining high office within the state was not very persuasive. Likewise, the Court held that the state could produce no

evidence that it currently had drug problems among its elected officials or that their officials perform risky, safety sensitive tasks.

*****

Vernonia School District v. Acton
515 U.S. 646, 115 S. Ct. 2386 (1995)

FACTS: A school district was experiencing a dramatic increase in student drug use. In particular, many of the students involved in the school's athletic programs were suspected of using controlled substances. The school district imposed a policy, applicable to all students participating in interscholastic athletics, subjecting them to random drug testing. The student and parents were required to sign a testing consent form before participating in an athletics program. The defendant was denied access to an athletics program as his parents refused consent.

ISSUE: Whether it is reasonable for a school district to require drug testing to participate in athletics programs?

HELD: Yes. Student-athletes have a reduced expectation of privacy and the government has a compelling interest in protecting the students from the associated dangers.

DISCUSSION: The Court has previously dispensed with the government's requirement of obtaining a warrant supported by probable cause in the past when a "special need" to conduct the search exists. The Court has found a "special need" in relation to public schools prior to this case, as well. See New Jersey v. T.L.O.. In this case, the Court found that "[L]egitimate privacy expectations are even less with regard to student athletes." They are subjected to a variety of communal observations and "they voluntarily subject themselves to a degree of regulation" by joining the team. The Court balanced the reduced expectation of privacy the student-athletes receive in this

environment with the government's compelling interest of protecting "school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." In doing so, it found the school district's requirements reasonable.

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United States v. Ramsey
431 U.S. 606, 97 S. Ct. 1972 (1977)

FACTS: A Customs officer, without any knowledge of possible criminal activity, inspecting a sack of incoming international mail from Thailand. He spotted eight envelopes that were bulky and which he believed might contain merchandise. He opened the envelopes and found controlled substances inside.

ISSUE: Whether Customs officials must establish a level of suspicion before searching international mail?

HELD: No. The Customs official must only demonstrate a suspicion that the package contains merchandise.

DISCUSSION: The Court noted "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration." In the case at hand, Congress authorized the Customs officer to act through Title 19 U.S.C. § 482, which states, in part "[A]ny of the officers or persons authorized to board or search vessels may…search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law…." At the time the Customs officer opened the letters, he "knew that they were from Thailand, were bulky, were many times the weight of a normal airmail letter, and 'felt like there was something in there.'" The Court found that the officer was in compliance with the statute in that he established

a reasonable 'cause to suspect' that there was merchandise or contraband in the envelopes.

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United States v. Flores-Montano
541 U.S. 149, 124 S. Ct. 1582 (2004)

FACTS: During a routine border inspection, the customs inspector directed the defendant to leave his vehicle, which was then removed to a secondary inspection station. There, another inspector tapping on the gas tank, which sounded solid. A mechanic was summoned, and within twenty-five minutes the gas tank was removed. Controlled substances were found inside.

ISSUE: Whether the removal of the gas tank required reasonable suspicion?

HELD: No. The routine (non-damaging) inspection of property at the border is reasonable without suspicion.

DISCUSSION: Routine searches made at the border are reasonable by virtue of the fact that they take place at the border. The Court stated that the government's "interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." Routine searches and seizures that take place at the border are reasonable to regulate the collection of duties and to prevent the introduction of contraband into the country. The expectation of privacy is less at the border than it is in the interior, which is a significant factor, as well, in allowing these searches.

The Court refused to require reasonable suspicion before the government removed the gas tank, in this instance, as the procedure did not damage his property in any noticeable manner. The government's authority to conduct suspicionless searches at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank. The Court

also warned that "[W]hile it may be true that some searches of property are so destructive as to require a different result, this was not one of them."

*****

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

FACTS: FBI and INS agents went to a hotel room the defendant occupied as a residence. The FBI agents suspected the defendant of espionage and attempted to obtain consent from him to search the hotel room. When the defendant refused to cooperate, the FBI agents signaled to the INS agents, who arrested the defendant on an INS administrative arrest warrant (for deportation). Evidence of his participation in espionage was discovered.

ISSUE: Whether the administrative arrest warrant (for deportation) was illegally used as a pretext to conduct a search for evidence of criminal (and unrelated) activity?

HELD: No. The FBI and INS did not act in "bad faith" in the use of the administrative warrant.

DISCUSSION: The Court was persuaded by the fact that the actions taken by the INS "differed in no respect from what would have been done in the case of an individual concerning whom no such information was known to exist." The FBI shared information about the defendant that the INS would find useful but "did not indicate what action it wanted the INS to take." Once it was discovered that the investigation for espionage could not be pursued, the FBI was not "required to remain mute."

The result would have been entirely different had the Court found that the administrative warrant "was employed as an instrument of criminal law enforcement to circumvent the

latter's legal restrictions, rather than as a bona fide preliminary step in a deportation proceeding." The Court stated that the test is "whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime." If the government had undertaken these steps to avoid the constitutional restraints on criminal law enforcement, the evidence would have been suppressed.

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VIII. RELATED SEARCH AND SEIZURE ISSUES

A. OFFICER'S INTENT

Whren v. United States
517 U.S. 806, 116 S. Ct. 1769 (1996)

FACTS: Plainclothes drug detectives were patrolling a known drug-use area in an unmarked police car. The detectives noticed the defendant's vehicle because of its suspicious, though legal, activity. As the officers made a U-turn to get a closer look at the vehicle, it suddenly turned without signaling and sped off at an unreasonable speed. Within a short distance, the vehicle stopped behind other traffic at a red light. One plainclothes detective got out of the unmarked car, approached the vehicle, identified himself as a police officer, and directed the operator to park his vehicle. The officer acknowledged that the purpose of his direction was to get a better look at the suspect, not issue a traffic ticket. The officer observed two large plastic bags of what appeared to be crack cocaine in the defendant's hands. The detective arrested the defendant and the subsequent search of the vehicle yielded several types of illegal drugs.

ISSUE: Whether the officer's pretextual detention of a motorist for a traffic violation rendered the seizure unreasonable under the Fourth Amendment?

HELD: No. The reasonableness of the officer's seize turns on whether the officer had the authority to make the seizure.

DISCUSSION: The Supreme Court found probable cause that the defendant's vehicle was involved in a traffic violation. The Court also found that the plainclothes officers would not have stopped the vehicle but for their concern that the vehicle might be involved in drug activity. As a general matter, the Court held that stopping an automobile is reasonable if the police officer has probable cause to believe that a traffic violation has occurred. Therefore, the Court was only left to consider whether the officers' pretextual intent in stopping the vehicle converted an otherwise reasonable police activity into an unlawful stop. While previous decisions left no doubt that the officer's motive can invalidate inventory searches and administrative inspections, the Court has never held the officer's motives relevant in any other area. The Court held that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." The seizure was lawful.

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Devenpeck v. Alford
543 U.S. 146, 125 S. Ct. 588 (2004)

FACTS: An officer stopped the defendant based on suspicion that he was impersonating a police officer. On his approach to the defendant's vehicle, the officer noticed that the defendant had a special radio designed to receive police frequencies, and the defendant possessed handcuffs and a portable police scanner. The defendant's answers were evasive and inaccurate. After a supervisor arrived at the scene, he noticed a tape recorder in the front seat of the vehicle. The recorder was operating in the "record" position. The officers placed the defendant under arrest for violating a state privacy act, though their primary concern was that he was impersonating a police officer. At a later time, the privacy act charge was dismissed.

ISSUE: Whether the probable cause inquiry to arrest is confined to the known facts of the offense for which the arrest is made?

HELD: No. The government is only required to demonstrate that the arresting officer knew of facts that established probable cause of an offense at the time of the arrest.

DISCUSSION: The Court rejected outright a "closely related offense" rule, which would have permitted the officer to establish probable cause for offense (or a closely related offense) for which the defendant was arrested alone. No other potential offenses could sustain the arrest, even if the officer could establish probable cause. The Supreme Court has previously established that the determination of probable cause depends upon the facts known to the arresting officer at the time of the arrest. Maryland v. Pringle (2003). The officer's subjective motive for making the arrest is irrelevant. The Court stated the "[S]ubjective intent of the arresting officer, however it is determined (and of course subjective intent is always determined by objective means), is simply no basis for invalidating an arrest."

*****

Arkansas v. Sullivan
532 U.S. 769, 121 S. Ct. 1876 (2001)

FACTS: A police officer stopped the defendant for speeding and for having an improperly tinted windshield. After a brief discussion with the defendant, the officer realized that he was aware of "intelligence on [the defendant] regarding narcotics." The officer noticed a weapon when the defendant opened the car door in an (unsuccessful) attempt to locate his registration and insurance papers. He placed the defendant under arrest for speeding, driving without his registration and insurance documentation, carrying a weapon, and improper window tinting with the expectation of conducting an inventory search of the defendant's vehicle. During an inventory of the vehicle's

contents, the officer discovered a controlled substance. The defendant moved to suppress this evidence on the grounds that the arrest was a pretext and sham to search.

ISSUE: Whether the officer's subjective intent is relevant in determining the reasonableness of a seizure?

HELD: No. The officer's subjective intent is immaterial in evaluating whether a seizure is reasonable.

DISCUSSION: The Supreme Court reaffirmed its holding in Whren, in which it noted its "unwillingness to entertain Fourth Amendment challenges based on the actual motivations of individual officers." The subjective intent of the officer making the seizure plays no role in determining whether probable cause to affect a seizure exists.

In another matter, the State Supreme Court also held that it may interpret the United States Constitution to provide greater protection than the Supreme Court. The Supreme Court also rejected this. The Court held that "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," it "may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them [quoting Oregon v. Hass, 420 U.S. 714 (1975)]."

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B. OTHER ISSUES

G. M. Leasing Corp. v. United States
429 U.S. 338, 97 S. Ct. 619 (1977)

FACTS: The IRS seized certain property of a corporation that was determined to be the alter ego of a delinquent taxpayer. Government agents seized automobiles registered in the corporation's name, acting without warrants, on public streets, parking lots, and other open places. They also went to

the defendant's office, a cottage-type building, and made a warrantless forced entry. Pending further information as to whether the cottage was an office or a residence, the agents made no initial seizures. However, two days later they again entered the cottage without a warrant and seized books, records, and other property.

ISSUES:

1. Whether the seizure of the defendant's property in public was reasonable?

2. Whether the warrantless intrusion into corporate property was reasonable?

HELD:

1. Yes. The Fourth Amendment was not violated by the warrantless seizures of the corporation's automobiles, since the seizures took place on public streets, parking lots, or other open places, and did not involve any invasion of privacy.

2. No. The warrantless entry into the corporation's business office constituted an unconstitutional intrusion into privacy that violated the Fourth Amendment.

DISCUSSION: The Court held that the warrantless automobile seizures, which occurred in public streets, parking lots, or other open areas, involved no invasion of privacy and were constitutional. The property was validly subject to seizure and securing the property in public did not invoke any further privacy interest of the defendant's. However, the warrantless entry into the privacy of the defendant's office violated the Fourth Amendment, since "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." The Fourth Amendment protects business premises, and corporations enjoy Fourth Amendment protections.

*****

Florida v. White
526 U.S. 559, 119 S. Ct. 1555 (1999)

FACTS: Police officers observed the defendant use his car to deliver cocaine. This subjected the car to forfeiture under a state statute that prohibited the use of motor vehicles in the transportation of contraband. Several months later, the officers arrested the defendant at his place of employment for an unrelated crime. His car was parked in the employee parking lot. The police seized his car, without a warrant, because they believed it was subject to the forfeiture statute.

ISSUE: Whether the officers may make a warrantless seizure of a car subject to forfeiture in a public place?

HELD: Yes. The automobile could be seized in a public place because it did not involve any greater intrusion than that authorized by law.

DISCUSSION: After the defendant used the automobile in violation of the forfeiture statute, the Court considered the automobile contraband. As the contraband was readily movable, the officers were reasonable in their warrantless seizure. This is to be distinguished from a seizure that takes place on private property as entry to make a seizure there constitutes an invasion of privacy. To seize an automobile on private property, officers must obtain a search warrant.

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Kolender v. Lawson
461 U.S. 352, 103 S. Ct. 1855 (1983)

FACTS: A state statute required persons who loiter or wander on the streets to identify themselves and to account for their presence when requested by a peace officer. The state appellate court construed the statute to require a person to provide "credible and reliable" identification when requested by

a police officer who has reasonable suspicion of criminal activity sufficient to justify a Terry stop. The defendant was arrested and convicted under the statute.

ISSUE: Whether the state statute was constitutionally valid?

HELD: No. The statute, as drafted and as construed by the state court, was unconstitutionally vague on its face within the meaning of the Due Process Clause of the Fourteenth Amendment.

DISCUSSION: A state criminal statute that requires persons to identify themselves and to account for their presence when requested by a peace officer under circumstances that would justify a valid stop is unconstitutionally vague. This statute encourages arbitrary enforcement by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reliable identification." The statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. Therefore, the statute is void-for-vagueness. The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

*****

Hiibel v. Sixth Judicial Dist. Court
540 U.S. 1175, 124 S. Ct. 1494 (2003)

FACTS: A police officer developed reasonable suspicion that the defendant was involved in an assault. He approached the defendant, explained he was investigating a crime, and asked to see the defendant's identification. The defendant refused the officer's eleven requests to see his identification. The officer arrested the defendant for violating a state law that prohibited

"obstructing a public officer in discharging…any legal duty of his office." The legal duty that the defendant obstructed was a statute that provided "[A]ny person so detained (Terry stop) shall identify himself, but may not be compelled to answer any other inquiry of any peace officer."

ISSUE: Whether the state statute is constitutional in that it requires persons to identify themselves during a Terry stop?

HELD: Yes. "Stop and identify" statutes do not change the nature of the seizure itself and the information obtained typically satisfies a significant governmental interest.

DISCUSSION: The Fourth Amendment requires all seizures to be reasonable. Reasonableness is determined "by balancing its intrusions on the individual's Fourth Amendment interests against its promotion of legitimate government interests." Delaware v. Prouse (1979). The Court held that the state statute satisfies this standard. The statute does not change the character, duration or location of a stop and the officer's demand for identity had an immediate purpose for the Terry stop.

The defendant's Fifth Amendment argument failed to persuade the Court because disclosure of his name presented no real danger of incrimination. The Court has previously determined that the Fifth Amendment privilege only covers those communications that are testimonial, compelled, and incriminating. The defendant's "refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him."

*****

Gerstein v. Pugh
420 U.S. 103, 95 S. Ct. 854 (1975)

FACTS: The defendants were arrested and charged with felonies based on a prosecutor's information. At that time, the

state only required indictments for capital offenses. State case law held that the filing of an information foreclosed the defendant's right to have a judge determine whether probable cause existed for the arrest.

ISSUE: Whether a person arrested and held for trial under an information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty?

HELD: Yes. The Fourth Amendment demands a judicial review of an arrest before an "extended restraint of liberty" is imposed.

DISCUSSION: The Court noted that in many instances, the government is permitted to act without the review of a judicial authority. The Court stated that "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate." At some point, the government's need to secure the defendant subsides and the "the suspect's need for a neutral determination of probable cause increases significantly." Based on these factors the Court held that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." The fact that the prosecutor found substantial evidence to warrant a prosecution does not afford the citizen the protections contemplated in the Fourth Amendment.

*****

Zurcher v. Stanford Daily
436 U.S. 547, 98 S. Ct. 1970 (1978)

FACTS: During a civil disturbance, a group of demonstrators attacked a group of nine police officers. One officer was knocked to the ground and was struck repeatedly on

the head. Another officer suffered a broken shoulder. All nine were injured. The officers were only able to identify two of their assailants, but one saw a photographer recording the assault. A special edition of the Stanford Daily (Daily), a student newspaper published at Stanford University, carried articles and photographs devoted to the protest. The photographs carried the byline of a Daily staff member and indicated that he had been in the area of the assault on the nine officers. A warrant was issued for an immediate search of the Daily's offices for negatives, film, and pictures showing the events at the demonstration.

ISSUE: Whether the newspaper's reasonable expectation of privacy is also protected by a First Amendment "freedom of the press" protection from the government intrusion?

HELD: No. Organizations involved in traditional First Amendment activities are not provided extra constitutional protections.

DISCUSSION: A search of the premises of a newspaper is not unreasonable within the meaning of the Fourth Amendment and does not violate the First Amendment. There is no constitutional requirement that when the innocent party of a search is a newspaper, criminal evidence must generally be secured through a subpoena duces tecum rather than a search warrant. Where the government seeks materials presumptively protected by the First Amendment, the warrant requirement of the Fourth Amendment should be administered to leave as little as possible to the discretion or whim of the officer in the field.

NOTE: This decision led to the enactment of 42 U.S.C. § 2000aa (Privacy Protection Act) that places some additional burdens on government officials attempting to secure a search warrant of premises traditionally operated in First Amendment activities.

*****

A Quantity of Copies of Books v. Kansas
378 U.S. 205, 84 S. Ct. 1723 (1964)

FACTS: A state law authorized the seizure of allegedly obscene books. The law did not provide the possessors of these books the right to challenge the determination of obscenity until after the seizure if property. Law enforcement officers obtained an order under this law to seize and impound copies of certain paperback novels from a place of business.

ISSUE: Whether the procedures leading to the seizure of obscene materials was constitutionally sufficient?

HELD: No. The line between constitutionally protected material and obscene material is very fine. Procedures for seizing illegal material must not inhibit the lawful possession of other materials.

DISCUSSION: The Court held that "State regulation of obscenity must 'conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.'" Bantam Books, Inc., v. Sullivan, 372 U.S. 58 (1963). As the state did not provide the defendant with the opportunity to challenge the determination of obscenity prior to the books' seizure, the process was unconstitutional.

THE FIFTH AMENDMENT

A. MISCELLANEOUS ISSUES

Corley v United States
129 S. Ct. 1558 (2009)

FACTS: The defendant was arrested for assaulting a federal officer and was also suspected of robbing a bank. He was detained by FBI agents at a local police station for several hours then taken to the hospital to be treated for a minor injury. He was next taken to the FBI office which was in the same building as the chambers of the nearest magistrate judges. He was questioned about the bank robbery in the FBI office until he waived his rights pursuant to Miranda and began an oral confession to the bank robbery some 9.5 hours after his arrest. The defendant was too tired to generate a written confession, so he was held overnight. He signed a written confession the next day. He was then presented to a magistrate judge for the first time, 29.5 hours after his arrest.

ISSUE: Whether 18 USC § 3501 eliminates or modifies the McNabb-Mallory rule under which an arrested person's confession is inadmissible if given after an unreasonable delay in bringing him before a judge ("presentment") even if the confession was voluntary?

HELD: 18 USC § 3501 only modified the McNabb-Mallory rule by providing that a confession made after arrest but before initial appearance is admissible, subject to the rules of evidence, if it is (1) made within six hours of arrest, (2) voluntary, and (3) the weight given to the confession is left to the jury to determine. If the confession occurred more than six hours after arrest but before initial appearance, it is not admissible if the delay was unnecessary or unreasonable per the McNabb-Mallory rule.

DISCUSSION: A logical reading of 18 USC § 3501 combined with the statute's legislative history indicates that it is intended

to modify, not eliminate the rule on the admissibility of confessions created by the McNabb-Mallory line of cases. Under McNabb-Mallory, an arrested person's confession is inadmissible if given after an unreasonable delay in bringing him before a judge. 18 USC §3501(c) created a rule that renders a confession made within six hours of arrest admissible, subject to the rules of evidence, so long as it was also voluntary and the jury is permitted to determine its weight. Because 18 USC §3501 did not eliminate the McNabb-Mallory rule, an arrested person's confession obtained more than six hours after arrest must be examined to determine if the delay was unnecessary or unreasonable. If the delay was unnecessary or unreasonable, the confession must be suppressed even if it was voluntary.

Note: This case pertains to federal prosecutions. See 18 U.S.C. §3501(c), and see McNabb v. United States, 318 U. S. 332 (1943) and Mallory v. United States, 354 U. S. 449 (1957), under which an arrested person's confession is inadmissible if given after an unreasonable delay in bringing him before a judge.

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Malloy v. Hogan
378 U.S. 1, 84 S. Ct. 1489 (1964)

FACTS: The defendant was arrested for and pled guilty to a misdemeanor gambling charge. While on probation, he was ordered to testify before a county referee conducting an investigation into gambling in the local area. The defendant refused to answer any questions on the grounds the answers may incriminate him. The court held the defendant in contempt for failing to answer the questions.

ISSUE: Whether the Fifth Amendment's self-incrimination clause applies to state actions?

HELD: Yes. Through the Fourteenth Amendment, the states must abide by the legal principles of the Fifth Amendment's Self-Incrimination Clause.

DISCUSSION: The Court held that the Due Process Clause of the Fourteenth Amendment to the Constitution requires states to respect the self-incrimination principles of the Fifth Amendment. The defendant may refrain from answering questions that would support a confession or provide a link in the chain of evidence needed to prosecute.

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Brogan v. United States
522 U.S. 398, 118 S. Ct. 805 (1998)

FACTS: The defendant falsely answered "no" when federal agents asked him whether he had received any cash or gifts from a company whose employees were represented by the union in which he was an officer. He was indicted on federal bribery charges and for making a false statement within the jurisdiction of a federal agency in violation of 18 U.S.C. § 1001 (false statements).

ISSUE: Whether the defendant has the right to assert a false defense to federal investigators?

HELD: No. Defendants have a constitutional right to remain silent during investigations, but no right to lie.

DISCUSSION: Although many Court of Appeals decisions had embraced the "exculpatory no" doctrine, the Court held that it is not supported by § 1001's plain language. By its terms, § 1001 covers "any" false statement including the use of the word "no" in response to a question. The defendant's argument that § 1001 does not criminalize simple denials of guilt proceeded from two mistaken premises: that the statute criminalizes only those statements that "pervert governmental functions," and that simple denials of guilt do not do so. The Fifth Amendment confers a privilege to remain silent. It does not confer a privilege to lie.

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Mitchell v. United States
526 U.S. 314, 119 S. Ct. 1307 (1999)

FACTS: The defendant pled guilty to one count of conspiring to distribute five or more kilograms of cocaine. The quantity of drugs involved was crucial, because this amount would be used by the court in sentencing. The defendant reserved the right to contest the drug quantity attributable to her under the conspiracy count. The trial court advised the defendant the drug quantity would be determined at her sentencing hearing. During the sentencing proceeding, the government offered testimony from others involved in the conspiracy to establish both the number of transactions in which the defendant had participated, as well as the amount of cocaine she had sold. The defendant did not testify at the sentencing proceedings, relying instead on her attorney's attacks on the credibility of the government witnesses. The judge expressly stated that he was drawing an adverse inference from the defendant's failure to testify at her sentencing hearing.

ISSUE: Whether a defendant waives her privilege against self-incrimination in the sentencing phase of the case by pleading guilty?

HELD: No. A defendant who pleads guilty does not waive her Fifth Amendment right against self-incrimination in the sentencing phase of the case.

DISCUSSION: Nothing prevents a defendant from relying upon a Fifth Amendment privilege at a sentencing proceeding. "Treating a guilty plea as a waiver of the privilege at sentencing would be a grave encroachment on the rights of defendants." Otherwise, the government could compel a defendant to take the witness stand and under questioning, elicit information from the defendant that could contribute to an enhanced sentence. "Where a sentence has not yet been imposed, a defendant may have a legitimate fear of adverse consequences from further testimony." The government retains the burden of presenting facts "relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense

of the self-incrimination privilege." By holding her silence against her, the judge impermissibly interfered with the defendant's exercise of her Fifth Amendment right against compulsory self-incrimination.

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B. FOURTH AMENDMENT VIOLATIONS

Dunaway v. New York
442 U.S. 200, 99 S. Ct. 2248 (1979)

FACTS: Following a robbery and murder, the police received information that implicated the defendant, though it did not amount to probable cause to arrest. Nevertheless, the police illegally seized the defendant and brought him to the police station. Once at the station, the officers placed the defendant in an interrogation room, where he was given his Miranda rights. The defendant waived his rights and, within an hour of reaching the police station, made statements and drew sketches that implicated him in the crime.

ISSUE: Whether the statements and sketches made by the defendant are admissible if the police violate his Fourth Amendment rights?

HELD: No. The statements and sketches provided by the defendant were inadmissible, as they were the product of an illegal seizure under the Fourth Amendment.

DISCUSSION: The police effectively arrested the defendant when they seized him and took him to the police station for questioning. While the police did not characterize the seizure as an "arrest," there was no practical difference between how the defendant was treated and a traditional arrest. For that reason, the police were required to have probable cause. Because they did not, the defendant's seizure was in violation of the Fourth Amendment.

As for the defendant's statements, the Court considered "whether the connection between the unconstitutional police conduct and the incriminating statements and sketches obtained during the defendant's illegal detention were nevertheless sufficiently attenuated to permit their use at trial." Among the factors to be considered are the time between "the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." Applying these factors, the Court found a direct connection between the illegal arrest of the defendant and the statements and sketches obtained from him. Less than two hours had elapsed between the arrest and the statements; there were no "intervening" circumstances; and the clear purpose of the officers in taking the defendant into custody was to interrogate him. Although the defendant was properly advised of his Miranda rights and his statements were given "voluntarily," these facts are not enough to break the direct causal connection between the illegal arrest and his statements.

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

FACTS: Police officers had probable cause the defendant committed a murder. They went to his apartment to arrest him without a warrant (illegal per Payton v. New York). After arriving, the officers knocked on the door, displayed their guns and badges, and entered the defendant's apartment without consent. Once inside, the police read the defendant his Miranda rights, which he waived. In response to the officers' questions, the defendant admitted his guilt in an oral statement and was arrested. He was taken to the station house and again informed of his Miranda rights. For a second time, the defendant admitted his guilt, this time in a signed, written statement. A third statement, this time videotaped, was later obtained from the defendant, even though he indicated that he wanted to end the interrogation. At trial, the defendant's first and third statements were suppressed, while his second

statement was admitted into evidence. The defendant was convicted of second-degree murder.

ISSUE: Whether the defendant's second statement (the written statement taken at the police station) should have been suppressed because the police violated his Fourth Amendment protections?

HELD: No. Where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the government's use of a statement made by the defendant outside of his home, even though the statement was obtained after an illegal entry into the home.

DISCUSSION: In Payton v. New York, the Court held that "the Fourth Amendment prohibits the police from effecting a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." Here, while the police had probable cause to arrest the defendant, they entered his home without an arrest warrant and without his consent. Their entry into the defendant's home violated the Fourth Amendment. Any evidence obtained during this illegal entry is excluded as the fruit of an unreasonable search. However, "the rule in Payton was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects, like the defendant, protection for statements made outside their premises where the police have probable cause to make an arrest." In this case, the police had probable cause to arrest the defendant prior to entering his home. Because of this, the defendant "was not unlawfully in custody when he was removed to the station house, given Miranda warnings, and allowed to talk." While the entry into the defendant's home was illegal, his continued custody outside of the home was lawful. Accordingly, the statement taken at the station house "was not an exploitation of the illegal entry into the defendant's home" and the exclusionary rule should not apply.

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Brown v. Illinois
422 U.S. 590, 95 S. Ct. 2254 (1975)

FACTS: The police arrested the defendant without probable cause and without a warrant, and under circumstances indicating that the arrest was part of an investigation. The defendant made two in-custody incriminating statements after he had been given Miranda warnings.

ISSUE: Whether being advised of his Miranda protections adequately removed the taint of the illegal arrest so as to allow the government the right to use the statements against the defendant at his trial?

HELD: It depends. Providing Miranda warnings to a suspect that was illegally arrested is only one factor in determining whether the "taint" of the illegal seizure has evaporated.

DISCUSSION: The Court held that the exclusionary rule serves different interests and policies under the Fourth and Fifth Amendment. The state court erred in adopting a per se rule that Miranda warnings in and of themselves break the causal chain between an illegal seizure (Fourth Amendment) and any subsequent statement (Fifth Amendment). Miranda warnings do not automatically amend Fourth Amendment transgressions. Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remained.

The question whether a confession is voluntary must be answered on the facts of each case. Though the Miranda warnings are an important factor in resolving the issue, other factors must be considered. Other factors trial courts should consider include the temporal proximity of the arrest to the confession, the intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. The burden of showing admissibility of in-custody statements of persons who have been illegally arrested rests with the government.

Kaupp v. Texas
538 U.S. 626, 123 S. Ct. 1843 (2003)

FACTS: Suspecting (but without probable cause) that the 17-year old defendant was involved in a murder, three police officers went to his home at 3 a.m. on a January morning. They were granted entry to the home by the defendant's father, and immediately went to the defendant's room, where they found him asleep. One of the officer's awoke the defendant with a flashlight, identified himself, and stated, "we need to go and talk." The defendant's reply was "Okay." The officers handcuffed the defendant and led him out of the house, putting him into a patrol car. The defendant was shoeless and wearing only boxer shorts and a T-shirt. At no point did the officers tell the defendant that he was free to decline to go. The officers took the defendant to their interview room, removed the handcuffs, and advised him of his Miranda rights. After initially denying his involvement, the defendant made incriminating statements.

ISSUE: Whether the defendant's illegal arrest tainted his subsequent statements about his involvement in the crime?

HELD: Yes. Unless the government can demonstrate that the statements were not directly the result of an illegal arrest, the statements are considered involuntarily obtained.

HELD: The Court did not consider the defendant's statement "Okay" as a basis for a consensual encounter. It found that the "removal from one's house in handcuffs on a January night with nothing on but underwear for a trip to a crime scene on the way to an interview room at law enforcement headquarters" to be a seizure. Though the Supreme Court has authorized certain seizures on something less than probable cause, it has never approved the involuntary removal of a suspect from his home for investigative purposes absent probable cause or judicial authorization.

This illegal arrest requires suppression of any subsequent statements unless the government can demonstrate they were made as "an act of free will [sufficient] to purge the primary taint of the unlawful invasion" (citing Wong Sun v. United States). Significant factors to examine include the providing of Miranda warnings, the sequential nearness of the illegal arrest and the statement, intervening circumstances, and, especially, the reason and flagrancy of the government's misbehavior. In this case, the Court noted that only one of these factors (providing of Miranda warnings) supported the government. The Court held previously held that the provision of Miranda warnings does not, by itself, automatically break the misconduct chain. All other factors favored the defendant's position.

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C. DUE PROCESS

Foster v. California
394 U.S. 440, 89 S. Ct. 1127 (1969)

FACTS: Following a robbery, the police presented a lineup to the only witness to the crime. The defendant was placed in the lineup with two other men. While the defendant was approximately six feet tall, the other two men were six to seven inches shorter. Additionally, the defendant wore a leather jacket that the witness stated was similar to one wore by the robber. When the witness was unable to identify the defendant as the robber, he requested, and was granted, the opportunity to speak with the defendant alone. He was still unable to identify the defendant as the robber. Approximately 10 days later, a second lineup was held, this time with five men. The defendant was the only man in the second lineup that had also appeared in the first lineup. This time, the witness positively identified him as the robber. He was ultimately convicted of robbery.

ISSUE: Whether the lineup procedures were conducted in a manner that could produce mistaken identification so as to deny due process of law?

HELD: Yes. Judged by the "totality of the circumstances," the lineup was unnecessarily suggestive of the defendant as the criminal.

DISCUSSION: The Supreme Court held that the identification procedures utilized by the police violated the defendant's right to due process. Looking at the "totality of the circumstances" in this case, "the suggestive elements in this identification procedure made it all but inevitable that the witness would identify the defendant as the robber, whether or not he was in fact the man." In the first lineup, the defendant stood out from the other two men due to the physical differences. He was also the only participant in the lineup wearing clothing similar to that worn by the actual robber. Because the witness was still unable to identify the defendant, the police permitted a "one on one" confrontation between the witness and the defendant. "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." The second lineup was unfairly suggestive because the defendant was the only participant who was also in the first lineup. "In effect, the police repeatedly said to the witness, 'This is the man.' This procedure so undermined the reliability of the eyewitness identification so as to violate due process."

*****

Stovall v. Denno
388 U.S. 293, 87 S. Ct. 1967 (1967)

FACTS: A doctor was stabbed to death in his home. His wife was also stabbed by the attacker, but survived. She underwent major surgery to save her life, but it was unclear whether she would survive. The police found evidence at the crime scene that led them to the defendant, who was arrested the day after the assault. On the next day, the police arranged to have the defendant brought to the injured woman' hospital room to determine if she could identify the defendant as the murderer. During this identification process, the defendant was

handcuffed to one of the five police officers accompanying him, and was the only African-American in the room. The defendant was also required to say some words for the purpose of voice identification. The victim identified the defendant as the murderer.

ISSUE: Whether the identification procedures utilized by the police were so unnecessarily suggestive so as to violate the defendant's due process rights?

HELD: No. Judged by the "totality of the circumstances," the identification procedures were necessary to secure significant information.

DISCUSSION: "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." Nonetheless, whether identification procedures constitute a due process violation requires the Court to look to the "totality of the circumstances" surrounding the identification. In this case, it was clear that the procedures utilized by the police were necessary. The victim was the only person who could either identify the defendant or exonerate him for the crime. "Her words, and only her words, could have resulted in freedom for the defendant. The hospital was not far from the courthouse and jail. No one knew how long the victim might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that the victim could not visit the jail, the police followed the only feasible procedure and took the defendant to the hospital room."

*****

Neil v. Biggers
409 U.S. 188, 93 S. Ct. 375 (1972)

FACTS: The defendant was convicted of rape. Some of the evidence consisted of testimony concerning the victim's visual and voice identification at a stationhouse show-up that occurred seven months after the crime. The victim had been in

the presence of the assailant for a significant amount of time and had several opportunities to directly observed him both indoors and outdoors. She testified that she had "no doubt" that the defendant was her assailant. She had previously given the police a description of her assailant that was confirmed by a police officer. The victim had not identified any of the others who were presented at previous show-ups, lineups, or through photographs. The police asserted that they used the show-up technique because they had difficulty in finding other individuals generally fitting the defendant's description as given by the victim for a lineup.

ISSUE: Whether the show-up was impermissibly suggestive of the defendant's identification as the perpetrator, to deprive him of his right to due process?

HELD: No. While the station-house identification may have been suggestive, under the "totality of the circumstances," the victim's identification of the defendant was reliable.

DISCUSSION: The Supreme Court held that the identification of the defendant was reliable. Eyewitness identification at trial following a pretrial identification will be set aside only if the pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. The factors to be considered in evaluating the likelihood of misidentification include:

1) the opportunity of the witness to view the criminal at the time of the crime

2) the witness' degree of attention

3) the accuracy of the witness' prior description of the criminal

4) the level of certainty demonstrated by the witness at the confrontation

5) the length of time between the crime and the confrontation.

Based on these factors, the witness' identification of the defendant was reliable.

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Simmons v. United States
390 U.S. 377, 88 S. Ct. 967 (1968)

FACTS: Two unmasked men robbed a bank. Five bank employees witnessed the robbery, and on that same day gave the FBI written statements. The next morning FBI agents obtained and showed separately to each of the witnesses some snapshots consisting mostly of group pictures of the defendants, and others. Each witness identified the defendant as one of the robbers from the pictures.

ISSUE: Whether the use of photographs to identify the defendant as the culprit was a deprivation of his due process rights?

HELD: No. The use of photographs is an effective way to identify perpetrators of crime if done so in a fair manner.

DISCUSSION: The Court came to this determination in light of the "totality of the circumstances." Each case involving pretrial identification by photographs has to be considered on its own facts. Court will set aside convictions based on eyewitness identification at trial on the grounds of prejudice only if the pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. In this case, the use of photographic identification by the FBI was necessary: a serious felony had been committed; the perpetrators were at large; the inconclusive clues led to the defendant; and the agents had to determine swiftly if they were on the right track.

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Manson v. Brathwaite
432 U.S. 98, 97 S. Ct. 2243 (1977)

FACTS: An undercover police officer purchased heroin from a seller through the open doorway of an apartment. The transaction took two or three minutes while the officer stood within two feet of the seller in a hallway illuminated by natural light. The undercover officer described the seller to another police officer, who suspected the defendant based on this description. The suspecting officer left a police photograph of the defendant in the undercover officer's office. He viewed it two days later and identified it as the picture of the seller. The defendant was charged with, and convicted of, possession and sale of heroin.

ISSUE: Whether the photograph tainted the undercover officer's identification of the defendant?

HELD: No. Based on the "totality of the circumstances" the eyewitness' identification of the defendant was reliable.

DISCUSSION: Reliability is the linchpin in determining the admissibility of identification testimony for identifications occurring prior to and after arrest. Reliability depends on the "totality of the circumstances." The factors to be weighed against the corrupting effect of the suggestive procedure in assessing reliability are whether the witness had an opportunity to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Under the "totality of the circumstances" in this case, there does not exist a very substantial likelihood of irreparable misidentification. A trained police officer with a sufficient opportunity to view the suspect, who accurately described him, positively identified the defendant's photograph as that of the suspect, and made the photograph identification only two days after the crime is reliable.

D. TESTIMONIAL EVIDENCE

Schmerber v. California
384 U.S. 757, 86 S. Ct. 1826 (1966)

FACTS: The defendant was the apparent driver involved in an accident. At the direction of a police officer, and without the defendant's consent, a physician at the hospital drew blood from the defendant's body. The chemical analysis of this sample indicated that the defendant was intoxicated. At trial, the chemical analysis was admitted into evidence against the defendant over his objection. Specifically, the defendant claimed that the withdrawal of the blood violated his constitutional protections, including his Fifth Amendment privilege against compelled self-incrimination.

ISSUE: Whether the withdrawal of the defendant's blood, as well as the admission of the chemical analysis, violated the defendant's Fifth Amendment privilege against compelled self-incrimination?

HELD: No. The defendant's blood does not constitute a testimonial admission.

DISCUSSION: The Court held that the Fifth Amendment privilege against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question did not involve compulsion to these ends." The right against self-incrimination protects a suspect's communications, in whatever form they may take. However, the privilege does not protect a suspect from providing "real or physical evidence," such as fingerprints, DNA or blood for identification.

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United States v. Dionisio
410 U.S. 1, 93 S. Ct. 764 (1973)

FACTS: A federal grand jury subpoenaed various individuals, including the defendant, to obtain voice exemplars to compare them to previously recorded conversations. The defendant refused to comply, claiming that providing the voice exemplars would violate his Fifth Amendment right to be free from compelled self-incrimination.

ISSUE: Whether compelling a defendant to provide voice exemplars violated the defendant's Fifth Amendment right against self-incrimination?

HELD: No. The sound of a suspect's voice is not testimonial in nature and is not protected by the defendant's Fifth Amendment right against self-incrimination.

DISCUSSION: The privilege against self-incrimination "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." The privilege prohibits compelling communications or testimony. In this case the voice recordings were to be used solely to measure the physical properties of the witnesses' voice, not for the communicative content of what was said.

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United States v. Mara
410 U.S. 19, 93 S. Ct. 774 (1973)

FACTS: A federal grand jury twice subpoenaed the defendant to appear and provide handwriting and printing exemplars for comparison with documents already in the grand jury's possession. The defendant refused, asserting that requiring him to produce the exemplars would violate his Fourth Amendment protections. Additionally, because he had

not seen the documents in the grand jury's possession, the defendant alleged that the government might actually be seeking "testimonial" communications (i.e., the contents of the handwriting exemplars, as opposed to the physical characteristics of his writing) in violation of his Fifth Amendment rights.

ISSUE: Whether compelling a defendant to provide handwriting exemplars violates the defendant's Fifth Amendment right against self-incrimination?

HELD: No. Compelling a defendant to provide handwriting exemplars does not require the defendant to make a communicative assertion.

DISCUSSION: The Supreme Court emphasized that the Fifth Amendment protection against self-incrimination did not protect the production of handwriting exemplars. "If the Government should seek more than the physical characteristics of the witness' handwriting - if, for example, it should seek to obtain written answers to incriminating questions or a signature on an incriminating statement - then, of course, the witness could assert his Fifth Amendment privilege against compulsory self-incrimination." Here, the grand jury was not concerned with the contents of the writings, but rather with the physical characteristics of the individual writer.

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1. Compelled

Brown v. Mississippi
297 U.S. 278, 56 S. Ct. 461 (1936)

FACTS: The defendants were convicted of murder. The only evidence offered against the defendants were confessions obtained from them through various forms of torture. For example, one of the defendants was repeatedly hung by the neck from a tree in an attempt to get him to confess. He ultimately confessed to the crime only after he was beaten and

threatened with continued beatings. Two other defendants confessed only after they were laid over chairs and had their backs cut to pieces with a leather strap.

ISSUE: Whether the defendants' convictions, which rested solely upon confessions secured by violence, were valid under the due process clause of the Fourteenth Amendment?

HELD: No. The convictions were not obtained in a fundamentally fair way.

DISCUSSION: While states are allowed some latitude in regulating the procedures of their courts, they are still required to comply with the due process clause of the Fourteenth Amendment. "The rack and torture chamber may not be substituted for the witness stand." In this case, the methods used by the police to obtain the confessions were so egregious that they deprived the defendants of their right to the due process of law guaranteed by the Fourteenth Amendment. As stated by the Court: "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions" in this case.

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

FACTS: The defendant, an attorney, was being investigated for fraud. Officers obtained a search warrant to search his office for business records containing statements made by the defendant. Various business records, some of which contained statements made by the defendant, were found and used in a criminal trial against him.

ISSUE: Whether the defendant's business records were obtained in violation of his Fifth Amendment right to be free from self-incrimination?

HELD: No. The government neither compelled the defendant to make the statements nor compelled him to bring the statements to the courthouse for use against him.

DISCUSSION: The Fifth Amendment serves as a prohibition against compelling individuals to bear witness against himself or herself. The Court noted that the defendant was not compelled to do or say anything. The government did not compel the defendant to create the records, bring the records to the criminal courtroom, or identify the records as his property. The Court quoted Mr. Justice Holmes in stating, "A party is privileged from producing the evidence but not from its production," cited in Johnson v. United States, 228 U.S. 457 (1913).

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United States v. Doe
465 U.S. 605, 104 S. Ct. 1237 (1984)

FACTS: The defendant owned several sole proprietorships. During a grand jury investigation of corruption, the grand jury served subpoenas on the defendant, seeking the production of voluntarily prepared business records of the sole proprietorships. The defendant moved to quash the subpoenas on two grounds. First, he claimed that the subpoenaed records were privileged under the Fifth Amendment. Second, he claimed that the act of producing the requested documents was privileged under the Fifth Amendment.

ISSUES:

1. Whether voluntarily created business records are protected by the Fifth Amendment privilege against self-incrimination?

2. Whether the act of compelling the production of the requested business records is protected by the Fifth Amendment privilege against self-incrimination?

HELD: 1. No. Business records that are voluntarily created are not protected by the Fifth Amendment privilege against self-incrimination as they were not compelled in their creation.

2. Yes. The act of compelling the production of requested business records (by subpoena) is protected by the Fifth Amendment privilege against self-incrimination.

DISCUSSION: The Fifth Amendment protects the defendant only from compelled self-incrimination. However, "where the preparation of business records is voluntary, no compulsion is present." In other words, "if the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged."

While the contents of the subpoenaed business records are not privileged under the Fifth Amendment, the act of producing the records is privileged. By producing the documents requested in the subpoena, the defendant is admitting the document's existence, that the defendant has possession or control over the document, and that the documents being turned over are authentic. These acts "may have testimonial aspects and an incriminating effect." However, the government could compel the defendant to produce the documents by providing him with "use" immunity, pursuant to 18 U.S.C. §§ 6002-6003, or secure them through the use of a search warrant.

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United States v. Hubbell
530 U.S. 27, 120 S. Ct. 2037 (2000)

FACTS: The defendant pled guilty to charges of mail fraud and tax evasion arising out of his practices as a member of a law firm. The plea agreement required the defendant to provide the prosecution with "full, complete, accurate, and truthful

information" about matters relating to another investigation. The subsequent prosecution of the defendant resulted from the government's determination that the defendant had violated that plea agreement. While incarcerated, the defendant was served with a grand jury subpoena calling for the production of eleven broad categories of documents. Subsequently, the defendant appeared before the grand jury and invoked his Fifth Amendment privilege against self-incrimination. In response to questioning, the defendant refused "to state whether there [were] documents within [his] possession, custody, or control responsive to the subpoena." He was then granted "use" immunity under 18 U.S.C. § 6002, and produced documents related to the subpoena. The contents of the documents provided the prosecutor with the information that led to a second prosecution of the defendant.

ISSUES:

1. Whether the Fifth Amendment privilege against self-incrimination protects a witness from being compelled to disclose the existence of incriminating documents that the government is unable to describe with reasonable particularity?

2. Whether "use" immunity under 18 U.S.C. § 6002 prevents the government from using information produced by a witness pursuant to a grant of immunity in preparing criminal charges against that witness?

HELD:

1. Yes. The constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence.

2. Yes. The "derivative use" of the testimonial act of producing the records is covered by the immunity granted under 18 U.S.C. § 6002.

DISCUSSION: The Court held that "the act of production" itself may implicitly communicate "statements of fact." By "producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic." Here, the answers to the prosecutor's questions and the act of production could certainly communicate information about the existence, custody, and authenticity of the documents. In addition, the Fifth Amendment protection extends to compelled statements that lead to the discovery of incriminating evidence, even though the statements themselves are not incriminating and are not introduced into evidence. It is undeniable that providing a catalog of existing documents fitting within any of the eleven broadly worded subpoena categories could provide a prosecutor with a "lead to incriminating evidence" or "a link in the chain of evidence needed to prosecute." Additionally, it was necessary for the defendant to make extensive use of "the contents of his own mind" in identifying the hundreds of documents responsive to the requests in the subpoena.

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United States v. Balsys
524 U.S. 666, 118 S. Ct. 2218 (1999)

FACTS: The defendant was a resident alien who obtained admission to the United States in 1961. In his application for admission, he stated that he had served in the Lithuanian army between 1934 and 1940, and had lived in hiding in Lithuania between 1940 and 1944. Further, he swore that the information was true, and signed a statement of understanding that if his application contained any false information or materially misleading statements, or concealed any material fact, he would be subject to criminal prosecution and deportation. The Office of Special Investigations (OSI), which was created to institute denaturalization and deportation proceedings against suspected Nazi war criminals, began investigating the defendant to determine if he had participated in Nazi persecution during World War II. If proven, this

participation could have resulted in the defendant being deported. Pursuant to a subpoena issued by OSI, the defendant appeared to testify at a deposition, but refused to answer questions about his wartime service and his immigration to the United States. He invoked his Fifth Amendment right against compelled self-incrimination, claiming that his answers could subject him to criminal prosecution by Lithuania, Israel, and Germany.

ISSUE: Whether an individual can claim the Fifth Amendment privilege against self-incrimination based upon fear of prosecution by a foreign nation?

HELD: No. The Fifth Amendment privilege against self-incrimination may only be based upon fear of prosecution within the United States.

DISCUSSION: The self-incrimination clause of the Fifth Amendment provides a privilege against self-incrimination in "any criminal case." This means that an individual has a right against compelled self-incrimination if what he says "could be used in a criminal proceeding against him brought by the Government of either the United States or one of the States." However, in this case, the defendant did not invoke the privilege based upon a fear of prosecution by the United States or one of the states. The Court held that possible criminal prosecution by a foreign government is not subject to our constitutional guarantees and, therefore, is beyond the scope of the Fifth Amendment's protections.

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2. Holder of the Privilege

Braswell v. United States
487 U.S. 99, 108 S. Ct. 2284 (1988)

FACTS: The defendant incorporated a business in which he was the sole shareholder. The defendant moved to quash a grand jury subpoena for the corporate records on the basis that

the act of producing the records would violate his Fifth Amendment right to be free from self-incrimination.

ISSUE: Whether a sole shareholder of a corporation, as custodian of the records, may resist a subpoena for corporate records on the ground that the act of production would incriminate him in violation of his Fifth Amendment rights?

HELD: No. Corporations do not enjoy the Fifth Amendment self-incrimination protection.

DISCUSSION: Corporations do not enjoy a Fifth Amendment privilege. The Fifth Amendment protects only private papers and records. However, the custodian of corporate records, regardless of how small the corporation may be, can claim a privilege.

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Couch v. United States
409 U.S. 322, 93 S. Ct. 611 (1973)

FACTS: The defendant turned over various business and tax records to her accountant for several years. The IRS summoned the accountant to bring these records to a court proceeding. The accountant, ignoring the summons, turned the records over to the defendant's attorney.

ISSUE: Whether a defendant may invoke a Fifth Amendment privilege against self-incrimination to prevent the production of her business and tax records in possession of her accountant?

HELD: No. Since the defendant was not in possession of the records, she could not object to the production by her accountant. The defendant was not compelled to do or say anything.

DISCUSSION: The Fifth Amendment privilege is a personal privilege that adheres to the person and not to the information that may incriminate. A person cannot be compelled to produce information but they cannot prevent the production of incriminating documents that are in the hands of others through the self-incrimination protection.

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Doe v. United States
487 U.S. 201, 108 S. Ct. 2341 (1988)

FACTS: The defendant was the target of a federal grand jury investigation. He was subpoenaed to produce records concerning accounts in foreign banks. However, the defendant invoked his Fifth Amendment privilege against self-incrimination when questioned about the existence or location of additional bank records. The foreign banks refused to comply with subpoenas to produce any account records without the customer's consent. The government sought a court order directing the defendant to sign a consent form authorizing the foreign banks to disclose the defendant's records.

ISSUE: Whether a court can compel a target of a grand jury investigation to authorize foreign banks to disclose records of his accounts?

HELD: Yes. However, the court may not require the defendant to explain the contents of these records or acknowledge their existence.

DISCUSSION: The Supreme Court held that a court order compelling the target of the grand jury investigation to authorize foreign banks to disclose records of his accounts, without identifying those documents or acknowledging their existence does not violate the target's Fifth Amendment privilege against self-incrimination. The consent form itself was not testimonial in nature. In order to be "testimonial," an accused's oral or written communication or act of production must itself, explicitly or implicitly, relate a factual assertion or disclose information. The privilege may be asserted only to resist

compelled explicit or implicit disclosures of incriminating information.

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Fisher v. United States
425 U.S. 391, 96 S. Ct.1569 (1976)

FACTS: In each of these cases, the defendants were under investigation for civil or criminal liability under the federal income tax laws. The defendants retrieved documents prepared by their respective tax accountants and transferred the documents to their respective attorneys to assist in their defenses. Subsequently, the IRS served summonses on the attorneys directing them to produce the documents, who refused to comply. The government then brought enforcement actions.

ISSUE: Whether documents delivered by the defendant to his attorney are protected by the self-incrimination clause?

HELD: No. Compelled production of the documents from the attorneys does not implicate whatever Fifth Amendment privilege the defendants may have enjoyed themselves.

DISCUSSION: The Fifth Amendment may have precluded a subpoena from compelling the defendants to produce the documents while the documents were in their possession. However, enforcing the subpoena against another does not violate this privilege. Such action in no way would compel the defendant to be a "witness" against himself. See Couch v. United States. The fact that the attorneys were agents of the taxpayers does not change this result.

The attorney-client privilege applies to documents in the hands of a client that would have been privileged in the hands of the attorney. However, the Fifth Amendment would not protect the

defendants from producing these documents. The government could have secured them through the use of a search warrant. Production of the documents themselves does not involve incriminating testimony. The Fifth Amendment does not prohibit the compelled production of all incriminating evidence. It only prohibits compelling the accused to make a testimonial communication that is incriminating. However incriminating the contents of the documents might be, the act of delivering them to the government under order does not involve testimonial self-incrimination.

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Bellis v. United States
417 U.S. 85, 94 S. Ct. 2179 (1974)

FACTS: During the defendant's tenure as a law partner in Bellis, Kolsby & Wolf, the partnership's financial records were maintained in his office. After the partnership dissolved, the defendant left to join another law firm. The partnership records remained in the partnership's previous location for approximately three years. Later, the defendant's secretary, acting at the defendant's request, removed the records and brought them to his new office. Approximately two months later, the defendant was subpoenaed by a grand jury and ordered to appear and testify and to bring with him "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969." The defendant refused to produce the partnership's records, claiming his Fifth Amendment right against self-incrimination.

ISSUE: Whether a defendant who holds partnership records in a representative capacity has a Fifth Amendment privilege against self-incrimination to avoid producing those partnership records, where the records might incriminate him personally?

HELD: No. The self-incrimination clause is a personal right, not one belonging to an artificial entity such as a partnership.

DISCUSSION: "It has long been established that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony." This protection may extend to the business records of a sole proprietor or sole practitioner. However, the Fifth Amendment right against compulsory self-incrimination is a purely private right that cannot be invoked by any artificial entity, such as a corporation or a partnership. "It follows that an individual acting in his official capacity on behalf of the organization may likewise not take advantage of his personal privilege." Instead, "the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity." This rule applies even where the records sought might personally incriminate the individual who holds them provided that the records sought are those of the organization and not the individual. Here, it was clear, based on the nature of the records sought, that they constituted records of the partnership, not the personal records of the defendant. The defendant had no ownership rights in these records, and could not use the records for anything other than partnership purposes.

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E. VOLUNTARY

Rogers v. Richmond
365 U.S. 534, 81 S. Ct. 735 (1961)

FACTS: The defendant was arrested for robbery. The officers found a weapon on him that was connected to a murder. The defendant denied committing the murder for the first six hours of the interview. Then, within the hearing of the defendant, a police officer pretended to place a phone call directing other officers to prepare to bring the defendant's wife in for questioning. The defendant remained silent from that point on until he was told by the police officer that his wife was

about to be taken into custody. The defendant then confessed. The next day, the local Coroner directed that the defendant be held incommunicado at the jail. When the defendant's lawyer tried to visit the defendant, he was turned away. The defendant was then taken to the Coroner's office where he was placed under oath and confessed again. In ruling on the admissibility of the defendant's confessions, the trial judge took into account the probable truth or falsity of the confessions in determining whether or not they had been voluntarily given. The statements were admitted into evidence and the defendant was convicted of murder.

ISSUE: Whether the correct legal standard in determining the admissibility of the defendant's statements is the likelihood of truthfulness?

HELD: No. In determining the voluntariness of a confession, the correct legal standard is whether the police conduct was such as to overbear the defendant's will to resist.

DISCUSSION: The Court stated that the correct standard is "whether the behavior of the State's law enforcement officials was such as to overbear the petitioner's will to resist and bring about confessions not freely self-determined...." This question must be answered without regard to whether the defendant was speaking truthfully when he made the confession. The Court reiterated its holdings in previous decisions that "convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand." This is not because the confessions are unlikely to be true, but because due process of law requires the State to establish a defendant's guilt "by evidence independently and freely secured, and may not by coercion prove its charge against an accused out of his own mouth."

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Lynumn v. Illinois
372 U.S. 528, 83 S. Ct. 917 (1963)

FACTS: The police watched a confidential informant enter the defendant's apartment where he allegedly engaged in a narcotics deal with the defendant. Police officers arrested the defendant outside her apartment for selling marijuana and took her back inside to question her. While inside the apartment, the defendant initially denied she had sold marijuana to the man. Later, she confessed to the crime after being told by the police that state aid to her infant children would be cut off and her children taken from her if she did not "cooperate." Specifically, the defendant was told that she "had better do what she was told if she wanted to see her kids again." These threats were made while three police officers and the confidential informant surrounded the defendant. The defendant had no previous criminal experiences; had no friend or adviser to whom she could speak; and had no reason to believe that the police did not have the power to carry out the threats they were making. The confession was used to convict the defendant at her trial.

ISSUE: Whether the defendant's statement was voluntarily given?

HELD: No. The police cannot use statements obtained through overcoming the defendant's will to remain silent through coercion.

DISCUSSION: In determining whether a defendant is "voluntarily" giving a statement, the question is "whether the defendant's will was overborne at the time he confessed." The statement must be "the product of a rational intellect and a free will." Looking at the totality of the circumstances, the Court held that the statement given by the defendant was not given voluntarily.

*****

Colorado v. Connelly
479 U.S. 157, 107 S. Ct. 515 (1986)

FACTS: The defendant approached a police officer and stated that he had committed murder and wanted to discuss it. The officer advised the defendant of his Miranda rights. The defendant said that he understood his rights but still wanted to talk about the murder. Shortly thereafter, a detective arrived and again advised the defendant of his rights. After the defendant responded that he had traveled all the way from Boston to confess to the murder, he was taken to police headquarters. He then confessed and pointed out the exact location of the murder. Subsequent psychiatric evaluation revealed that defendant was following the "voice of God" in confessing to the murder.

ISSUE: Whether the defendant's waiver of his Miranda rights and his statements were coerced?

HELD: No. Coercion must originate in the government's actions.

DISCUSSION: Voluntariness of a waiver of the privilege of the Fifth Amendment depends upon absence of police overreaching. The sole concern of the Fifth Amendment is governmental coercion. The Supreme Court is not concerned with moral and psychological pressures to confess coming from sources other than government coercion. The statements made by the defendant are admissible. The government need prove only by a preponderance of the evidence that the defendant knowingly, voluntarily and intelligently waived his Miranda rights.

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Arizona v. Fulminante
499 U.S. 279, 111 S. Ct. 1246 (1991)

FACTS: After the defendant's stepdaughter was murdered in Arizona, he left the state. He was convicted of an unrelated

crime and was incarcerated in prison in New York. There, Sarivola, a fellow inmate who was also a paid informant of the FBI, befriended him. Sarivola told the defendant that he knew the defendant was getting harsh treatment from other inmates because of a rumor he was a child murderer. Sarivola offered him protection in exchange for the truth. The defendant admitted to Sarivola that he had killed his stepdaughter, and he provided details. The defendant made the same confession to Sarivola's wife. Subsequently, he was indicted for murder.

ISSUE: Whether the defendant's confession coerced?

HELD: Yes. The confession was the result of mental coercion.

DISCUSSION: The Court reasoned that the defendant was motivated to confess by a fear of physical violence, absent protection from a government informant. The Court found that a credible threat of physical violence is sufficient to support a finding that the subsequent confession is unreliable.

*****

Beecher v. Alabama
408 U.S. 234, 92 S. Ct. 2282 (1972)

FACTS: The defendant made a series of incriminating statements after being threatened by various government authorities. In a 1967 decision, the Supreme Court rejected the government's use of those statements from the point of his arrest to written statements he made five days later. The Court held that the "stream of events" was such that the defendant did not make the statements voluntarily. Nonetheless, the government retried the defendant with the use of additional statements the defendant made to an attending physician. One hour after his arrest, the defendant was taken to a hospital for treatment for a gunshot wound, which required two large morphine injections. Within the presence of the attending physician but not the police officers, the defendant made

several incriminating statements, presumably while under the influence of the morphine injections.

ISSUE: Whether the statements made to the attending physician were made voluntarily?

HELD: No. The defendant's statements were made during the "stream of events" that had been prompted by government coercion.

DISCUSSION: The Court held that the statements made to the attending physician were a part of the "stream of events" that was involuntary in nature. This "stream of events" was so infected with gross coercion that the Court did not feel comfortable that any statements made under these circumstances were voluntary. The Due Process Clause demands such inherently untrustworthy evidence to be excluded from the government's use.

*****

Haynes v. Washington
373 U.S. 503, 83 S. Ct. 1336 (1963)

FACTS: The defendant was arrested for robbery. The police took him to the station house and questioned him about the crime. The defendant asked to call either his wife or his attorney. The police officers told him that he could do so once he had "cooperated." The defendant then made several incriminating statements.

ISSUE: Whether the defendant's statements were voluntarily made?

HELD: No. The defendant's statements were made in an atmosphere dominated by substantial coercion.

DISCUSSION: The test of admissibility of a suspect's statement is whether it was made freely, voluntarily and without compulsion or inducement of any sort. The issue of coercion or improper inducement can only be determined by

examining "all the attendant circumstances," or, the "totality of the circumstances." As the suspect had initially resisted giving any kind of statement, and only made statements after repeated denials of his request to contact his wife or attorney, the Court held that the defendant did not voluntarily make the statements.

*****

Townsend v. Sain
372 U.S. 293, 83 S. Ct. 745 (1963)

FACTS: The defendant, a confirmed heroin addict, was arrested for his suspected involvement in a murder. When questioned, he denied any involvement. Several hours later the defendant complained of withdrawal sickness. A police physician was summoned and administered a dosage of Phenobarbital and hyoscine. The doctor also gave the defendant four or five tablets of Phenobarbital to combat withdrawal symptoms in the future. After the doctor left, a police officer and a state's attorney questioned the defendant. The defendant gave a complete confession to the murder. The defendant later alleged that these drugs had the effect of a "truth serum." The officers testified that they were unaware of the potential effects of the doctor's treatment.

ISSUE: Whether the confession was voluntarily made?

HELD: No. Courts must consider the mental state of a person that makes statements before considering their voluntariness.

DISCUSSION: Statements are not voluntary if the individual's will is overborne, or not the product of his rational intellect or free will. The Court stated that coercion could take place either through physical or psychological pressure. Factors that play a role in determining psychological pressure include the mental competency, the youth or inexperience, or the effects drugs have on the suspect. It was immaterial to the

Court that the officers did not know of the potential "truth serum" characteristics of the medication administered to the suspect. "Any questioning by officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible."

*****

Lego v. Twomey
404 U.S. 477, 92 S. Ct. 619 (1972)

FACTS: The defendant was arrested for and confessed to committing armed robbery. The confession was included at trial. The defendant denied making the confession voluntarily. The state law provided that a challenged confession could be admitted into evidence if, at a hearing outside the presence of the jury, the judge found it voluntary by a preponderance of the evidence.

ISSUE: Whether the standard of proof for voluntariness of confessions is a preponderance of the evidence?

HELD: Yes. Proof of the voluntariness of a confession by a preponderance of the evidence is constitutionally adequate.

DISCUSSION: When the government seeks to use a confession challenged as involuntary, the defendant is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. The Court held that this is accomplished by requiring the government to prove at least by a preponderance of the evidence that the confession was voluntary. The exclusion of unreliable confessions is not the purpose of a voluntariness hearing. The sole issue in such a hearing is whether a confession was coerced.

*****

Spano v. New York
360 U.S. 315, 79 S. Ct. 1202 (1959)

FACTS: A foreign-born man, age 25, was a suspect in a killing. He had no previous criminal history or experience with official interrogation. He had only six months of high school education and a history of emotional instability. The defendant was questioned by officials for nearly eight straight hours, long into the night, before he confessed. The defendant repeatedly refused to answer questions and even requested his attorney. During the interrogation, the police used a "childhood friend" of the defendant who had become a police officer. This officer told the suspect that the situation had gotten the officer in trouble and that his job was in jeopardy. He played up the terrible effect this would have on the officer's family. At almost sunrise, police obtained the final pieces of the defendant's confession.

ISSUE: Was the suspect's statement voluntarily given?

HELD: No. The suspect's will was overborne by official pressure, fatigue, and sympathy from deception, in violation of the Due Process Clause of the Fourteenth Amendment.

DISCUSSION: In this pre-Miranda case, the Court's focus was on the voluntariness of the statements made by the suspect. Given the tactics used by the officers (inducing false sympathy, lengthy interrogation), and the vulnerability of their somewhat unstable suspect, the Court determined that the statement was not voluntary and should not have been admitted at trial. The Court looked at all the facts taken together in reaching its holding that the statement violated Due Process guarantees (state cases involving the admissibility of confessions were grounded solely in the Fourteenth Amendment at that time).

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F. IMMUNITY

Murphy et. al. v. Waterfront Commission of New York Harbor
378 U.S. 52, 84 S. Ct. 1594 (1964)

FACTS: The defendants were subpoenaed to testify in front of the Waterfront Commission of New York Harbor. When they refused to answer questions asked of them, they were granted immunity from prosecution under the laws of both New Jersey and New York. They still refused to testify, contending that their answers might tend to incriminate them under federal law, to which the grant of immunity did not extend. They were then held in civil and criminal contempt.

ISSUE: Whether a state can compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime in federal court?

HELD: No. A state cannot compel a witness to give testimony that could be use to convict him of a crime in federal court.

DISCUSSION: The Court looked to the policies and purposes of the Fifth Amendment right to be free from compulsory self-incrimination. "Most, if not all, of these policies and purposes are defeated when a witness 'can be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each." The Fifth Amendment right against compulsory self-incrimination protects a "state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." Accordingly, the Court held that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."

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Kastigar v. United States
406 U.S. 441, 92 S. Ct. 1653 (1972)

FACTS: The defendants were subpoenaed to testify before a federal grand jury. Anticipating that the defendants would invoke their Fifth Amendment right against self-incrimination, the government sought an order to compel the defendants to testify under a grant of immunity pursuant to 18 U.S.C. §§ 6002-6003. The immunity granted to the defendants provided them protection from the use of their compelled testimony in subsequent criminal proceedings, as well as immunity from the use of evidence derived from the testimony (use and derivative use immunity) but not from the crimes themselves. The order was granted over the objection of the defendants. When the defendants appeared before the grand jury, all invoked their privilege against self-incrimination and refused to testify. The District Court held the defendants in contempt and placed them in custody until such time as they answered the grand jury's questions or the grand jury's term expired.

ISSUES:

1. Whether the government can compel testimony from an unwilling witness who invokes his Fifth Amendment privilege against self-incrimination by granting the witness immunity?

2. Whether the government must grant use or transactional immunity?

HELD:

1. Yes. The government can compel testimony from an unwilling witness who invokes his Fifth Amendment privilege against self-incrimination by granting the witness immunity.

2. The grant of use immunity to the witness is all that the Fifth Amendment guarantees.

DISCUSSION: The power to compel individuals to testify before grand juries and in courts is well settled. However, this power is not absolute and is subject to a variety of exemptions, most notably the Fifth Amendment privilege against self-incrimination. In this case, the defendants asserted that, at a minimum, a statute must afford them full transactional immunity in order to comply with the Fifth Amendment privilege. The Court rejected this argument, noting, "the statute's explicit proscription of the use in any criminal case of 'testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)' is consonant with the Fifth Amendment standards." Accordingly, the Court held "that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." Transactional immunity, on the other hand, provides a defendant a much broader protection than does the Fifth Amendment privilege, in that a defendant is afforded full immunity from prosecution. "While a grant of immunity must afford protection commensurate with that afforded by the Fifth Amendment privilege, it need not be broader." In sum, the Court concluded "the immunity provided by 18 U.S.C. § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it."

*****

Ohio v. Reiner
532 U.S. 17, 121 S. Ct. 1252 (2001)

FACTS: The defendant was charged with involuntary manslaughter in connection with the death of his child. He alleged that abuse by the family's babysitter caused his child's death. Upon advice of counsel, the babysitter invoked her privilege against self-incrimination, although she denied any wrongdoing. The trial court granted transactional immunity for the babysitter's testimony, the jury was advised of the grant of

immunity, and the babysitter testified that she had nothing to do with the child's injuries.

ISSUE: Whether the babysitter's denial of culpability precluded any self-incrimination privilege, so that the granting of immunity prejudiced the defendant by effectively telling the jury that the babysitter was innocent?

HELD: No. The babysitter had a reasonable apprehension that her answers could have been used to incriminate her, and, therefore, had a right to invoke her self-incrimination protection.

DISCUSSION: The United States Supreme Court held that, while the self-incrimination privilege's protection only extended to witnesses who had reasonable cause to apprehend danger from a direct answer, the babysitter's expression of innocence did not by itself eliminate the babysitter's privilege. It was reasonable for the babysitter to fear that answers to possible questions might tend to incriminate her, despite her asserted innocence

The witness' assertion of innocence did not, by itself, preclude her invocation of the privilege against self-incrimination. Therefore, the court's grant of immunity to the witness was not prejudicial. In view of the defense accusation that the witness committed the child abuse, the witness had reasonable ground to fear that answers might tend to incriminate her.

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G. MIRANDA v. ARIZONA

Miranda v. Arizona
384 U.S. 436, 86 S. Ct. 1602 (1966)

FACTS: The defendant was arrested at his home for a rape and taken to the police station. While there, the victim identified him as the rapist. The police took the defendant to an

interrogation room, where he was questioned by two police officers. These officers later testified at trial that the defendant was not advised that he had a right to have an attorney present during his questioning. The officers also testified that the defendant was not told that he had a right to be free from self-incrimination. The defendant signed a statement that contained a pre-prepared clause stating that he had "full knowledge" of his "legal rights." At trial, the written confession was admitted against the defendant and he was convicted.

ISSUE: Whether the written confession given by the defendant was obtained in violation of the defendant's Fifth Amendment right to be free from compulsion?

HELD: Yes. The written confession by the defendant was obtained in violation of the defendant's Fifth Amendment privilege against compulsory self-incrimination.

DISCUSSION: The Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The Court defined a "custodial interrogation" as "<u>questioning</u> initiated by <u>law enforcement officers</u> after a person has been taken into <u>custody</u> or otherwise deprived of his freedom of action in any significant way [underline added]." The procedural safeguards required by the Court consisted of four warnings that must be provided to the suspect before a custodial interrogation can take place. First, the suspect must be notified that he has the right to remain silent. Second, the suspect must be notified that any statement made may be used as evidence against him. Third, that the suspect has the right to consult with a lawyer and have the lawyer present during the questioning. And fourth, the suspect must be informed that if he cannot afford to retain a lawyer, one will be appointed to represent him prior to any questioning.

Once these warnings have been given, then and only then, can the individual voluntarily, knowingly, and intelligently waive these rights. However, "if the individual indicates in any manner that he wishes to remain silent, the interrogation must cease." Similarly, "if the individual states that he wants an attorney, the interrogation must cease until an attorney is present."

*****

Dickerson v. United States
530 U.S. 428, 120 S. Ct. 2326 (2000)

FACTS: The defendant was arrested for bank robbery. He made several incriminating statements in violation of his Miranda protections. The government attempted to admit these statements into evidence through the use of a federal statute enacted after the Miranda v. Arizona decision that permitted statements' introduction into evidence solely on whether they were made voluntarily. An appellate court allowed the government to use the federal statute because it did not disrupt a constitutional standard.

ISSUE: Whether Miranda warnings are of a constitutional in nature?

HELD: Yes. The Supreme Court held that the Miranda warnings are a constitutional rule and may not be reduced by Congressional intervention.

DISCUSSION: In Miranda v. Arizona, the Court set out "concrete constitutional guidelines for law enforcement agencies and courts to follow." Congress' enactment of the federal statute was an effort to overturn the ruling of Miranda. In certain circumstances, this is acceptable. "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution." However, "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."

Here, the Court noted that the history of Miranda is that it had constitutional dimension as its interpretations had consistently been applied to the states. The Court noted that it has no "supervisory power over the courts of the several States." The Supreme Court's "authority is limited to enforcing the commands of the United States Constitution." As the statute relied upon by the government does not provide the full protections found in the Miranda decision, that statute is unconstitutional. The Court explicitly rejected the notion of overruling the Miranda decision as it "has become embedded in routine police practice to the point where the warnings have become part of our national culture."

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Florida v. Powell
___ U.S. ___, No. 08-1175 (2010)

FACTS: Police arrested the defendant and read him a Miranda warning prior to questioning. He waived his rights and made criminal admissions. The warning used included the following, "You have the right to talk to a lawyer before answering any of our questions" and "[y]ou have the right to use any of these rights at any time you want during this interview."

ISSUE: Whether the warning language used adequately informed the defendant of his right to have his attorney present during questioning, as required by Miranda?

HELD: Yes. The warning requirements are satisfied when the language reasonably conveys to the suspect his rights as required by Miranda.

DISCUSSION: The rights that are required under Miranda to be given in warnings to a custodial suspect cannot be varied, and must include the right to have an attorney present during any questioning. However, the words used to communicate the information may be varied, so long as they adequately inform the suspect the essential rights required under Miranda. The

warning that was used did not omit any of the required rights under Miranda. While not in the clearest possible language, taken together, the words used did reasonably convey that an attorney could be present not only at the outset, but at all times during the interview.

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1. Police

Illinois v. Perkins
496 U.S. 292, 110 S. Ct. 2394 (1990)

FACTS: The police suspected the defendant had information concerning a murder. They placed an undercover agent in a jail cellblock with the defendant when he was incarcerated on unrelated charges. The agent engaged the defendant in conversation about plans to escape. When the agent asked him if he had ever killed anyone, the defendant made inculpatory statements implicating himself in the murder. The defendant was then charged with the murder. The defendant filed a motion to suppress the statements because the agent had not given him Miranda warnings.

ISSUE: Whether the officer must provide a suspect in custody Miranda warnings if the suspect does not know the officer represents the government?

HELD: No. Miranda warnings only apply to the police-dominated environment in which a known police officer controls the conditions.

DISCUSSION: The Miranda doctrine must be strictly enforced, but only in situations where the concerns underlying that decision are present (i.e., a police-dominated atmosphere whereby the suspect may feel compelled to speak by the fear of reprisal or in the hope of more lenient treatment should he confess). That coercive atmosphere is not present when an incarcerated person speaks freely to someone whom he believes

to be a fellow inmate. In such circumstances, Miranda does not forbid mere strategic deception by taking advantage of a suspect's misplaced trust. The Miranda warnings were not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates. Note that Massiah v. United States, which held that the government could not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged, is inapplicable here since no murder charges had been filed at the time of the interrogation (the Sixth Amendment had not attached).

Coercion is determined from the perspective of the suspect. The inherent coerciveness of custodial interrogation is not present when the target is unaware that he is talking with authorities. Miranda is not concerned with ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak.

*****

Arizona v. Mauro
481 U.S. 520, 107 S. Ct. 1931 (1987)

FACTS: The defendant was arrested for killing his son. After being read his Miranda rights, he invoked his right to counsel and stated that he did not wish to answer any questions until a lawyer was present. The defendant's wife insisted that she be allowed to speak with defendant. The police allowed the meeting on the condition that an officer be present during the encounter. Using a tape recorder in plain sight, the officer taped a brief conversation during which the defendant told his wife not to answer any questions until a lawyer was present. At trial, the prosecution used the tape to rebut defendant's insanity defense.

ISSUE: Whether the police impermissibly interrogated the defendant in violation of his Miranda rights?

HELD: No. The defendant, who had asserted his right to counsel, was not subjected to interrogation or its functional equivalent when police allowed defendant's wife to speak with defendant in the presence of an officer.

DISCUSSION: The purpose of Miranda is to prevent the government from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment. This fear was not implicated here because the defendant was not subjected to compelling influences, psychological ploys, or direct questioning by the government. From the defendant's perspective, it is improbable that he felt he was being coerced to incriminate himself simply because he was told his wife would be allowed to speak to him.

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2. Custody

Berkemer v. McCarty
468 U.S. 420, 104 S. Ct. 3138 (1984)

FACTS: After observing the defendant's car weave, a police officer stopped him and asked him to get out of the car. Noticing that the defendant was having difficulty standing, the officer concluded that he would arrest the defendant for drunk driving. The officer did not communicate his intent to the defendant. The defendant failed field sobriety tests, whereupon the officer asked if he had been using intoxicants. The defendant replied that he had consumed two beers and had smoked marihuana a short time before. The officer formally arrested the defendant and took him to a county jail. At no time did the officer provide the defendant with Miranda warnings.

ISSUE: Whether the defendant was in custody for Miranda purposes?

HELD: No. Routine traffic stops do not create a police-dominated atmosphere Miranda is designed to protect against.

DISCUSSION: A person subjected to custodial interrogation by police officers is entitled to Miranda warnings. However, roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute "custodial interrogation." The Miranda warnings are applicable as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest. A police officer's unarticulated plan to arrest a motorist and charge him with a traffic offense does not amount to custody. The relevant inquiry was whether a reasonable person in the motorist's position would have believed he or she was in custody.

*****

Pennsylvania v. Bruder
488 U.S. 9, 109 S. Ct. 205 (1988)

FACTS: An officer observed a motorist driving erratically and ignoring a red light. He stopped the defendant's vehicle. After smelling alcohol and observing the defendant's stumbling movements, the officer administered field sobriety tests to the defendant, including asking the defendant to recite the alphabet. The officer inquired about the defendant's use of alcohol. The defendant stated that he had been drinking. The defendant also failed the sobriety tests. The officer arrested the defendant, placed him a police car, and administered his Miranda warnings.

ISSUE: Whether the defendant was in custody at the time he was asked if he had been drinking?

HELD: No. Ordinary traffic stops do not involve custody for purposes of the requirement to give Miranda warnings.

DISCUSSION: The rule of Berkemer v. McCarty, that ordinary traffic stops do not involve custody for the purposes of Miranda, governs this case. Although unquestionably a seizure, this stop had the same noncoercive aspects as the Berkemer seizure: a single police officer asking the defendant a modest number of questions and requesting him to perform simple tests in a location visible to passing motorists. The defendant was not in custody and, therefore, the officer did not have to administer Miranda warnings before questioning.

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Oregon v. Mathiason
429 U.S. 492, 97 S. Ct. 711 (1977)

FACTS: The defendant, a parolee, was suspected of being involved in a residential burglary. The officer investigating the burglary left his card at the defendant's apartment, with a note asking him to call the officer "to discuss something." The defendant called the officer the next day. When the officer asked the defendant where it would be convenient to meet, the defendant expressed no preference. The officer asked if the defendant could come to the police station to meet. The defendant agreed and voluntarily went to the station. The officer met the defendant in the hallway, shook his hand, and took him into an office. He told the defendant that he was not under arrest. The officer closed the office door and the two sat down. The officer explained that he wanted to talk to the defendant about a burglary, and that the district attorney or judge would possibly consider his truthfulness. The officer told the defendant that he was suspected of committing the burglary and falsely claimed his fingerprints had been found at the scene of the crime. The defendant considered this information, then admitted his involvement in the burglary. At that point, the officer advised the defendant of his Miranda rights for the first time, secured a waiver, and obtained a taped confession. Once the taping had been completed, the defendant was released and told that the matter would be turned over to the district attorney for a determination on whether charges would be filed.

ISSUE: Whether the defendant was in "custody" when he made his initial incriminating statement?

HELD: No. At the time he was being questioned, the defendant was not in "custody."

DISCUSSION: Police officers must provide Miranda warnings to any person who is being subjected to a "custodial interrogation." The phrase "custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Here, the defendant voluntarily came to the patrol station where the officer immediately advised him that he was not under arrest. At the close of the interview, the defendant was allowed to leave. For these reasons, the Court held that the defendant was not in "custody" or "otherwise deprived of his freedom of action in any significant way."

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Beckwith v. United States
425 U.S. 341, 96 S. Ct. 1612 (1976)

FACTS: The IRS was investigating the defendant for tax fraud. Two IRS agents met with the defendant in a private home where he sometimes stayed. One of the agents testified that they went to see the defendant at this residence at approximately 8:00 a.m. in order to spare him the possible embarrassment of being interviewed at his place of employment, which opened at 10:00 a.m. Upon arrival, the agents were invited into the house and, when the defendant entered the room, they introduced themselves. The defendant excused himself for a period of approximately five minutes to finish dressing. When he returned, the three sat at a dining room table where the agents presented their credentials, informed the defendant of why they wanted to speak with him, and read him some, but not all, of his Miranda warnings. The defendant acknowledged that he understood his rights and the agents interviewed him until approximately 11:00 a.m. The agents

described the conversation as "friendly" and "relaxed," while the defendant noted that the agents did not "press" him on any question he could not or chose not to answer. Before ending the interview, the agents requested permission to examine certain records. When the defendant indicated the records were maintained at his place of employment, the agents asked if they could meet him there later. The agents met him approximately 45 minutes later at his place of employment. The senior agent advised the defendant that he was not required to furnish any books or records, but the defendant supplied the books to the agents nonetheless. Prior to trial, the defendant moved to suppress all of the statements made to the agents and any evidence obtained as a result of those statements on the grounds that he was in custody at the time of the interview and had not been fully advised of his Miranda warnings.

ISSUE: Whether the defendant was in custody at the time of the interview?

HELD: No. The defendant could not have reasonably believed he was in custody at the time of the interview.

DISCUSSION: Miranda warnings are necessary whenever law enforcement officers question an individual who has been "taken into custody or otherwise deprived of his freedom of action in any significant way." The defendant was neither arrested nor detained against his will by the agents. While he was clearly the "focus" of the agents' investigation, "he hardly found himself in the custodial situation described by the Miranda Court as the basis for its holding." The agents were not required to read him his Miranda warnings, and any statements he made and any evidence derived from those statements were admissible against him at his later trial.

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Orozco v. Texas
394 U.S. 324, 89 S. Ct. 1095 (1969)

FACTS: The defendant was a murder suspect. At approximately 4:00 a.m., four police officers arrived at the defendant's boardinghouse. They were told that the defendant was asleep in his bedroom. All four officers entered the bedroom, notified the defendant that he was under arrest, and began to question him. The officers did not read the defendant his Miranda rights. In response to questioning, he admitted being at the murder scene on the night in question. When asked if he owned a pistol, the defendant replied that he did. He later told the officers where the pistol was located, and ballistics tests performed on the weapon indicated that it was the gun used in the murder.

ISSUE: Whether the defendant was in custody at the time of his statements?

HELD: Yes. The officers were required to read the defendant his Miranda warnings because he was in custody or otherwise deprived of his freedom of action in a significant way.

DISCUSSION: In Miranda v. Arizona, the Supreme Court held that warnings were required whenever a suspect being interrogated was "in custody at the station or otherwise deprived of his freedom of action in any significant way." Here, the State argued that since the defendant was interrogated in his own bedroom, in familiar surroundings, Miranda should not apply. However, the Court disagreed, noting that the Miranda decision "iterated and reiterated the absolute necessity for officers interrogating people 'in custody' to give the described warnings." According to one of the officer's testimony, the defendant in this case "was under arrest and not free to leave when he was questioned in his bedroom in the early hours of the morning." For this reason, the admissions made by the defendant, without the benefit of Miranda warnings, were obtained in violation of the Fifth Amendment privilege against compelled self-incrimination.

Mathis v. United States
391 U.S. 1, 88 S. Ct. 1503 (1968)

FACTS: The defendant was serving a state prison sentence when an IRS agent questioned him about tax returns. Prior to the questioning, the defendant was not notified of his Miranda rights by the investigator. Documents and oral statements obtained from him during this interrogation were introduced at his criminal trial for filing false claims for tax refunds.

ISSUE: Whether the defendant was in custody at the time of the questioning about the income tax investigation?

HELD: Yes. The defendant was in custody at the time of the questioning about the income tax investigation.

DISCUSSION: The government claimed that Miranda warnings were not required in this case for two reasons: First, the questions were asked as part of a routine tax investigation that would not necessarily result in criminal charges; and second, the defendant was not placed in jail by the officer questioning him, but was there for an entirely separate offense. The Court disagreed with both of these positions. First, while tax investigations "may be initiated for the purpose of civil action rather than criminal prosecution," these investigations frequently lead to criminal prosecutions, just as occurred here. Further, there was always the possibility that the investigation could end up in a criminal prosecution. Thus, "routine tax investigations" still require that Miranda warnings be given to a person in custody. Second, the reason the defendant was in custody was irrelevant for Miranda purposes. According to the Court, there is "nothing in the Miranda opinion that calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody."

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Stansbury v. California
511 U.S. 318, 114 S. Ct. 1526 (1994)

FACTS: The defendant was thought to be a witness to a homicide. When he was contacted by three police officers at his home, the defendant agreed to go to the police station for an interview. Upon arrival, the defendant was questioned by police officers about his whereabouts at the time of the murder. The officer did not provide the defendant with Miranda warnings before asked these questions. However, when the defendant mentioned that he had been driving a vehicle that matched the description given by another witness, one of the officers suspected that the defendant was involved in the murder. When the defendant then admitted that he had previously been convicted of rape, kidnapping, and child molestation, the officers terminated the interview and a different officer advised the defendant of his Miranda rights. The defendant declined to answer any further questions, requested an attorney, and was arrested. At trial, the defendant filed a motion to suppress his statements made to the police, as well as all evidence discovered as a result of those statements.

ISSUE: Whether a police officer's subjective view concerning whether the person being interviewed is a suspect is relevant to whether the person is in "custody?"

HELD: No. A police officer's subjective view regarding the status of a suspect is irrelevant to the assessment of whether the person is in "custody."

DISCUSSION: A police officer is required to administer Miranda warnings whenever an individual is questioned while in custody or otherwise deprived of his freedom of action in any significant way. In determining whether an individual is in custody for purposes of Miranda, courts use the "totality of the circumstances" test. Previous decisions of the Court, however, clearly provide that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating

officers or the person being questioned." The requirement to administer Miranda warnings does not depend on whether the person being questioned is the focus of the police investigation, but on "how a reasonable man in the suspect's position would have understood his situation." A police officer's "subjective view that the individual under questioning is a suspect, if not disclosed to the individual, does not bear upon the question of whether the individual is in custody for purposes of Miranda." However, if the officer communicates his views to the suspect, this fact weighs upon the question of custody. "In sum, an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment of whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave."

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California v. Beheler
463 U.S. 1121; 103 S. Ct. 3517 (1983)

FACTS: After the defendant called the police to report a homicide in which he was involved, he voluntarily accompanied them to the station house. The police told the defendant that he was not under arrest. At the station house, the defendant talked about the murder in an interview that lasted less than 30 minutes. The police did not advise him of his Miranda rights. The defendant was permitted to return to his home, and he was arrested five days later. After he was advised of his Miranda rights at that time, he waived those rights and gave a second confession.

ISSUE: Whether the defendant was in custody at the time of his first interview?

HELD: No. A person is not in custody if he or she voluntarily goes to a police station and is allowed to leave unhindered by the police after a brief interview.

DISCUSSION: The Court held that Miranda warnings were not required at the defendant's first interview with the police. Miranda warnings are not necessary unless there is police custodial interrogation. The Court found that the defendant was neither taken into custody for the first interview nor significantly deprived of his freedom of action. Although the circumstances of each case must be considered in determining whether a suspect is "in custody," the ultimate inquiry is whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Miranda warnings are not required simply because the questioning takes place in a coercive environment in the station house or because the questioned person is one whom the police suspect. Also, the length of time that elapses between the commission of a crime and a police interview that takes place when a person voluntarily comes to the police station has no relevance in determining whether a Miranda warning is required. The fact that a person who voluntarily engages in an interview with police is unaware of the consequences of his participation does not transform the voluntary interview into custody.

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Thompson v. Keohane
516 U.S. 99, 116 S. Ct. 457 (1995)

FACTS: A defendant, upon the request of a police officer, presented himself at police headquarters. Once there, during a 2-hour tape-recorded session, he was questioned by police officers about the murder of his former wife. During the questioning, the officers repeatedly told the accused that he was free to leave, but also told him that they knew he had killed the victim. The accused was not informed of his Miranda rights. Eventually, he told the officers that he had committed the

crime. Following the interview, the defendant was allowed to leave the police headquarters. He was arrested 2 hours later and charged with first-degree murder. The state court found that the defendant was not in custody at the time of the statements.

ISSUE: Whether the state court's determination of the custody issue has a presumption of correctness?

HELD: No. The determination of whether a person is in custody is a mixed question of fact and law.

DISCUSSION: Trial courts are given great deference in issues of credibility. However, two discrete inquiries are essential to the determination whether there was "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler. The first inquiry, what circumstances surrounded the interrogation, is distinctly factual. The second inquiry, would a reasonable person have felt at liberty to terminate the interrogation and leave, calls for application of the law. In these inquiries, the trial court's superior capacity to resolve credibility issues is not the foremost factor.

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Yarborough v. Alvarado
541 U.S. 652, 124 S. Ct. 2140 (2004)

FACTS: The 17-year old defendant was involved in a murder. About a month later, at the request of a police officer, the defendant's parents brought him to a police station. With only the officer and the defendant present, the officer conducted a two-hour interview. At the conclusion of this interview, the defendant made incriminating statements. At no time did the officer offer the defendant his Miranda warnings.

ISSUE: Whether the defendant's youth and inexperience must be evaluated in determining whether a

reasonable person in his position would have felt as if he was in custody?

HELD: No. The Court stated that its prior "opinions applying the Miranda custody test have not mentioned the suspect's age, much less mandated its consideration."

DISCUSSION: Custody must be determined based on how a reasonable person in the suspect's situation would perceive the circumstances. In making this determination, the Supreme Court has never held that "a suspect's age or experience is relevant to the Miranda custody analysis." These factors (as well as education and intelligence) are useful in viewing whether a suspect engaged in a voluntary act, such as in making a statement to law enforcement officers. However, age and experience are not proper factors in determining custody.

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3. Interrogation

Rhode Island v. Innis
446 U.S. 291, 100 S. Ct. 1682 (1980)

FACTS: A robbery victim identified the defendant in a photo display. Nearly four hours later, a police officer spotted the defendant. The defendant was arrested and advised of his Miranda rights. He was not in the possession of the shotgun used in the robbery at the time of his arrest. After being advised of his rights, the defendant requested to speak with a lawyer. A supervisor on scene had the defendant placed in a vehicle, along with three officers. Before departing, the supervisor advised the officers in the vehicle "not to question the defendant or intimidate or coerce him in any way." While traveling to the police station, two of the patrolmen discussed the possibility that a handicapped child from a nearby school might find a loaded shotgun and get hurt. The defendant, who overheard the conversation, interrupted the conversation and told the officers to turn the car around so that he could show

them where the shotgun was located. The police returned him to the scene of the arrest and again advised of his Miranda rights. He replied that he understood his rights, but that he "wanted to get the gun out of the way because of the kids in the area in the school." The defendant then led the police to a nearby field, where he pointed out the hidden shotgun. At trial, both the shotgun and the testimony relating to its discovery were introduced against the defendant.

ISSUE: Whether the police officers "interrogated" the defendant after he had invoked his Miranda rights?

HELD: No. The police officers' actions did not amount to "interrogation" or the "functional equivalent of interrogation" of the defendant.

DISCUSSION: The procedural safeguards of Miranda apply "whenever a person in custody is subjected to either express questioning or its functional equivalent." The Court stated "the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." In this case, the defendant had not been "interrogated" since there had been neither "express" questioning, nor the "functional equivalent" of questioning. There was no "express" questioning in that the conversation was entirely between two officers in the vehicle, and not directed to the defendant. Similarly, the officers did not subject the defendant to the "functional equivalent" of questioning. "There is nothing in the record to suggest that the officers were aware that the defendant was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent (defendant) was unusually disoriented or upset at the time of his arrest."

NOTE: Compare this case to Brewer v. Williams (1977).

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Pennsylvania v. Muniz
496 U.S. 582, 110 S. Ct. 2638 (1990)

FACTS: The defendant was stopped by a police officer on suspicion of driving while intoxicated. He performed poorly on a series of field sobriety tests and was placed under arrest. The officer took the defendant to a booking center. Officers there, following the usual practice with drunk-driving suspects, videotaped the booking proceedings. The defendant, who was informed of the videotaping, responded to questions concerning his name, address, height, weight, eye color, date of birth, and current age, stumbling over his address and age. In response to a question about whether he knew the date of his sixth birthday, the defendant stated, "No, I don't." He did poorly in repeated sobriety tests. The defendant was then advised of his Miranda rights for the first time, signed a statement waiving those rights, and admitted under questioning that he had been driving while intoxicated.

ISSUE: Whether the officers interrogated the defendant before providing him with his Miranda warnings?

HELD: Yes. The defendant's Fifth Amendment rights were violated by the admission of that part of the videotape in which the suspect responded to the question as to the date of his sixth birthday. However, the admission of the portions of the videotape in which the suspect performed the sobriety tests and responded to booking questions was not interrogation.

DISCUSSION: The privilege against self-incrimination protects an "accused from being compelled to testify against himself, or otherwise, provide the State with evidence of a testimonial or communicative nature," but not from being compelled by the State to produce "real or physical evidence." Schmerber v. California. To be testimonial, the communication must, "explicitly or implicitly, relate a factual assertion or disclose information." Doe v. United States.

The defendant's answers to direct questions are not rendered inadmissible by Miranda merely because the slurred nature of his speech was incriminating. Any slurring of speech and other evidence of lack of muscular coordination revealed by the defendant's responses constitute non-testimonial aspects of those responses. The defendant's incriminating responses made during the sobriety tests were not the result of interrogation as the officer's dialogue with him concerning the tests consisted of carefully scripted instructions as to how the tests were to be performed. Therefore, they were not "words or actions" constituting custodial interrogation.

However, the defendant's response to the sixth birthday question was incriminating not just because of his delivery, but also because the content of his answer supported an inference that his mental state was confused. His response was testimonial because he was required to communicate an express or implied assertion of fact or belief and, thus, was confronted with the "trilemma" of truth, falsity, or silence, the historical abuse against which the privilege against self-incrimination was aimed.

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4. Right to Silence

Jenkins v. Anderson
447 U.S. 231, 100 S. Ct. 2124 (1980)

FACTS: The defendant was suspected of a homicide. He turned himself in two weeks later. At his trial for first-degree murder, the defendant took the witness stand and contended that the killing was the result of self-defense. The prosecutor argued that the defendant's two-week delay in reporting the incident was inconsistent with self-defense.

ISSUE: Whether the government's use of the defendant's pre-arrest silence violated his constitutional right to remain free from self-incrimination?

HELD: No. The use of the defendant's pre-arrest silence was not contemplated by the Fifth Amendment privilege from self-incrimination.

DISCUSSION: The Court long ago held that the "immunity from giving testimony is one in which the defendant may waive by offering himself as a witness," citing Raffel v. United States, 271 U.S. 494 (1926). When the defendant took the witness stand in this case, the prosecution was entitled to impeach his testimony as inconsistent with his previous actions. Courts have repeatedly allowed the impeachment of witnesses with their failure to state a fact under circumstances in which it would have been natural to do so. If the defendant does not want to face this standard trial practice, he should decline to testify.

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Fletcher v. Weir
455 U.S. 603, 102 S. Ct. 1309 (1982)

FACTS: The defendant was involved in an altercation that led to the death of another man. The defendant immediately left the scene and did not report the incident to the police. He was later arrested for murder but at no time was he provided Miranda warnings. At his trial, the defendant took the witness stand. He admitted to accidently stabbing the victim but claimed to have acted in self-defense. This was the first time the defendant had offered an exculpatory explanation of the events. On cross-examination, the prosecution asked why the defendant had not offered this explanation to the police at the time of his arrest or disclose the location of the knife.

ISSUE: Whether the government may use the defendant's silence to impeach his testimony?

HELD: Yes. The government may use the defendant's silence against him if no Miranda warnings were provided.

DISCUSSION: It is fundamentally unfair and a deprivation of due process to use a person's silence against them after they have accepted the protections of their Miranda rights. The government should not be able to coax a suspect into remaining silent through a reading of the Miranda rights and then use that silence against him at trial. However, the defendant here was not promised that his silence would not be used against him, as he was not read his Miranda rights. The Court found that, absent this promise, the government was free to introduce the defendant's silence against him at trial for purposes of impeachment, as his silence was inconsistent with his defense. It would have been reasonable to assume that a person would want to explain their involvement in an accidental stabbing rather than face a murder charge.

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United States v. Hale
422 U.S. 171, 95 S. Ct. 2133 (1975)

FACTS: The defendant was arrested for robbery. He was advised of his Miranda rights, searched, and found to be in possession of a small amount of currency. The defendant made no response when the officer asked him where he got the money. At trial, the defendant testified that he met the victim on the day of the robbery but did not commit the crime. He claimed the money found on him belonged to his wife and was for the purpose of purchasing money orders. On cross-examination, the prosecutor asked the defendant why he did not mention these facts to the arresting officer.

ISSUE: Whether the government can inquire into why a suspect remained silent after invoking his right to remain silent?

HELD: No. It is not unusual (or inconsistent) for a suspect to remain silent after being advised of his right to do so.

DISCUSSION: It is a basic principle of the law of evidence that a witness can be impeached with prior inconsistent statements they have made. However, there must be a connection between the initial statement (or lack thereof) and the testimony at trial. In most circumstances, silence does not amount to prior inconsistency (but see Jenkins v. Anderson). The act of silence amounts to a prior inconsistent statement only if it would have been natural to object to the question when it was put to the witness. This was not the case at the time the question was put to the defendant at his arrest. The guilty and innocent alike could find an arrest so intimidating that they choose to remain silent.

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Doyle v. Ohio
426 U.S. 610, 96 S. Ct. 2240 (1976)

FACTS: The defendants were arrested for attempting to sell a controlled substance and were provided Miranda warnings. At trial, they testified that the government had "framed" them. The government then sought to introduce evidence that the defendants had not made any statements to this effect after their arrest.

ISSUE: Whether the government's use of the defendants' post-arrest silence on cross-examination violated their Fifth Amendment right to remain silent?

HELD: Yes. Once provided the right to remain silent, the government may not use that protection against the defendant.

DISCUSSION: Providing a constitutional protection to a defendant and then using that protection against them renders the protection meaningless. The Court stated that "while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due

process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."

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Michigan v. Mosley
423 U.S. 96, 96 S. Ct. 321 (1975)

FACTS: The defendant was arrested for two robberies. Once in custody, a police officer attempted to interview him regarding the robberies. The defendant was brought to an office in the police headquarters building, where the officer advised the defendant of his Miranda rights and had him read and sign a notification certificate. He also had the defendant orally acknowledge an understanding of his rights. When the officer attempted to question him, the defendant stated that he did not wish to answer any questions about the robberies. He did not, however, request to speak with counsel. The officer immediately ceased the interrogation and took the defendant to a cell. Over two hours later, a homicide detective had the defendant moved to a different office building for questioning about a homicide that was unrelated to the robberies for which the defendant had been arrested. Again, the defendant was read his Miranda rights and signed a notification certificate. Within 15 minutes, the defendant made a statement implicating himself in the homicide. At no time during this interview did the defendant request a lawyer or indicate that he did not wish to discuss the homicide. Additionally, at no time was the defendant asked any questions regarding the robberies for which he had been arrested. The incriminating statement was introduced at the defendant's trial and he was convicted of first-degree murder.

ISSUE: Whether the police violated the defendant's rights by questioning him about an unrelated crime after he had invoked his right to remain silent?

HELD: No. The police may re-approach the defendant after he invoked his right to remain silent.

DISCUSSION: In answering this question, the Court relied almost entirely on a single passage from their decision in Miranda v. Arizona: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." The Miranda decision never addressed "under what circumstances, if any, a resumption of questioning is permissible." What was clear, however, was that nothing in the Miranda opinion "can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent."

The Court concluded "that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his right to cut off questioning was 'scrupulously honored.'" In this case, a review of the circumstances led the Court to hold that the defendant's right to cut off questioning was "scrupulously honored." First, before his initial interrogation, the defendant was fully informed of his Miranda rights, orally acknowledged an understanding of those rights, and signed a notification certificate. Second, when the defendant stated that he did not wish to answer questions about the robberies, all questioning immediately ceased. Third, a significant period of time (more than two hours) passed before a different officer, in a different location, regarding a different crime, next questioned the defendant. Fourth, before his second interview, the defendant was again fully advised of his Miranda rights.

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5. Right to Counsel

Maryland v. Shatzer
___ U.S. ___, No. 08-680 (2010)

FACTS: The defendant was initially approached by police for questioning while in prison serving a sentence for an

unrelated conviction. He invoked his right to counsel, the interview was terminated, and the case closed. Still in prison more than 2 years later, the defendant was re-approached by police, who had reopened the case. After being again advised of his Miranda rights and without counsel present, he waived his rights and made incriminating admissions that led to his conviction.

ISSUES: 1. Whether post-conviction incarceration in prison constitutes custody for purposes of Miranda?

2. Whether a sufficient "break in custody" would permit officers to re-approach a suspect in custody who has previously invoked his right to counsel under Miranda and obtain a valid Miranda waiver without his counsel present?

HELD: 1. No. An incarcerated suspect serving a prison sentence is not in custody for purposes of Miranda, absent some additional restraint being placed on the suspect's freedom of movement.

2. Yes. A break in a suspect's custody of 14 days or more is sufficient to allow officers to re-approach a suspect in custody who has previously invoked his right to counsel and obtain a valid Miranda waiver from the suspect without his counsel being present.

DISCUSSION: The rule in Edwards v. Arizona presumes invalid any Miranda waiver given by a suspect in custody and without counsel present, when re-approached by officers after he had previously invoked his right to counsel. This rule was intended to protect a suspect who has invoked his right to counsel – signifying his unwillingness to deal with officers directly – from overzealous officers who might exploit the inherently coercive circumstances of prolonged custody by badgering him into waiving that right. Unlike a suspect being held in pre-trial or investigative custody however, a prisoner

serving a prison sentence is not subject to the same coercive pressures that both Miranda and Edwards intended to address. The prisoner cannot reasonably view submission to his interrogator's will as affecting the circumstances of his continued incarceration. A police interrogation of a prisoner housed in the general prison population is thus not deemed to be a custodial interrogation without some additional coercive restraint being imposed on the prisoner.

Similarly, a sufficient break in custody, permitting a suspect to return to familiar people, surroundings, and routines, serves to diminish the coercive pressures of the custody such that the protections of Edwards are not justified. A break in custody of 14 days or more, which includes a prisoner's return to the general prison population after invoking his Miranda right to counsel, is of sufficient duration to terminate the need for Edwards protection and permit officers to re-approach a suspect in a custodial setting and obtain a valid Miranda waiver.

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Edwards v. Arizona
451 U.S. 477, 101 S. Ct. 1880 (1981)

FACTS: After being arrested on a criminal charge and being advised of his Miranda rights, the defendant was questioned by the police until he said that he wanted an attorney. The officers ceased their questioning. The next day, the police went to the jail, again advised defendant of his Miranda rights, and obtained a confession.

ISSUE: Whether the officers may approach a suspect who has invoked his Fifth Amendment right to counsel?

HELD: No. An accused, having expressed his desire to deal with the police only through counsel, may not be subject to further interrogation until counsel has been made available to him, unless the accused has initiated further communication with the police.

DISCUSSION: The use of the defendant's confession violated his rights under the Fifth Amendment to have counsel present during custodial interrogation. When an accused has invoked his right to have counsel present during custodial interrogation (as opposed to his right to remain silent; see Michigan v. Mosley), a valid waiver of that right cannot be established by showing only that he responded to police-initiated interrogation after again being advised of his rights. In this case, the authorities initiated the second interrogation. The defendant's confession, made without counsel present, did not amount to a valid waiver.

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Arizona v. Roberson
486 U.S. 675, 108 S. Ct. 2093 (1988)

FACTS: After being arrested at the scene of a burglary and given Miranda warnings, the defendant said he "wanted a lawyer before answering any questions." Three days later, while still in custody, and without a lawyer having been appointed, a different officer approached the defendant about an unrelated crime. This officer was unaware of the defendant's previous request for an attorney. He provided the defendant with Miranda warnings, which the defendant waived. The defendant gave an incriminating statement about the crime for which he had not yet been arrested.

ISSUE: Whether the Edwards rule bars custodial interrogation by another law enforcement officer on other offenses after a defendant has invoked his right to counsel under Miranda?

HELD: Yes. A request for counsel under the Fifth Amendment prohibits the government from approaching the defendant about any crime, unless counsel is present.

DISCUSSION: The principle of Edwards v. Arizona was designed to provide a bright-line rule for law enforcement officers that bars further law enforcement- initiated custodial interrogation of a suspect who has requested counsel. It is immaterial whether it is a different law enforcement officer or that the questions are about a different offense. Subsequent law enforcement officer-initiated interrogation will result only in an invalid waiver. Such interrogation may occur only in the presence of counsel or if initiated by the defendant.

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Minnick v. Mississippi
498 U.S. 146, 111 S. Ct. 486 (1990)

FACTS: The defendant was wanted for murders committed in Mississippi. He was arrested in California. The day after his arrest, two FBI agents sought to interview the defendant. The defendant was advised of his Miranda rights and agreed to speak with the two agents. After answering some questions, the defendant stopped, telling the agents to "Come back Monday, when I have a lawyer," and stating that he would "make a more complete statement then with his lawyer present." The agents then terminated the interview. Three days later, after the defendant had consulted with his lawyer on two or three occasions, a Sheriff from Mississippi arrived in California to question the defendant. The defendant was told that he "had to talk" to the Sheriff, and that he "could not refuse." The defendant declined to sign a written waiver of his Miranda rights, but agreed to talk to the Sheriff and made an incriminating statement. The defendant's lawyer was not present during this interview.

ISSUE: Whether the defendant's Fifth Amendment right to counsel was violated by the police-initiated questioning that was conducted after he had requested counsel, even though he had been given the opportunity to consult with his counsel?

HELD: Yes. The defendant's Fifth Amendment right to counsel was violated. The questioning was initiated by the police after he had requested counsel.

DISCUSSION: In Miranda v. Arizona, the Court held that "the police must terminate an interrogation of an accused in custody if the accused requests the assistance of counsel." To ensure compliance with this mandate, the Court held in Arizona v. Edwards that "once an accused requests counsel, officials may not reinitiate questioning until counsel has been made available to him." The issue in this case was whether the police could reinitiate questioning after a defendant, who requested counsel, has been given the opportunity to consult with counsel. The Court relied upon the language in its Miranda decision for the holding that "the Fifth Amendment protection of Edwards is not terminated or suspended by consultation with counsel." In other words, "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." The need for counsel to protect a suspect's Fifth Amendment right against self-incrimination includes not only the right to consult with counsel, but also to have counsel present during any questioning, if the suspect so desires.

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Davis v. United States
512 U.S. 452, 114 S. Ct. 2350 (1994)

FACTS: Police officers suspected the defendant of committing a murder and brought him to their office. After being read his rights under the Uniform Code of Military Justice (similar to Miranda rights), the defendant waived his rights to remain silent or to consult with an attorney and agreed to be interviewed by the officers. About a half hour into the interview, the defendant stated "Maybe I should talk to a lawyer." The officers stated this request would be respected if the defendant wanted to speak to an attorney. The defendant stated "No, I'm not asking for a lawyer," and continued with the

interview for another hour. At that point, the defendant confirmed that he wanted to speak to an attorney before saying anything else and the interview was terminated. The government used several incriminating statements made during the interview at the defendant's court-martial.

ISSUE: Whether the defendant's statement concerning whether he should speak to a lawyer was a legal request for an attorney?

HELD: No. The defendant's request for counsel must be unequivocal.

DISCUSSION: The right to request counsel during custodial interrogation was designed to act as a safeguard against the police badgering a defendant into waiving previously asserted Miranda rights. At that moment, the police must discontinue their efforts to interview a suspect. However, the suspect must assert his right before this safeguard takes effect. The Supreme Court noted that it has a long history of denying the assertion of rights based on ambiguous references by a suspect. The suspect must articulate his desire to have counsel present in a sufficiently clear manner so that a reasonable police officer would understand that such articulation is a request for counsel. Otherwise, questioning of the suspect may continue.

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Smith v. Illinois
469 U.S. 91, 105 S. Ct. 490 (1984)

FACTS: Shortly after his arrest in connection with a robbery, the 18-year-old defendant was taken to an interrogation room for questioning by two police detectives. When the detectives informed him that he had a right to his counsel's presence at the interrogation, the accused responded "Uh, yeah. I'd like to do that." Despite this response, the detectives continued with their questioning, and when they subsequently asked the accused whether he wished to talk to them without a lawyer being present, the accused responded

"Yeah and no, uh, I don't know what's what, really," and "All right. I'll talk to you then." The defendant then told the detectives that he knew in advance about the planned robbery but claimed that he was not a participant. After considerable probing by the detectives, he confessed, but he then reasserted his earlier story that he only knew about the planned crime. Upon further questioning, the defendant again requested a lawyer saying "I wanta get a lawyer." This time the detectives honored the request and terminated the interrogation.

ISSUE: Whether the defendant's initial request for counsel was ambiguous in light of his responses to further police questioning?

HELD: No. The defendant's responses to continued police questioning did not render his initial request for counsel ambiguous under rule that all questioning must cease after an accused requests counsel.

DISCUSSION: The Court held that the accused's initial request for counsel when he stated "Uh, yeah. I'd like to do that," was not ambiguous. The officers should have terminated their questioning at that point. The defendant's post-request responses to further interrogation could not be used to cast doubt on the clarity of his initial request for counsel. A valid waiver of an accused's right to have his counsel present during police interrogation cannot be established by showing only that the accused responded to further police-initiated custodial interrogation.

*****

McNeil v. Wisconsin
501 U.S. 171, 111 S. Ct. 2204 (1991)

FACTS: The defendant was arrested for armed robbery. Two officers advised him of his Miranda rights, and sought to question him. The defendant refused to answer any questions, but did not request an attorney. The officers ended the interview. The defendant appeared at a bail hearing on the

armed robbery charge and accepted representation by a public defender. Later that day, an officer visited the defendant as a part of an investigation of a completely unrelated murder. The officer advised the defendant of his Miranda rights. The defendant signed a waiver form and made admissions regarding the murder.

ISSUE: Whether an accused's request for counsel at an initial appearance on a charged offense constitutes an invocation of his Fifth Amendment right to counsel that precludes police interrogation on unrelated, uncharged offenses?

HELD: No. An accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding (bail hearing) does not constitute an invocation of the right to counsel derived from Miranda rights.

DISCUSSION: The Sixth Amendment right to counsel does not attach until the initiation of the adversarial judicial process. Even then, it only serves to guarantee the right to have counsel present for critical stages of the adversarial process that has initiated the right in the first place. Miranda warnings apply to uncharged matters but only if the suspect is placed in custody and confronted with government interrogation.

The defendant's invocation of his Sixth Amendment right with respect to the armed robbery does not restrict the use of his statements regarding uncharged offenses. The Miranda right to counsel is not offense-specific. Once asserted, it prevents any further police-initiated interrogation outside the presence of counsel. However, the invocation of the Sixth Amendment right does not impart a Miranda right. The two different rights to counsel have different purposes and effects. The Miranda protections are intended to ensure the suspect's "desire to deal with the police only through counsel" for any encounter. The Sixth Amendment right is intended to protect the unaided layman at critical confrontations with the government after the initiation of the adversarial process with respect to a particular crime.

Oregon v. Bradshaw
462 U.S. 1039, 103 S. Ct. 2830 (1983)

FACTS: Following the death of a minor in a vehicle accident, the defendant was given his Miranda rights and questioned by police officers. The defendant was suspected of being the driver of the vehicle. While he denied driving the vehicle, the defendant admitted to furnishing alcohol to the minor. He was arrested for furnishing alcohol to a minor and again informed of his Miranda rights. Upon being told that he was suspected of being the driver of the vehicle, the defendant invoked his right to counsel and the conversation ended. Shortly thereafter, the defendant was being transported to the county jail, when he asked a police officer, "Well, what is going to happen to me now?" The officer reminded the defendant he did not have to speak to the police and that if he chose to do so it would have to be of his free will. The defendant stated that he understood and a discussion followed in which the officer suggested that the defendant take a polygraph examination. The defendant agreed. The next day, before the polygraph examination, the defendant was read his Miranda warnings for a third time. When the polygrapher stated that he did not believe the defendant was being truthful, the defendant admitted to driving the vehicle at the time of the fatal accident.

ISSUE: Whether there exist circumstances in which the police can continue to interrogate a defendant that has invoked his Fifth Amendment right to counsel?

HELD: Yes. If the defendant initiated the conversation with the police after invoking his right, the interrogation can resume.

DISCUSSION: The Court held that once a suspect invokes his right to counsel, that request must be strictly honored and all questioning must cease. Only after the suspect "initiates further communication, exchanges, or conversation with the police" can further interrogation take place. In other words, "before a suspect in custody can be subjected to further interrogation after he requests an attorney, there must be a

showing that the 'suspect himself initiates dialogue with the authorities.'" In this case, the defendant's question to the officer, "Well, what is going to happen to me now?" showed a clear desire on the defendant's part "for a generalized discussion about the investigation." The defendant's comment was distinct from some of the routine questions that necessarily arise when a suspect is in custody, such as a request to use the bathroom. Even if the accused initiates a conversation, the government still bears the burden of showing that the suspect waived his right to have counsel present.

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6. Waiver

Colorado v. Spring
479 U.S. 564, 107 S. Ct. 851 (1987)

FACTS: The defendant killed a person named Walker in Colorado. Thereafter, an informant told ATF agents that the defendant was engaged in the interstate transportation of stolen firearms, and that the defendant had discussed his participation in the Colorado killing. Based on this information, ATF agents set up an undercover purchase of firearms from the defendant. After the purchase was made, the agents arrested the defendant and advised him of his rights. The defendant waived his Miranda rights and the agents questioned him about the firearms transactions. They also asked him about the Colorado murder. The defendant stated that he had "shot another guy once." When asked if the defendant had shot a man named Walker, the defendant said "no." Sometime later, state officers read the defendant his Miranda rights. After he waived these rights he confessed to the Colorado murder.

ISSUE: Whether a suspect must be advised of all the subjects about which he will be questioned in order to make a valid waiver of his Miranda rights?

HELD: No. The purpose of reading Miranda rights is to ensure the defendant does not feel compelled to make any statement.

DISCUSSION: A suspect's awareness of all the crimes about which he could be questioned is not relevant in determining the validity of the decision to waive his rights. The Court is only interested in whether the suspect waived his or her Miranda rights in a voluntary, knowing, and intelligent manner. The Court set out a two-part test to determine if a waiver was obtained through coercion: (1) whether the defendant relinquished the right voluntarily, and (2) if it was given with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it.

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Connecticut v. Barrett
479 U.S. 523, 107 S. Ct. 828 (1987)

FACTS: The defendant, while in custody for sexual assault, was advised of his Miranda warnings three times. On each occasion, after signing and dating an acknowledgment that he had been informed of his rights, the defendant indicated to the police that he would not make a written statement. However, he was willing to talk about the incident that led to his arrest. After the second and third warnings, the defendant added that he would not make a written statement outside the presence of counsel. He then orally admitted to his involvement in the sexual assault.

ISSUE: Whether the defendant's limited invocation of his right to counsel prohibits all interrogation?

HELD: No. As long as the officers scrupulously abided by the defendant's requests they can proceed with the interrogation.

DISCUSSION: The fundamental purpose of the Miranda rights is "to assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process." Once the suspect is warned, he is free to exercise his own will in deciding whether or not to make a statement.

The defendant's limited requests for counsel were accompanied by affirmative announcements of his willingness to speak with the officers. The defendant's decision need not be logical. It only needs to be voluntary.

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California v. Prysock
453 U.S. 355, 101 S. Ct. 2806 (1981)

FACTS: The defendant was apprehended for commission of a murder. Prior to questioning, a police officer informed the defendant as follows:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used as evidence against you in a court of law. You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. You have the right to have a lawyer appointed to represent you at no cost to yourself.

The defendant acknowledged that he understood these rights and then provided a taped statement to the officer. Based in part on his taped statement, the defendant was convicted of first-degree murder.

ISSUE: Whether an officer must use the precise language contained in the Miranda case?

HELD: No. An officer is not required to use the precise language contained in the Miranda case but must convey the equivalent information found in that case.

DISCUSSION: The Supreme Court does not require that an officer use the precise language contained in the Miranda case when notifying defendants of their Miranda warnings. The Court actually stated in Miranda that "the warnings required

and the waiver necessary ... are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant (emphasis added)." Further, in Rhode Island v. Innis, the Court discussed the Miranda case and noted that what was required was "the now familiar Miranda warnings ... or their equivalent." In this case, "nothing in the warnings given the [defendant] suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right 'to a lawyer before you are questioned ... while you are being questioned, and all during the questioning."

*****

Duckworth v. Eagan
492 U.S. 195, 109 S. Ct. 2875(1989)

FACTS: The defendant agreed to go to the police station to discuss a stabbing. The officer read the defendant a form purporting to be his Miranda rights. The defendant signed the form which contained all required Miranda warnings but which said "You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you if you wish, if and when you go to court." The defendant claimed his innocence but was taken into custody. Twenty-nine hours later, he was interrogated and confessed after reading and signing a warning without the conditional provision previously added.

ISSUE: Whether informing a suspect that an attorney would be appointed for him "if and when you go to court" renders the Miranda warnings inadequate?

HELD: No. The law only requires that the suspect be informed that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one.

DISCUSSION: The Miranda decision required that certain warnings be given as a prerequisite to the admissibility of a custodial statement. However, the Court has never held that these must be given in the form set forth in the Miranda case. That form or a fully effective equivalent is sufficient. Miranda compliance does not require that attorneys be produced on call, but only that the suspect be informed, as he was here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one. If a law enforcement officer cannot provide appointed counsel, Miranda requires only that the officer not question a suspect unless he waives his right to counsel.

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North Carolina v. Butler
441 U.S. 369, 99 S. Ct.1755 (1979)

FACTS: The defendant was involved in the armed robbery of a gas station. At the time of his arrest on a fugitive warrant, the defendant was fully advised of his Miranda rights, although he was not questioned at that time. Later, after it was determined that the defendant had an 11th grade education and was literate, he was given an "Advice of Rights" form containing the Miranda warnings, which he read. When asked if he understood his rights, the defendant stated that he did. However, the defendant refused to sign the waiver at the bottom of the form. He was then told that he did not need to either speak or sign the form, but that the agents would like to speak to him. The defendant stated, "I will talk to you, but I am not signing any form." He then made an incriminating statement. The defendant said nothing when he was advised of his right to counsel, and at no time did he request counsel or attempt to terminate the questioning. He was ultimately convicted of kidnapping, armed robbery, and felonious assault.

ISSUE: Whether the defendant validly waived his right to counsel at the time he made the incriminating statement, as required by Miranda?

HELD: Yes. Waivers may be made orally or in writing.

DISCUSSION: In Miranda, the Court held that an "express" statement (e.g., "I waive my right") could constitute a valid waiver. However, the Court never made an express statement a requirement for obtaining a valid waiver. "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver." What is required, regardless of the form of the waiver, is that it be voluntary and knowing, considering "the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." While the Court in Miranda held that mere silence, standing alone, is not enough to establish a valid waiver of rights, "that does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights." In this case, the defendant's waiver of his right to counsel can be inferred from his actions and words.

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Oregon v. Elstad
470 U.S. 298, 105 S. Ct. 1285 (1985)

FACTS: The defendant was identified as the suspect in a burglary. Two officers obtained an arrest warrant and went to the defendant's home. They found the defendant laying on his bed and asked him to get dressed and accompany them to the living room. One of the officers, without providing the defendant his Miranda warnings, asked the defendant if he knew why the officers were there. When the defendant responded that he did not, the officer told him that they believed the defendant was involved in the burglary. The defendant admitted he had been at the victim's home. Upon arriving at the police station, the defendant was advised for the first time of his Miranda rights. After indicating that he

understood his rights, the defendant waived them and gave the officers a full written confession. The defendant conceded that the officers made no threats or promises either at his residence or at the station house. At trial, the defendant contended that the first statement (given at the home) should be suppressed because no Miranda warnings had been provided, and that the second statement (given at the police station) should be suppressed under the "fruit of the poisonous tree" doctrine.

ISSUE: Whether the officers' initial failure to read the defendant his Miranda warnings, without more, "tainted" the subsequent confession given by the defendant after he had been advised of, and agreed to waive, his Miranda rights?

HELD: No. The officers' initial failure to read the defendant his Miranda warnings, without more, did not amount to a "tainting" of the subsequent confession.

DISCUSSION: A police officer's failure to administer Miranda warnings creates a presumption of compulsion. However, "a procedural Miranda violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the 'fruit of the poisonous tree' doctrine." While the defendant's unwarned statement must be suppressed, "the admissibility of any subsequent statement should turn solely on whether it is knowingly and voluntarily given." The Court concluded that, "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion" with regard to any subsequent statements. Providing Miranda warnings to a suspect who has previously given a voluntary, but unwarned, statement "ordinarily should suffice to remove the conditions that precluded admission of the earlier statement."

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Missouri v. Seibert,
542 U.S. 600, 124 S. Ct. 2601 (2004)

FACTS: The defendant was arrested for participating in a murder. The officers specifically refrained from providing her with Miranda warnings and took her to the police station. After 30 to 40 minutes or interrogation, she admitted to her role in the crime. The officers gave the defendant a short break, turned on a tape recorder, provided her Miranda warnings, and obtained a signed waiver of those protections. The officer then resumed questioning the defendant and she repeated her admissions. The officer testified that he made a "conscious decision" to withhold Miranda warnings from the defendant; using an interrogation technique he had been taught.

ISSUE: Whether Miranda warnings provided to the defendant after being placed in custody and thoroughly questioned are adequate?

HELD: No. Such "question-first" interrogation tactics invalidate subsequent Miranda warnings.

DISCUSSION: The Court noted that "Miranda addressed 'interrogation practices…likely…to disable [an individual] from making a free and rational choice' about speaking [quoting Miranda v. Arizona]. The purpose of the "question-first" tactic is to seek a particularly opportune moment to provide the warnings after the confession has already been secured. By withholding warnings until after a successful interrogation, they become ineffective in preparing the suspect for the follow up interrogation. The Court found that this "question-first" tactic is likely to lead to confusion on the part of the suspect because of the "perplexity about the reason for discussing the rights as that point, bewilderment being an unpromising frame of mind for knowledgeable discussion."

This case is different from Oregon v. Elstad. In Elstad the Court held that an officer's initial failure to warn was an "oversight" rather than a deliberate design. The connection between the first (pre-Miranda warnings) and second (post-

Miranda warnings) interviews with the police was "speculative and attenuated." In Elstad, the questioning at a station house was significantly different from the short conversation that occurred in the defendant's house. In the case at hand, the pre-Miranda interrogation occurred at the station house and the question was methodical and extensive. At the conclusion of the interrogation, most of the incriminating statements had been divulged. The defendant was only allowed 15 to 20 minutes for a break and the post-Miranda interrogation transpired in the same location.

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Michigan v. Tucker
417 U.S. 433, 94 S. Ct. 2357 (1974)

FACTS: The police arrest the defendant and brought him to the police station for questioning about a rape. The officers asked the defendant if he wanted an attorney and that any statements he made could be used against him in court. They did not tell him he had the right to have an attorney appointed to represent him if he could not afford one himself. The defendant stated that he understood his rights and invoked the name of an associate, Henderson, as an alibi. The police interviewed Henderson. They learned that the defendant was not in his company at the time of the crime and made several incriminating statements to Henderson on the day following the crime. The police only knew of Henderson's identity as a result of the defendant's statements. Henderson's statements were excluded at trial.

ISSUE: Whether the government may use information (Henderson's statements) obtained after providing imperfect Miranda warnings?

HELD: Yes. The purpose of the exclusionary rule is designed to deter future law enforcement behavior.

DISCUSSION: The Court stated that "[J]ust as the law does not require that a defendant receive a perfect trial, only a fair

one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever." The police asked the defendant if he wanted an attorney, and he stated that he did not. "Whatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness Henderson as well."

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United States v. Patane
542 U.S. 630, 124 S. Ct. 2620 (2004)

FACTS: Officers approached the defendant at his home to discuss his possible connection to a gun crime and for violating a restraining order. After placing the defendant under arrest for violating the order, one of the officers began to read him the Miranda warnings. The defendant interrupted the officer, claiming to understand his rights. Without completing the Miranda warnings, the officer began questioning the defendant about a gun. The defendant volunteered several statements. He told the officers the gun was located in his residence and granted consent for its retrieval.

ISSUE: Whether the failure to provide adequate Miranda warnings prohibits the government from using physical evidence discovered as a result of this violation?

HELD: No. The Miranda rule protects against violations of the self-incrimination clause. This clause is not implicated by the admission into evidence the physical evidence found through voluntary statements made by the defendant.

DISCUSSION: The Court held that "[T]he Miranda rule is not a code of police conduct, and police do not violate the Constitution (or even the Miranda rule, for that matter) by mere failures to warn." The primary protection afforded by the self-

incrimination clause is a prohibition on compelling a defendant to testify against himself at trial. "Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial." The Court recognized that the Miranda rule sweeps beyond those protections actually found in the self-incrimination clause and is, therefore, reluctant to extend its reach without significant justification.

In the case at hand, the introduction of non-testimonial fruit of a voluntary statement does not implicate the self-incrimination clause. "The admission of such fruit presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial." Exclusion of the statements themselves serves as a complete remedy for any perceived Miranda violation. Note that the fruit of involuntary (through force or other coercive means) statements will continue to be suppressed.

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Chavez v. Martinez
538 U.S. 760, 123 S. Ct. 1994 (2002)

FACTS: After an altercation with the police that led to his arrest, the defendant was seriously injured. An investigating officer approached the defendant while receiving medical attention at the hospital. The defendant admitted that he took the gun from an officer's holster and pointed it at the police. The defendant also stated "I am not telling you anything until they treat me," though the officer continued the interview. At no point did the officer ever give the defendant Miranda warnings. The defendant was never charged with the crimes but he filed a suit against the officer for depriving him of his Miranda warnings.

ISSUE: Whether an officer can be held liable for failing to provide Miranda warnings to suspect?

HELD: No. The Fifth Amendment's protections prohibit the government from compelling a suspect from becoming a witness against himself in a criminal case. This did not occur.

DISCUSSION: The Court stated that as the defendant was "never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case" a violation of his rights occurred. A criminal case does not take place until there is "the initiation of legal proceedings." The Court also stated that "it is enough to say that police questioning does not constitute a 'case.'" As the defendant was not made to be a witness against himself in a criminal case, no violation of the Constitution occurred. A violation of the constitutional right against self-incrimination does not occur until the defendant has been compelled to be a witness against himself in a criminal case.

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Moran v. Burbine
475 U.S. 412, 106 S. Ct. 1135 (1986)

FACTS: The defendant was arrested for burglary. The government obtained evidence suggesting that the defendant might be also responsible for the murder of a woman in Providence. The officers telephoned the Providence police and an hour later Providence officers arrived at the station to question the defendant. That same evening the defendant's sister telephoned the Public Defender's Office to obtain legal assistance for the defendant on the burglary charge. She was unaware that he was also suspected of involvement in a murder. At 8:15 p.m., an Assistant Public Defender telephoned the station, stated that she would act as the defendant's counsel if the police intended to question him, and was told that he would not be questioned further until the next day. The Public Defender was not informed that the Providence police were present or that the defendant was a murder suspect. Less than an hour later, the Providence police interviewed the defendant after providing him with his Miranda warnings. The defendant admitted to committing the murder. At all relevant times, the defendant was unaware of his sister's efforts to retain counsel and of the attorney's telephone call, but at no time did he request an attorney.

ISSUE: Whether the police violated either the defendant's Miranda rights or his Sixth Amendment right to counsel?

HELD: No. The defendant knowingly and voluntarily waived his Fifth Amendment rights and his Sixth Amendment right to counsel had not yet attached.

DISCUSSION: The Court held that the officer's failure to inform the defendant of the attorney's telephone call did not deprive him of information essential to his ability to knowingly waive his Fifth Amendment rights. Events occurring outside of a suspect's presence and entirely unknown to him have no bearing on the capacity to comprehend and knowingly relinquish a constitutional protection. Once it is demonstrated that a suspect's decision to waive his rights was uncoerced, that he at all times knew he could stand silent and request a lawyer, and that he was aware of the government's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

Further, the conduct of the police did not violate the defendant's Sixth Amendment right to counsel. This right initially attaches only after the first formal charging procedure, whereas the police conduct here occurred before the defendant's initial appearance. The Sixth Amendment becomes applicable only when the government's role shifts from investigation to accusation through the initiation of the adversarial judicial process. Nor was the asserted police misconduct so offensive as to deprive the defendant of the fundamental fairness guaranteed by due process. Although on facts more egregious than those presented here police deception might rise to a level of a due process violation, the conduct challenged here falls short of the kind of misbehavior that shocks the sensibilities of civilized society.

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7. Government Employees

Gardner v. Broderick
392 U.S. 273, 88 S. Ct. 1913 (1968)

FACTS: The defendant was a police officer. He was subpoenaed to testify before a grand jury that was investigating alleged bribery and corruption of police officers. He was advised that the grand jury proposed to examine him concerning the performance of his official duties. The defendant was advised of his privilege against self-incrimination, but was asked to sign a "waiver of immunity" so that the grand jury could continue to look into his potential wrongdoing. He was told that he would be fired if he did not sign. Following his refusal, he was given an administrative hearing and was discharged solely for this refusal.

ISSUE: Whether a government employee who refuses to waive the privilege against self-incrimination may be dismissed because of that refusal?

HELD: No. The threat of the loss of financial position amounts to coercion.

DISCUSSION: The defendant's testimony was demanded before the grand jury in part so that it could be used to prosecute him, and not just for the purpose of securing an accounting of his official duties. The mandate of the self-incrimination clause prohibits the attempt to coerce a waiver of immunity from the defendant. Threatened loss of employment amounts to coercion. However, if a government employee refuses to answer questions relating to performance of his official duties after being granted immunity (his statements could not be used in a criminal case), the privilege against self-incrimination does not prevent his dismissal.

*****

Garrity v. New Jersey
385 U.S. 493, 87 S. Ct. 616 (1967)

FACTS: The defendant was a police officer. A state statute required state employees to answer questions or forfeit their job and pension. The defendant was told:

1) anything he said could be used against him in a criminal prosecution;

2) he could refuse to answer questions if the answers could tend to incriminate him; and

3) if he refused to answer he could be removed from his job.

The defendant made admissions and was convicted of a criminal offense in part based on the evidence consisting of his admissions.

ISSUE: Whether the defendant was deprived of his Fifth Amendment rights in view of the state statute?

HELD: Yes. The protection of the individual under the Fifth Amendment against coerced statements prohibits the use in subsequent criminal proceedings of statements obtained under threat of removal from a job.

DISCUSSION: Coercion that drives a confession can be mental as well as physical. The choice the government gave the defendant was between self-incrimination or job forfeiture. These choices were likely to exert such pressure as to prevent the defendant from making a free and rational choice. Because of the state statute, the defendant had a choice between a "rock and a whirlpool." Making such a choice cannot be voluntary. The protection of the individual under the Fifth Amendment against coerced statements prohibits the use of these statements in subsequent criminal proceedings. However, the Fifth Amendment does not prohibit the use of these statements in administrative or civil matters.

Kalkines v. United States
473 F.2d 1391 (1973)

FACTS: The defendant was a federal employee who was suspected of taking money in return for favorable treatment. There was an on-going criminal investigation of the defendant concurrent with this civil/administrative inquiry. He was called for four interviews. In three of those interviews, the defendant was not told that his answers would not be used against him in a criminal prosecution. In one interview he was told of this fact. The defendant was fired for violating a personnel policy that required employees to provide information in their possession about agency matters and to allow agents to obtain information on employee financial matters.

ISSUE: Whether the defendant was advised of his options and the consequences of his choice and was adequately assured of the protection against the use of his answers or their fruits in any criminal prosecution?

HELD: No. The government must provide sufficient warnings.

DISCUSSION: In citing Gardner v. Broderick, the appellate court reaffirmed that a person cannot be discharged simply because he invokes his Fifth Amendment right against self-incrimination in refusing to respond. The appellate court also cited Garrity v. New Jersey, holding that a later prosecution cannot constitutionally use statements, or their fruits, coerced from a government employee in an earlier disciplinary investigation by threat of removal from office if he fails to answer questions. A government employer can insist on answers or remove an employee for refusal to answer if the employee is adequately informed both that he is subject to discharge for not answering and that his replies (and their fruits) cannot be used against him in a criminal case.

*****

Lefkowitz v. Turley
414 U.S. 70, 94 S. Ct. 316 (1973)

FACTS: New York Municipal law required public contracts to provide that if a contractor refused to answer questions concerning a contract, the contract may be canceled and the contractor shall be disqualified from further public transactions. The defendants were subpoenaed to testify before a grand jury investigating charges of conspiracy. They refused to waive their right to remain silent. The state then initiated proceedings to terminate their current contracts.

ISSUE: Whether the government can compel public contractors to waive their right to be free from self-incrimination?

HELD: No. The government can only secure self-incriminating statements from witnesses if it first agrees that those statements will not be used in criminal prosecutions against the witnesses.

DISCUSSION: The purpose of the Fifth Amendment is to insure that persons are not compelled to give testimony that may prove that they were involved in criminal activity. While the state has a strong public interest in ferreting out fraud and other criminal activity as it relates to their contracts, it does not outweigh the importance of the self-incrimination clause. The Court further stated that a waiver of a right secured under threat of substantial economic sanction is not voluntarily made. If the state desires this testimony, it must ensure that any information gathered would not be used against the defendant in a criminal trial.

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LaChance v. Erickson
522 U.S. 262, 118 S. Ct. 753 (1998)

FACTS: The defendants, federal employees, were subjected to adverse actions by their agencies. Each made false

statements to agency investigators with respect to the misconduct with which they were charged. In each case, the agency additionally charged the false statement as a ground for adverse action, and the action taken against the employees were based in part on the added charge.

ISSUE: Whether the government may take adverse action against an employee for making a false statement during an agency investigation?

HELD: Yes. If answering an agency's investigatory question could expose an employee to a criminal prosecution, he could exercise his Fifth Amendment right to remain silent, bus not lie.

DISCUSSION: The American legal system provides methods for challenging the government's right to ask questions -- lying is not one of them. A citizen can decline to answer the government's question, or answer it honestly. However, a citizen may not knowingly and willfully answer with the government with a falsehood without repercussion.

If answering an agency's investigatory question could expose an employee to a criminal prosecution, he may exercise his Fifth Amendment right to remain silent. The Court stated that "it may well be that an agency, in ascertaining the truth or falsity of the charge, would take into consideration the failure of the employee to respond." The Fifth Amendment does not forbid adverse inferences against parties in civil or administrative actions when they refuse to testify. The Fifth Amendment's right to remain silent applies only to those cases with criminal ramifications.

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NASA v. FLRA
527 U.S. 229, 119 S. Ct. 1979 (1999)

FACTS: The Federal Service Labor-Management Relations Statute (FSLMRS) permits union participation at an employee

examination conducted "by a representative of the agency" if the employee believes that the examination will result in disciplinary action and requests such representation. The NASA Office of Inspector General (OIG) began investigating a government employee. An investigator from the OIG's office interviewed the employee and, while a union representative was allowed to attend the interview, the representative's participation was curtailed. Because of this limitation on the representative's participation, the union filed an unfair labor charge with the Federal Labor Relations Authority (FLRA).

ISSUE: Whether the NASA OIG investigator was a "representative" of NASA under the terms of the FSLMRS, so that the employee had a right to union representation during the interview?

HELD: Yes. The NASA OIG investigator qualified as a "representative" of NASA under the terms of the law.

DISCUSSION: The statute refers to "representatives of the agency," and is not limited solely to those individuals who have management responsibilities. The term "representative" therefore includes OIG investigators of NASA. Because the employee was entitled to union representation, the investigator's action in preventing active union representative participation was a violation of the FSLMRS.

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8. Miranda Exceptions

Harris v. New York
401 U.S. 222, 91 S. Ct. 643 (1971)

FACTS: The defendant was on trial for selling a controlled substance to an undercover police officer. At the time of his arrest, police secured statements from the defendant in violation of his Miranda protections. The defendant testified at trial that the contents of the bag sold to the officer were

represented as a controlled substance but was actually baking powder. This testimony contradicted those statements obtained in violation of his Miranda rights. On cross-examination, the prosecution asked the defendant if he recalled making incriminating statements after his arrest. The defendant testified that he could not recall those statements.

ISSUE: Whether the government can introduce statements that were obtained in violation of the defendant's Miranda rights to impeach his testimony?

HELD: Yes. The government is permitted to introduce statements that were obtained in violation of the defendant's Miranda rights but only for the limited purposes of impeaching his testimony.

DISCUSSION: The prosecution may not use Miranda-tainted statements in its case-in-chief. However, that does not preclude the use of these statements altogether. The Court noted that the impeachment process serves an invaluable function to the jury in assessing a witness' credibility. The defendant's right to testify does not include a right to commit perjury. Provided that the statements were trustworthy, such evidence can be used to impeach the defendant's testimony.

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New York v. Quarles
467 U.S. 649, 104 S. Ct. 2626 (1984)

FACTS: A woman approached two police officers, told them she had just been raped, provided a description of the suspect, and stated that the suspect entered a nearby supermarket carrying a gun. One of the officers entered the supermarket, spotted the defendant (who matched the description given by the victim), and began to chase him. The officer ordered the defendant to stop. Upon frisking the defendant, the officer discovered that he was wearing an empty shoulder holster. After handcuffing the defendant, the officer asked him where

the gun was. The defendant nodded toward some empty cartons and stated that "the gun is over there."

ISSUE: Whether the officer was required to read the defendant his Miranda warnings before asking him where the gun was located?

HELD: No. The interest of public safety allows the officer to ask about the gun without first reading the defendant his Miranda warnings.

DISCUSSION: The defendant was in certainly custody at the time the officer asked him where the gun was located. Nonetheless, the Court held that there is an overriding "public safety" exception to the requirement that Miranda warnings be provided before a custodial interrogation. The Court noted that Miranda warnings are not required when "police officers ask questions reasonably prompted by a concern for public safety." Here, the police officer was "confronted with the immediate necessity of ascertaining the whereabouts of a gun which [he] had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket." While the gun remained concealed in the supermarket, it posed numerous dangers to public safety. The officer "needed an answer to his question not simply to make his case against [the defendant], but to insure that further danger to the public did not result from the concealment of the gun in a public area."

SIXTH AMENDMENT RIGHT TO COUNSEL

A. ATTACHMENT OF RIGHT

Montejo v. Louisiana
129 S. Ct. 2079 (2009)

FACTS: Defendant was charged with first degree murder and appointed counsel at a preliminary hearing. Later that day, police read him his Miranda rights, and he agreed to accompany them to locate the murder weapon. During the trip, the defendant wrote an inculpatory apology letter to the victim's widow. When he returned from the trip, the defendant met his court-appointed lawyer for the first time. The letter was admitted at trial over defense objection.

ISSUE: Whether police may initiate interrogation of a defendant once he has been appointed counsel at arraignment or a similar proceeding?

HELD: Yes. Police may initiate interrogation of a defendant who has been appointed counsel unless he actually requests a lawyer or otherwise asserts his sixth amendment right to counsel.

DISCUSSION: The Court overturned its earlier decision in Michigan v. Jackson in which it held that if police initiate interrogation of a defendant after he has asserted his right to counsel at an arraignment or similar proceeding, any waiver of his right to counsel is invalid. The purpose of the rule was to prevent the police from badgering a defendant into changing his mind about his sixth amendment rights. A defendant who has simply been appointed an attorney and has never asked for counsel, however, has not necessarily made up his mind about his rights. The requirement that police advise a defendant of his Miranda rights prior to custodial interrogation and obtain a valid waiver is sufficient protection against such badgering.

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Rothgery v. Gillespie County, Texas
128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008)

FACTS: Police made a warrantless arrest of Rothgery on a charge of felon in possession of a firearm, relying upon erroneous information that he had been previously convicted of a felony. The police promptly brought the accused before a magistrate judge, where a probable cause determination was made, bail set, and formal notice of the charges given. No prosecutor was involved in or aware of the charges or proceeding. Rothgery was conditionally released on posting a surety bond. Since he could not afford an attorney, he made multiple requests for one to be appointed, all to no avail. Six months later, he was indicted for the same offense, rearrested, and jailed on $15,000 bail. Being indigent and unable to post bail, he remained jailed for three months. After the county did appoint Rothgery counsel, he quickly won a bail reduction, secured Rothgery's release, assembled documentation of the lack of a prior felony conviction, and had the charges dismissed. Rothgery sued under §1983 for violation of his Sixth Amendment right to counsel.

ISSUE: Whether the Sixth Amendment right to counsel always attaches at an accused's initial appearance.

HELD: Yes.

DISCUSSION: Even without a prosecutor's knowledge of, involvement in, or commitment to a charge against an accused, the first appearance of an accused on charges before a judge triggers the Sixth Amendment right to the assistance of counsel. This is true even when the proceeding is not formally labeled an "initial appearance." An accusation filed with a judicial officer is sufficiently formal, and bringing a defendant before a court for initial appearance signals a sufficient commitment to prosecute. Therefore, "[a] criminal defendant's initial appearance before a judicial officer, where he learns of the charges against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger the Sixth Amendment right to counsel."

Kirby v. Illinois
406 U.S. 682, 92 S. Ct. 1877 (1972)

FACTS: The victim of a robbery was called to the police station for the purpose of identifying the defendant as a robber. The defendant had been arrested in connection with an unrelated criminal offense. At the time of the confrontation the defendant had not been advised of the right to counsel, nor did he ask for or receive legal assistance.

ISSUE: Whether the defendant was entitled to representation during the "show-up" under the Sixth Amendment?

HELD: No. The government had not yet initiated the adversarial process against the defendant for the robbery.

DISCUSSION: A person's Sixth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial itself. The right attaches at the time the process begins--whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. The defendant, in this case, had no Sixth Amendment right to counsel.

*****

United States v. Gouveia
467 U.S. 180, 104 S. Ct. 2292 (1984)

FACTS: Four defendants, all of whom were inmates in a federal prison, were placed in administrative detention in individual cells pending the investigation of a fellow inmate's death. They remained in administrative detention without appointed counsel for approximately 19 months before their indictment for murder and their arraignment, when counsel was appointed for them.

ISSUE: Whether the defendants were entitled to appointed counsel during their administrative detention?

HELD: No. The Sixth Amendment right to counsel is not effective until the government has initiated adversarial proceedings.

DISCUSSION: The Court held that the defendants were not constitutionally entitled to the appointment of counsel while they were in administrative segregation and before any adversary judicial proceedings had been initiated against them. The right to counsel attaches only at or after the initiation of adversary judicial proceedings against a defendant. This interpretation of the Sixth Amendment right to counsel is consistent not only with the literal language of the Amendment, which requires the existence of both a "criminal [prosecution]" and an "accused," but also with the purposes that the right to counsel serves, including assuring aid at trial and at "critical" pretrial proceedings when the accused is confronted with the intricacies of criminal law or with the expert advocacy of the public prosecutor, or both.

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B. CRITICAL STAGES

1. Questioning

Brewer v. Williams
430 U.S. 387, 97 S. Ct. 1232 (1977)

FACTS: The defendant was suspected of abducting and murdering a 10-year old girl. He was arrested, arraigned, and committed to jail 160 miles away from the crime scene. His attorney advised him not to make any statements. The police officers accompanying the defendant on his return trip agreed not to question him during the trip. One of the police officers, which knew that the defendant was a former mental patient and was deeply religious, engaged him in a conversation covering a wide range of topics, including religion. The officer delivered

what has been referred to as the "Christian burial speech." He addressed the defendant as "Reverend" and said:

> I want to give you something to think about.... They are predicting several inches of snow for tonight...you are the only person that knows where this little girl's body is.... And since we are going right past the area...I feel we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl.... We should stop and locate it...rather than waiting until... a snowstorm....

The officer stated: "I do not want you to answer me.... Just think about it...." The defendant made incriminating statements and directed the officers to evidence and the victim's body.

ISSUE: Whether the defendant was "questioned" within the meaning of the Sixth Amendment?

HELD: Yes. The officer's actions were designed to motivate the defendant into revealing information.

DISCUSSION: The right to counsel means at least that a person is entitled to the help of a lawyer at or after the time judicial proceedings have been commenced against him, whether by way of formal charge, preliminary hearing, indictment, information or arraignment. The Court found little doubt that the officer deliberately set out to elicit information from the defendant just as surely as, and perhaps more effectively than, if he had formally interrogated him. The "Christian burial speech" was equivalent to questioning. As the defendant had been interrogated without his attorney present, the officer violated his Sixth Amendment right to assistance of counsel.

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Patterson v. Illinois
487 U.S. 285, 108 S. Ct. 2389 (1988)

FACTS: The defendant was arrested as a result of a gang fight in which one member of a rival gang was killed. Following his arrest, the defendant was advised of and waived his Miranda rights. He then acknowledged his involvement in the fight, but denied culpability in the murder. Two days later, while still in custody, the defendant was indicted. The police officer that had initially questioned the defendant removed him from his jail cell and told the defendant that, because he had been indicted, he was being moved. When he learned that one particular gang member had not been indicted, the defendant asked the officer, "Why wasn't he indicted, he did everything?" The defendant then began to explain his involvement in the crime. At that point, the officer interrupted the defendant and handed him a Miranda waiver form. The defendant initialed each of the warnings, signed the waiver form, and gave a lengthy statement implicating himself in the murder. Later that day, the defendant gave a second incriminating statement to a prosecutor. Before doing so, the defendant had again been advised of his Miranda rights and waived them. At trial, the defendant claimed that, because he had been indicted and had a Sixth Amendment right to counsel, the police officer and the attorney could not initiate an interrogation with him. The defendant also contended that while Miranda warnings are sufficient to waive a suspect's Fifth Amendment rights, they are insufficient to waive the Sixth Amendment right to counsel.

ISSUES:

1. Whether once the Sixth Amendment right to counsel attaches the police are prohibited from questioning a suspect?

2. Whether a waiver of Miranda rights is sufficient to waive a suspect's Sixth Amendment right to counsel?

HELD:

1. No. Even though the Sixth Amendment right to counsel attaches the police are not barred from questioning a suspect in all cases.

2. Yes. A suspect can effectively waive his Sixth Amendment right to counsel by waiving those rights via the Miranda waiver form.

DISCUSSION: Because the defendant had been indicted at the time he was interrogated by the officer and the prosecutor, he had a Sixth Amendment right to have the assistance of counsel at both interrogations. However, the fact that the defendant's Sixth Amendment right to counsel was in existence at the time of the questioning does not mean that he exercised that right. In this case, the defendant never sought to exercise his right to have counsel present at either interrogation. "Had the defendant indicated he wanted the assistance of counsel, the authorities' interview with him would have stopped, and further questioning would have been forbidden (unless the defendant called for such a meeting)."

The Court held that "as a general matter, an accused who is admonished with the warnings required by Miranda has been sufficiently appraised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on that basis will be considered a knowing and intelligent one." First, the accused is specifically notified of his right to counsel in the Miranda warnings. Second, the accused is advised of the "ultimate adverse consequence" of proceeding without a lawyer, namely, that any statement he chooses to make can be used against him in any subsequent criminal proceedings. However, the Court made clear that there are circumstances where the post-indictment questioning of a suspect will not survive a Sixth Amendment challenge, even though the challenged practice would be constitutional under Miranda. For example, the Court has "permitted a Miranda waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning," whereas under the Sixth Amendment this waiver would not be valid. Also, "a surreptitious conversation between an undercover police officer and an unindicted suspect would not give rise to any Miranda violation as long as the 'interrogation' was not in a custodial setting; however, once the accused is indicted, such questioning would be prohibited."

United States v. Henry
447 U.S. 264, 100 S. Ct. 2183 (1980)

FACTS: The defendant was indicted and arrested for armed robbery of a bank. While he was in jail pending trial, government agents contacted an informant who was then an inmate confined in the same cellblock as the defendant. An agent instructed the informant to be alert to any statements made by prisoners but not to initiate conversations with or question the defendant regarding the charges against him. After the informant had been released from jail, he reported to the agent that he and the defendant had engaged in conversation and that the defendant made incriminating statements about the robbery. The agent paid the informant for furnishing the information.

ISSUE: Whether the use of the informant infringed on the defendant's Sixth Amendment right to counsel?

HELD: Yes. By intentionally creating a situation likely to induce the defendant to make incriminating statements without the assistance of counsel, the government had violated defendant's Sixth Amendment right to counsel.

DISCUSSION: The Court noted that the defendant's Sixth Amendment right to counsel had attached at the time he made the statements. Further, the Court held that the government's specific mention of the defendant to the undercover informant, who was paid on a contingency fee basis, constituted the type of affirmative steps to secure incriminating information from defendant outside the presence of his counsel. Under these facts, that the informant was acting under instructions as a paid informant for the government, and that the defendant was in custody and under indictment at the time, incriminating statements were "deliberately elicited" from the defendant within the meaning of Massiah. This is the type of evidence collection prohibited by the Sixth Amendment.

Kuhlmann v. Wilson
477 U.S. 436, 106 S. Ct. 2616 (1986)

FACTS: The defendant was arrested for murder. After his initial appearance, he was placed in a holding cell with a police informant. The informant was to listen to the defendant's comments and report them to the police. He was not to ask any questions but to "keep his ears open." The defendant made several incriminating statements to the informant.

ISSUE: Whether the government deprived the defendant of his right to counsel by placing an informant in his jail cell?

HELD: No. The government is not compelled to ignore the statements of a defendant.

DISCUSSION: Once the right to counsel has attached, the government is precluded from deliberately eliciting incriminating statements in the absence of the defendant's lawyer. While the Court held in United States v. Henry that informants that use their positions of trust to elicit remarks are engaged in interrogation, that did not occur here. The defendant must show the police took some action that was deliberately designed to elicit incriminating statements.

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Fellers v. United States
540 U.S. 519, 124 S. Ct. 1019 (2004)

FACTS: A grand jury indicted the defendant for conspiracy to distribute a controlled substance. Police officers went to his home and informed the defendant that he had been indicted, that they had a warrant for his arrest and they wanted to talk to him about his participation. The officers explained that the indictment referred to the defendant's association with others, and named four individuals. The defendant made incriminating statements about his involvement with these individuals. The

officers took the defendant to a local jail and, for the first time, advised him of his Miranda rights. The defendant signed Miranda waiver form and repeated his incriminating remarks.

ISSUE: Whether the statements made at his home were the result of adversarial government questioning in violation of the Sixth Amendment?

HELD: Yes. The government deliberately eliciting incriminating information from a defendant after the adversarial process had been initiated and without counsel present or obtaining the defendant's waiver of counsel.

DISCUSSION: An indictment initiates the adversarial process. From that moment onward, the government is prohibited from deliberately eliciting incriminating information from a defendant unless the defendant waives his right to assistance of counsel (Sixth Amendment). The Court had no doubt that the government deliberately elicited information from the defendant at his home. In fact, the officers told the defendant that they wanted to speak to him about his involvement in the crime for which he had been indicted. These statements were taken in violation of the defendant's Sixth Amendment right to have counsel present.

As for the defendant's statements made at the jailhouse, the Court noted that it had not had the occasion to consider whether the Fifth Amendment's Elstad taint rule (from Oregon v. Elstad (1985)) was applicable to a Sixth Amendment violation. The Court sent this issue back to the appellate court for further review.

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2. Lineups

Gilbert v. California
388 U.S. 263, 87 S. Ct. 1951 (1967)

FACTS: The defendant was suspected of various robberies in which the robber used a handwritten note to demand money.

He was arrested and indicted. Approximately 16 days after his indictment and after he had been appointed counsel, police officers required the defendant to participate in a lineup without notice to his counsel. Numerous witnesses identified the defendant during this lineup and later identified him in court.

ISSUE: Whether the post-indictment lineup, conducted without notice to the defendant's appointed counsel, violated the defendant's Sixth Amendment right to counsel?

HELD: Yes. The defendant had a right to have counsel present at all critical stages, including lineups.

DISCUSSION: "Post-indictment pretrial lineups at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution." Accordingly, the accused had a Sixth Amendment right to counsel at this proceeding. The "conduct of such a lineup without notice to and in the absence of the defendant's appointed counsel denied him his Sixth Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the defendant by witnesses who attended the lineup."

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United States v. Wade
388 U.S. 218, 87 S. Ct. 1926 (1967)

FACTS: Several weeks after the defendant was indicted for robbery he was, without notice to his appointed counsel, placed in a lineup. Each person in the lineup wore strips of tape on his face, as the robber allegedly had done. Upon direction each repeated words like those the robber allegedly had used. Two witnesses identified the defendant as the robber.

ISSUE: Whether the defendant was deprived of his Sixth Amendment right to counsel at the lineup?

HELD: Yes. Once the Sixth Amendment right to counsel attaches, the defendant is entitled to have counsel present at all critical stages.

DISCUSSION: The Sixth Amendment guarantees an accused the right to counsel at trial and any critical confrontation by the prosecution. This includes pretrial proceedings where the results could determine his fate and where the absence of counsel might deny his right to a fair trial. A post-indictment lineup is a critical confrontation at which the defendant is entitled to the aid of counsel. There is a great possibility of unfairness to the accused in lineups because of how they are frequently conducted: the dangers inherent in eyewitness identification, the suggestibility inherent in the context of the confrontations, and the unlikelihood that the accused can reconstruct what occurred in later hearings.

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C. RIGHT TO COUNSEL

Massiah v. United States
377 U.S. 201, 84 S. Ct. 1199 (1964)

FACTS: The defendant was indicted, along with another individual, for violating narcotics laws. The defendant retained a lawyer, pled not guilty, and was released on bail. Shortly after the defendant was released, the other individual agreed to cooperate with the government in their continued investigation of the defendant. This individual permitted an agent to install a radio transmitter under the front seat of his automobile that would allow the agent to monitor conversations carried on in the vehicle. One evening, the individual and the defendant had a lengthy conversation in the vehicle that was overheard by the agent. During this conversation, the defendant made several incriminating statements. The statements made by the defendant were used to convict him at his subsequent trial.

ISSUE: Whether the defendant's statements to the individual, after indictment and in the absence of

his counsel, were obtained in violation of the Sixth Amendment?

HELD: Yes. The defendant has a Sixth Amendment right to the presence of counsel during any government questioning during the adversarial process related to those charges pending in the adversarial process.

DISCUSSION: A defendant's Sixth Amendment right to counsel attaches at the beginning of the "adversarial judicial process." Once the adversarial judicial process begins, a defendant has a right to have counsel present at all "critical stages" of the process, including when any agent of the government questions the defendant. In this case, the defendant was denied the basic protections of the Sixth Amendment "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."

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Michigan v. Jackson
475 U.S. 625, 106 S. Ct. 1404 (1986)

FACTS: The defendant was involved in a murder conspiracy. Arrested on an unrelated charge, he made a series of six statements to police officers prior to his initial appearance. During his initial appearance, the defendant requested that counsel be appointed for him. The following morning, before he had an opportunity to consult with counsel, two police officers approached the defendant and obtained another statement from him to "confirm" that he was the person who shot the victim. As with his six previous statements, the defendant was provided his Miranda warnings and waived them prior to this seventh statement. The defendant was convicted of second-degree murder and conspiracy to commit second-degree murder.

ISSUES: 1. Whether the defendant's Sixth Amendment right to counsel was violated by the police-initiated questioning that took place after the defendant was arraigned and formally requested counsel?

2. Whether the defendant's waiver of his Sixth Amendment right at the post-arraignment questioning was valid?

HELD: 1. Yes. The defendant's Sixth Amendment right to counsel was violated by the police-initiated questioning that took place after the defendant was arraigned and formally requested counsel.

2. No. The defendant's assertion of his Sixth Amendment rights precludes an effective waiver.

DISCUSSION: In Edwards v. Arizona, the Court held that "an accused person in custody who has expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." While that case dealt with a defendant's Fifth Amendment right to counsel at custodial interrogations, the same rule is applicable in cases involving a defendant's Sixth Amendment right to counsel. The Sixth Amendment right to counsel attaches at the initiation of the "adversarial judicial process," which includes indictment, information, or the initial appearance. Once the right attaches, a defendant is entitled to have counsel present at all "critical stages" thereafter, including questioning by law enforcement officers. Once the Sixth Amendment right to counsel attaches, "the right to be furnished counsel does not depend upon a request by the defendant." The rule barring police-initiated questioning after a defendant has invoked his Sixth Amendment right to counsel applies even where the police may not know that a defendant has requested counsel at arraignment.

The Court, citing Edwards, noted that "just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in a Sixth Amendment analysis." Thus, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."

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D. CRIME SPECIFIC

Maine v. Moulton
474 U.S. 159, 106 S. Ct. 477 (1985)

FACTS: The defendant and co-defendant Colson were indicted for possession of stolen automobiles and parts. They appeared with their attorneys at arraignment and were released on bail. Before trial, Colson and his lawyers met with the police and Colson confessed to his participation with the defendant in the pending charges. He agreed to testify against the defendant and cooperate with the investigation. Colson also consented to having a recording device placed on his telephone to record his conversations with the defendant and to wear a body wire transmitter to record a meeting with the defendant during which he would discuss the pending charges. The defendant made incriminating statements during an encounter with Colson.

ISSUE: Whether the defendant's Sixth Amendment right to counsel was violated by admission at trial of incriminating statements made to a government informant after indictment?

HELD: Yes. The defendant has a right to the presence of counsel for any government questioning that occurs after the Sixth Amendment has attached.

DISCUSSION: The Sixth Amendment guarantees the right to assistance of counsel. This assistance is not limited to participation in the trial but encompasses all critical stages (court hearings, lineups and government questioning). The right to counsel attaches at or after the time that adversarial judicial proceedings have been initiated. This occurs at the indictment or the filing of an information. This can occur at the initial appearance if the defendant expresses a desire to be represented by counsel. The co-defendant's participation in the meeting was the "functional equivalent" of interrogation and violates this Sixth Amendment right. However, incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are admissible at a trial for those offenses.

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Texas v. Cobb
532 U.S. 162, 121 S. Ct. 1335 (2001)

FACTS: While under arrest for an unrelated offense, the defendant confessed to a home burglary. However, he denied knowledge of a woman and child's disappearance from the home. He was indicted for the burglary, and counsel was appointed to represent him. He later confessed to his father that he had killed the woman and child, and his father then contacted the police. While in custody, the defendant waived his Miranda rights and confessed to the murders. This confession was used against him in the murder trial. The defendant argued that the government deprived him of his Sixth Amendment right to counsel since the adversarial process had been initiated for a related offense (the burglary).

ISSUE: Whether the officers must provide counsel for closely related but uncharged criminal matters if counsel already represents the defendant?

HELD: No. The Sixth Amendment right to counsel only attaches to the crimes for which a defendant has been formally charged.

DISCUSSION: The Supreme Court held that, regardless of whether the murder charge was closely related factually to the burglary offense, the right to counsel was specific to the charged offense. Since the two offenses required different elements of proof, they are separate offenses. As prosecution had not been initiated for the murder offense at the time of the interrogation, no Sixth Amendment right to counsel had attached to it. The defendant had no right to the presence of his previously appointed counsel during the interrogation concerning the murder charge, and the confession resulting from that interrogation was admissible.

Although the Sixth Amendment right to counsel clearly attaches only to charged offenses, the Court has recognized that the definition of an "offense" is not limited to the four corners of a charging document. The test to determine whether there are two different offenses or only one is whether each provision requires proof of a fact which the other does not. See Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180. The Blockburger test has been applied to delineate the scope of the Fifth Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the "same offense." When the Sixth Amendment right to counsel attaches, it encompasses offenses that, even if not formally charged, would be considered the same offense under the Blockburger test.

ADDITIONAL CASES OF INTEREST

I. USE OF FORCE

Graham v. Connor
490 U.S. 386, 109 S. Ct. 1865 (1989)

FACTS: Graham, a diabetic, felt the onset of an insulin reaction and desired to purchase some orange juice to counteract the reaction. Berry, a friend of the Graham's, drove him to a convenience store. Graham, concerned about the number of people ahead of him at the checkout line, rushed out of the store and returned to Berry's automobile. He asked Berry to take him to a friend's house. Officer Connor observed Graham hastily enter and leave the store and became suspicious. Officer Connor made an investigative stop of the automobile. Although Berry explained that his friend was suffering from a "sugar reaction," the officer ordered Berry and Graham to wait while he found out what happened in the convenience store. When the officer returned to his patrol car to call for backup, Graham got out of the car, ran around it twice, and sat down on the curb, where he passed out briefly. A number of other police officers responded to the officer's request for backup. One of the officers rolled Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry's pleas to get him some sugar. Another officer said "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M. F. but drunk. Lock the S.B. up." Several officers then lifted Graham up from behind, carried him over to Berry's car, and placed him face down on its hood. Regaining consciousness, Graham asked the officers to check in his wallet for a diabetic decal that he carried. One of the officers told him to "shut up" and shoved his face down against the hood of the car. Four officers grabbed Graham and threw him headfirst into the police car. A friend of Graham's brought some orange juice to the car, but the officers refused to let him have it. After receiving a report that Graham had done nothing wrong at the convenience store, the officers drove him home and released him. Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he

also claimed to have developed a permanent loud ringing in his right ear. He sued the officers under Title 42 U.S.C. § 1983, alleging that they had used excessive force in making the investigatory stop.

ISSUE: Whether the constitutional standard governs a citizen's claim that a law enforcement officer used excessive force is "reasonableness?"

HELD: Yes. Claims of excessive use of force in the course of making an arrest, investigatory stop, or other "seizure" of a person are examined under the Fourth Amendment's "objective reasonableness" standard.

DISCUSSION: When an excessive force claim arises in the context of an arrest or investigatory stop, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons ... against unreasonable ... seizures." Accordingly, all claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other "seizure" should be analyzed under the Fourth Amendment and its "reasonableness" standard. Further, the "reasonableness" of a particular seizure depends not only on when it is made, but also on how it is carried out. The Supreme Court has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to affect it.

In determining whether the use of force in a given situation was "reasonable," courts consider all of the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. For example, the

Fourth Amendment is not necessarily violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation. Finally, as in other Fourth Amendment contexts, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

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Tennessee v. Garner
471 U.S. 1, 105 S. Ct. 1694 (1985)

FACTS: At about 10:45 p.m. two police officers were dispatched to answer a "prowler inside call." Upon arriving at the scene they saw a woman standing on her porch and gesturing toward the adjacent house. She told them she had heard glass breaking and that "they" or "someone" was breaking in next door. While one of the officers radioed the dispatcher to say that they were on the scene, the second officer went behind the house. He heard a door slam and saw someone run across the backyard. The fleeing suspect, the defendant, stopped at a 6-feet-high chain link fence at the edge of the yard. With the aid of a flashlight, the officer was able to see his face and hands. He saw no sign of a weapon, and, though not certain, was "reasonably sure" and "figured" that the defendant was unarmed. The officer testified he thought the defendant was 17 or 18 years old and about 5'5" or 5"7" tall. In fact, the defendant, an eighth-grader, was 15. He was 5'4" tall and weighed somewhere around 100 or 110 pounds. While the

defendant was crouched at the base of the fence, the officer called out "police, halt" and took a few steps toward him. The defendant began to climb over the fence. Convinced that if he made it over the fence he would elude capture, the officer shot him. The bullet hit the defendant in the back of the head. The defendant later died at a hospital. In using deadly force to prevent the escape, the officer was acting under the authority of a state statute and pursuant to his department's policy. The statute provided that "[if], after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." The department policy was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary. The defendant's father brought suit under Title 42 U.S.C. § 1983, alleging, among other things, that his son's Fourth Amendment rights had been violated by the use of deadly force in this situation.

ISSUE: Whether deadly force may be used to prevent the escape of an apparently unarmed suspected felon?

HELD: No. Deadly force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

DISCUSSION: Whenever an officer restrains the freedom of a person to walk away, he has "seized" that person. Apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. To determine the constitutionality of a seizure a court must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. The "reasonableness" of a seizure depends on not only when a seizure is made, but also how it is carried out.

Notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The use of deadly force to

prevent the escape of all felony suspects, without considering the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead. For this reason, the state statute was found to be unconstitutional insofar as it authorized the use of deadly force against such fleeing suspects.

It was not, however, unconstitutional on its face. Where an officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatened the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

In this case, the officer could not reasonably have believed that the defendant - young, slight, and unarmed - posed any threat. Indeed, the officer never attempted to justify his actions on any basis other than the need to prevent an escape. While the defendant was suspected of burglary, this fact could not, without regard to the other circumstances, automatically justify the use of deadly force. The officer did not have probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others.

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Scott v. Harris
127 S. Ct. 1769 (2007)

FACTS: In an effort to stop a speeding motorist, a police officer activated his blue flashing lights. The suspect sped away and the officer radioed for assistance and gave chase. The pursuit resulted in dangerous maneuvers by the suspect, including damage to one of the officers' vehicles. "Six minutes and nearly 10 miles after the chase had begun," a police officer attempted a maneuver designed to cause the fleeing vehicle to spin to a stop. The result, however, was that the officer applied his bumper to the rear of the suspect's vehicle, who lost control of his vehicle and crashed. The suspect was "badly injured and was rendered a quadriplegic."

ISSUE: Whether it is reasonable for an officer to take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?

HELD: Yes. "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."

DISCUSSION: The defendant's actions "posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." The officers were justified in taking some action. The Court asked "how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person?" An appropriate analysis includes taking "into account not only the number of lives at risk, but also their relative culpability." In this instance, the defendant's actions place a significant number of persons in danger, and the officers' range of reasonable responses was limited. In this instance, ramming the vehicle was reasonable under the Fourth Amendment.

Saucier v. Katz
533 U.S. 194, 121 S. Ct. 2151 (2001)

FACTS: Katz attended a speech by the Vice President to voice opposition to the possibility that an Army hospital might be used for animal experiments. During the speech, Katz attempted to unfurl a banner. Military police officers had been warned by superiors of the possibility of demonstrations, and Katz had been identified as a potential protestor. As Katz began placing the banner on the side of a fence, the military police officers grabbed him from behind, took the banner, and rushed him out of the area. Officers had each of Katz's arms, half-walking, half-dragging him, with his feet barely touching the ground. Katz was wearing a visible, knee-high leg brace, although one of the officers testified he did not remember noticing it at the time. The officers took Katz to a nearby military van, where, Katz claimed, he was shoved or thrown inside. As a result of the shove, Katz fell to the floor of the van, where he caught himself just in time to avoid any injury. At least one other protester was arrested at about the same time as Katz. The officers drove Katz to a military police station, held him for a brief time, and then released him. Katz sued one of the officers for using excessive force during this encounter.

ISSUE: Whether the military police officer was entitled to qualified immunity on the claim of excessive force brought by Katz?

HELD: Yes. The military police officer was entitled to qualified immunity on the claim of excessive force because there was no clearly established rule that prevented the officer from using the amount of force that he did in arresting Katz.

DISCUSSION: Even if a constitutional violation occurred, an officer is still entitled to qualified immunity if the right violated was not clearly established at the time. In determining whether a right is clearly established for qualified immunity purposes, the contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing

violates that right. In excessive force cases, an officer might correctly perceive all of the relevant facts, but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

In this case, the Court first assumed, for the sake of argument, that a Fourth Amendment violation had occurred. They then addressed whether the military officer should reasonably have known that the force he used in this instance (primarily the shove of Katz into the van, although also in the manner in which he hurried Katz away from the speaking area) was excessive under the circumstances. In finding that the officer's conduct did not violate a clearly established right, the Court relied upon the following: First, the officer did not know the full extent of the threat Katz posed or how many other persons there might be who, in concert with Katz, posed a threat to the security of the Vice President. Second, there were other potential protestors in the crowd, and at least one other individual was arrested and placed into the van with Katz. Third, in carrying out the detention, as it was assumed the officers had the right to do, the officer was required to recognize the necessity to protect the Vice President by securing Katz and restoring order to the scene. Accordingly, it cannot be said there was a clearly established rule that would prohibit using the force the officer did to place Katz into the van to accomplish these objectives. Finally, regarding the shove into the van, the Court reiterated that not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment.

II. CIVIL LIABILITY

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics
403 U.S. 388, 91 S. Ct. 1999 (1971)

FACTS: Bivens sued federal agents under Title 42 U.S.C. § 1983 after they entered his apartment without a warrant. The agents searched his apartment, then placed him under arrest for violating narcotics laws. They placed Bivens in manacles in the presence of his wife and children. They also threatened to arrest his family. The agents took Bivens to the courthouse, then their headquarters. He was interrogated, fingerprinted, photographed, subjected to a visual strip search, and booked. The charges against Bivens were ultimately dismissed. Bivens alleged the search and his arrest were conducted "in an unreasonable manner." Initially, the court dismissed Bivens' lawsuit because Title 42 U.S.C. § 1983 was inapplicable to actions performed by federal officials. This ruling was affirmed by the court of appeals, and Bivens appealed to the Supreme Court.

ISSUE: Whether a violation of the Fourth Amendment by a federal official acting under color of federal authority gives rise to a cause of action for damages in federal court?

HELD: Yes. When a federal official acting under color of law violates the Fourth Amendment, a cause of action for damages may be pursued in federal court.

DISCUSSION: The Fourth Amendment guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And where federally protected rights have been violated, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief to those who have been victimized. While the Fourth Amendment does not provide for its enforcement by an

award of money damages for the consequences of its violation, it is well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. Here, Bivens' complaint stated a cause of action under the Fourth Amendment, and he was entitled to recover money damages for any injuries he suffered as a result of the agents' violation of that Amendment.

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County Of Sacramento v. Lewis
523 U.S. 833; 118 S. Ct. 1708 (1998)

FACTS: After a failed attempt to stop two suspects on a motorcycle, a police officer pursued them at a high rate of speed. For 75 seconds over a course of 1.3 miles in a residential neighborhood, the motorcycle wove in and out of oncoming traffic, forcing two cars and a bicycle to swerve off of the road. The motorcycle and patrol car reached speeds up to 100 miles an hour, with the officer following at a distance as short as 100 feet (at that speed, his car would have required 650 feet to stop). The pursuit ended after the motorcycle tipped over. By the time the officer slammed on his brakes, the operator of the motorcycle was out of the way, but his passenger was not. The patrol car skidded into him at 40 miles an hour, causing fatal injuries. The decedent's family filed a lawsuit under Title 42 U.S.C. § 1983, alleging that decedent's Fourteenth Amendment substantive due process right to life had been violated.

ISSUE: Whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process in a high-speed automobile chase aimed at apprehending a suspected offender?

HELD: It depends. In high-speed automobile chases, the standard to be used in determining whether a

violation of the Fourteenth Amendment's substantive due process clause occurred is whether the officer's conducted "shocks the conscience."

DISCUSSION: The Supreme Court first noted that the Fourth Amendment's "objective reasonableness" test was inapplicable in this case, because no "seizure" had taken place. A police pursuit in attempting to seize a person does not amount to a "seizure" within the meaning of the Fourth Amendment. Similarly, no Fourth Amendment seizure would take place where a pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit, but accidentally stopped the suspect by crashing into him. A Fourth Amendment "seizure" occurs only when there is a governmental termination of freedom of movement through means intentionally applied.

Substantive due process claims do protect the individual against arbitrary action of government officials. The Court has repeatedly recognized the "shocks the conscience" standard as appropriate in due process cases, and found it applicable here. In pursuit cases, a police officer deciding whether to give chase must balance on one hand the need to stop a suspect, and, on the other, the high-speed threat to all persons within the pursuit range. Accordingly, the Court held that high-speed chases with no intent to harm suspects do not give rise to liability under the Fourteenth Amendment. Here, the officer was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause the motorcycle operator's high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at excessive speeds. While prudence would have repressed the officer's response, the officer's instinct was to do his job as a law enforcement officer.

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Malley v. Briggs
475 U.S. 335; 106 S. Ct. 1092 (1986)

FACTS: State Police were conducting a court-authorized wiretap on the telephone of a suspect. A log sheet of one of the calls intercepted during this operation appeared to contain incriminating references to marijuana use. The trooper in charge of the investigation reviewed this log sheet and another from a second call monitored the same day. Based on these two calls, he prepared felony complaints, along with unsigned warrants for the arrest of various people, and supporting affidavits describing the two intercepted calls. The judge issued over 20 arrest warrants for various individuals identified through the wiretap evidence. Ultimately, charges against Briggs and others were dropped when the grand jury to which the case was presented did not return an indictment. A lawsuit was then brought pursuant to Title 42 U.S.C. § 1983, alleging that, by applying for arrest warrants, the state trooper had violated their Fourth and Fourteenth Amendment rights.

ISSUE: Whether immunity is proper for a law enforcement officer who causes a person to be unconstitutionally arrested by presenting a judge with a complaint and a supporting affidavit that fails to establish probable cause?

HELD: Yes. A law enforcement officer who causes a person to be unconstitutionally arrested by presenting a judge with a complaint and supporting affidavit that fails to establish probable cause is entitled to "qualified" immunity, rather than "absolute" immunity.

DISCUSSION: The Court noted that, as the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law. Thus, a defendant will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue. However, if officers of reasonable competence could disagree on this issue, immunity should be granted.

Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost. The appropriate question to be answered is such cases is: whether a reasonably well-trained officer in the defendant's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. It is reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.

III. BRADY MATERIAL

Brady v. Maryland
373 U.S. 83; 83 S. Ct. 1194 (1963)

FACTS: Brady and his companion, Boblit, were found guilty of murder in the first degree and were sentenced to death. Their trials were separate, with Brady being tried first. At his trial, Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment." Prior to the trial, Brady's counsel had requested the prosecution to allow him to examine Boblit's out of court statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit confessed to the actual homicide, was not provided to the defense and did not come to Brady's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed. Brady moved for a new trial based on the newly discovered evidence. The appellate court found the suppression of the statement by the prosecutor violated Brady's Due Process rights, and remanded the case for a retrial on the question of punishment, but not guilt.

ISSUE: Did the prosecution's failure to provide Boblit's confession to Brady violate the Due Process Clause of the Fourteenth Amendment?

HELD: Yes. The prosecution's failure to provide evidence to the defendant that would have been useful to the defense violated the Due Process Clause of the Fourteenth Amendment.

DISCUSSION: Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily

on the defendant. Accordingly, the Court held the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

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Banks v. Dretke
540 U.S. 668, 124 S. Ct. 1256 (2004)

FACTS: Before the defendant's murder trial, the government provided the defendant with the following statement "[W]e will, without the necessity of motions[,] provide you with all discovery to which you are entitled." Thereafter, the government presented two witnesses to the jury and failed to draw attention to their false testimony. One witness falsely stated he was not a paid informant and another witness perjured himself about his pretrial preparation. The witness testified on three occasions that "he had not talked to anyone about his testimony." However, the witness actually engaged in at least one "pretrial practice sessio[n]" in which prosecutors and a police officer coached him.

ISSUE: Whether the government's concealment of offering a witness that was a paid informant and its involvement in coaching a witness is exculpatory evidence subject to Brady v. Maryland?

HELD: Yes. The government violates the principles of due process by allowing perjured testimony to be presented without challenge.

DISCUSSION: In Brady v. Maryland (1963), the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In Strickler v. Greene, 527 U.S. 263 (1999), the Court further clarified that to establish an effective Brady claim, (1) the

evidence must be favorable to the accused (2) the evidence must have been suppressed by the government (intentionally or unintentionally) and (3) the accused must have been harmed as a result.

In his case, the Court found that the defendant demonstrated the standards for a Brady claim. A government witness that is a paid informant qualifies as evidence advantageous to the defendant. The prosecution repeatedly allowed false testimony to stand uncorrected. The government represented that it held nothing back yet was silent when its witnesses perjured themselves. The Court concluded that the defendant was harmed by these suppressions as he could not properly impeach key witnesses for the government.

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Giglio v. United States
405 U.S. 150; 92 S. Ct. 763 (1972)

FACTS: Giglio was charged with passing forged money orders. At his trial, the key Government's key witness was named Taliento. Under cross-examination, Taliento denied that any promises had been made to him in exchange for his testimony, and the Government attorney stated in his summation to the jury that Taliento "received no promises that he would not be indicted." Giglio was convicted and sentenced to five years' imprisonment. While his appeal was pending, Giglio's defense counsel discovered new evidence indicating the Government had in fact failed to disclose an alleged promise made to Taliento that he would not be prosecuted if he testified for the Government. The defense made a motion for a new trial based upon this newly discovered evidence. In their response opposing this request, the Government confirmed Giglio's claim that a promise was made to Taliento by one assistant, DiPaola, that if he testified before the grand jury and at trial he would not be prosecuted. DiPaola presented the Government's case to the grand jury, but did not try the case in the District Court, and Golden, the assistant who took over the case for trial, filed

an affidavit stating that DiPaola assured him before the trial that no promises of immunity had been made to Taliento. The United States Attorney filed an affidavit stating that he had personally consulted with Taliento and his attorney shortly before trial to emphasize that Taliento would definitely be prosecuted if he did not testify and that if he did testify he would be obliged to rely on the "good judgment and conscience of the Government" as to whether he would be prosecuted.

ISSUE: Was the government's failure to disclose evidence that could affect the credibility of its witness a violation of the Due Process Clause?

HELD: Yes. The government must disclose evidence that could affect the credibility of its witness.

DISCUSSION: In Brady v. Maryland, the Supreme Court held the suppression of material evidence justifies a new trial irrespective of the good or bad faith of the prosecution. When the reliability of a given witness may determine guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule. The Court does not, however, automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense, but not likely to have changed the verdict. A finding of materiality of the evidence is required under Brady. A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. Whether the nondisclosure in this case was a result of negligence or design was irrelevant. It is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. Further, the Government's case against Giglio depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility.

IV. OTHER CASES

Riverside v. McLaughlin
500 U.S. 44, 111 S. Ct. 1661 (1991)

FACTS: The County of Riverside, California combined probable cause determinations with its arraignment procedures. These arraignments must be conducted without unnecessary delay and, in any event, within two business days of arrest.

ISSUE: Whether the government is providing the defendant with an initial appearance "without unnecessary delay?"

HELD: It depends. There is a presumption that initial appearances occurring within 48 hours of arrest are timely.

DISCUSSION: The Court previously deciding against mandating jurisdictions to provide probable cause hearings immediately after taking a suspect into custody and completing booking procedures. The Court stated "…the Fourth Amendment permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system." While expressing a desire to avoid providing a specific timeframe, the Court concluded that "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of…" the Fourth Amendment. The Court found that initial appearances that occur within 48 hours of arrest are presumed to be timely. The "burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance" after 48 hours have elapsed.

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Sanchez-Llamas v. Oregon
548 U.S. 331, 126 S. Ct. 2669 (2006)

FACTS: After a gun battle with police in which an officer was wounded, police arrested the defendant, a Mexican national. Police interrogated him through use of an interpreter, complying with the requirements of Miranda. However, police never informed him of his right to have the Mexican consulate notified of his detention, as required under Article 36 of the Vienna Convention on Consular Relations (VCCR). The defendant made admissions that the state sought to use at his trial for attempted murder and related offenses. The trial court denied a pre-trial motion to suppress the statements on grounds of involuntariness and the VCCR violation.

ISSUE: Whether violation of the consular notification provision of the VCCR requires suppression of a suspect's statements to police.

HELD: No. Unlike violations of Fifth and Sixth Amendment constitutional rights, violations of a treaty obligation under the VCCR do require suppression or exclusion of evidence.

DISCUSSION: The VCCR itself does not mandate exclusion of evidence or any other specific remedy for violations of its provisions. Instead, U.S. law determines whether the exclusionary rule applies. U.S. courts do not invoke the remedy of exclusion lightly, due to the negative impact on law enforcement objectives and the court's own truth-finding function, and therefore primarily limit its use to deter constitutional violations in the gathering of evidence. The VCCR notification provision has little connection to evidence or statements obtained by police. Foreign nationals in U.S. Territory have all due process protections, including Fifth and Sixth Amendment rights, which adequately protect the same interests as the VCCR provision. A defendant whose consular notification rights under the VCCR were violated may raise a broader challenge to the voluntariness of any statements obtained.

ADDITIONAL RESOURCES

The United States Constitution

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE. I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. [1] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as

they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. [1] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

[2] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5] The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. [1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. [1] Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[2] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

[3] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. [1] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION. 7. [1] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections

to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3] Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2] To borrow Money on the credit of the United States;

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[7] To establish Post Offices and post Roads;

[8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9] To constitute Tribunals inferior to the supreme Court;

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13] To provide and maintain a Navy;

[14] To make Rules for the Government and Regulation of the land and naval Forces;

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square)

as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;--And

[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9. [1] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2] The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3] No Bill of Attainder or ex post facto Law shall be passed.

[4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5] No Tax or Duty shall be laid on Articles exported from any State.

[6] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

[7] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10. [1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

[3] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE. II.

Section 1. [1] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

[2] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[3] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

[4] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[5] No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[6] In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and

Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[8] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. [1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[2] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE. III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the

same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. [1] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE. IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3. [1] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States,

or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE. VI.

[1] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV.

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

AMENDMENT V.

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

AMENDMENT VI.
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII.
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII.
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX.
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X.
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI.
The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII.

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;--The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.--The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such numbers be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But

Congress may by a vote of two-thirds of each House, remove such disability.
SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
SECTION 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV.
SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
SECTION 2. The Congress shall have the power to enforce this article by appropriate legislation.

AMENDMENT XVI.
The Congress shall have power to lay and collect taxes on incomes, from whatever sources derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII.
The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.
When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to

make temporary appointments until the people fill the vacancies by election as the legislature may direct.
This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

AMENDMENT XVIII.
SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
SECTION. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
SECTION. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XIX.
The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.
Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX.
SECTION 1. The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.
SECTION. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.

SECTION. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.
SECTION. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.
SECTION. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.
SECTION. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT XXI.
SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XXII.

SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more that once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

SECTION. 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT XXIII.

SECTION 1. The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

SECTION. 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXIV.

SECTION 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by

the United States or any State by reason of failure to pay poll tax or any other tax.
SECTION. 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXV.
SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.
SECTION. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take the office upon confirmation by a majority vote of both houses of Congress.
SECTION. 3. Whenever the President transmits to the President Pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.
SECTION. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmits to the President Pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.
Thereafter, when the President transmits to the President Pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmits within four days to the President Pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the

Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

AMENDMENT XXVI.

SECTION 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXVII.

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

Department of Justice

U.S. Department of Justice
Civil Rights Division

Guidance Regarding The
Use Of Race By Federal Law Enforcement Agencies

June 2003

Introduction and Executive Summary

In his February 27, 2001, Address to a Joint Session of Congress, President George W. Bush declared that racial profiling is "wrong and we will end it in America." He directed the Attorney General to review the use by Federal law enforcement authorities of race as a factor in conducting stops, searches and other law enforcement investigative procedures. The Attorney General, in turn, instructed the Civil Rights Division to develop guidance for Federal officials to ensure an end to racial profiling in law enforcement.

"Racial profiling" at its core concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.

Racial profiling in law enforcement is not merely wrong, but also ineffective. Race-based assumptions in law enforcement perpetuate negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair our efforts to maintain a fair and just society.[1]

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[1] See United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000) ("Stops based on race or ethnic appearance send the underlying message to

The use of race as the basis for law enforcement decision-making clearly has a terrible cost, both to the individuals who suffer invidious discrimination and to the Nation, whose goal of "liberty and justice for all" recedes with every act of such discrimination. For this reason, this guidance in many cases imposes more restrictions on the consideration of race and ethnicity in Federal law enforcement than the Constitution requires.[2] This guidance prohibits racial profiling in law enforcement practices without hindering the important work of our Nation's public safety officials, particularly the intensified anti-terrorism efforts precipitated by the events of September 11, 2001.

I. Traditional Law Enforcement Activities.

Two standards in combination should guide use by Federal law enforcement authorities of race or ethnicity in law enforcement activities:

- **In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful.**

- **In conducting activities in connection with a specific investigation, Federal law enforcement officers may consider race and ethnicity only to the extent that there is trustworthy information, relevant**

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all our citizens that those who are not white are judged by the color of their skin alone.").

[2] This guidance is intended only to improve the internal management of the executive branch. It is not intended to, and does not, create any right, benefit, trust, or responsibility, whether substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities, entities, officers, employees, or agents, or any person, nor does it create any right of review in an administrative, judicial or any other proceeding.

to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization. This standard applies even where the use of race or ethnicity might otherwise be lawful.

II. National Security and Border Integrity.

The above standards do not affect current Federal policy with respect to law enforcement activities and other efforts to defend and safeguard against threats to national security or the integrity of the Nation's borders,[3] to which the following applies:

- **In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation's borders, Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.**

Any questions arising under these standards should be directed to the Department of Justice.

The Constitutional Framework

"[T]he Constitution prohibits selective enforcement of the law based on considerations such as race." Whren v. United States, 517 U.S. 806, 813 (1996). Thus, for example, the decision of federal prosecutors "whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'"[4] United States v. Armstrong,

[3] This guidance document does not apply to U.S. military, intelligence, protective or diplomatic activities conducted consistent with the Constitution and applicable Federal law.

[4] These same principles do not necessarily apply to classifications based on alienage. For example, Congress, in the exercise of its broad powers over immigration, has enacted a number of provisions that apply only to aliens, and enforcement of such provisions properly entails consideration of a person's alien status.

517 U.S. 456, 464 (1996) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)). The same is true of Federal law enforcement officers. Federal courts repeatedly have held that any general policy of "utiliz[ing] impermissible racial classifications in determining whom to stop, detain, and search" would violate the Equal Protection Clause. Chavez v. Illinois State Police, 251 F.3d 612, 635 (7th Cir. 2001). As the Sixth Circuit has explained, "[i]f law enforcement adopts a policy, employs a practice, or in a given situation takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred." United States v. Avery, 137 F.3d 343, 355 (6th Cir. 1997). "A person cannot become the target of a police investigation solely on the basis of skin color. Such selective law enforcement is forbidden." Id. at 354.

As the Supreme Court has held, this constitutional prohibition against selective enforcement of the law based on race "draw[s] on 'ordinary equal protection standards.'" Armstrong, 517 U.S. at 465 (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)). Thus, impermissible selective enforcement based on race occurs when the challenged policy has "'a discriminatory effect and . . . was motivated by a discriminatory purpose.'" Id. (quoting Wayte, 470 U.S. at 608).[5] Put simply, "to the extent that race is used as a proxy" for criminality, "a racial stereotype requiring strict scrutiny is in operation." Cf. Bush v. Vera, 517 U.S. at 968 (plurality).

I. Guidance For Federal Officials Engaged In Law Enforcement Activities

A. Routine or Spontaneous Activities in Domestic Law Enforcement

[5] Invidious discrimination is not necessarily present whenever there is a "disproportion" between the racial composition of the pool of persons prosecuted and the general public at large; rather, the focus must be the pool of "similarly situated individuals of a different race [who] were not prosecuted." Armstrong, 517 U.S. at 465 (emphasis added). "[R]acial disproportions in the level of prosecutions for a particular crime may be unobjectionable if they merely reflect racial disproportions in the commission of that crime." Bush v. Vera, 517 U.S. 952, 968 (1996) (plurality).

In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful.

Federal law enforcement agencies and officers sometimes engage in law enforcement activities, such as traffic and foot patrols, that generally do not involve either the ongoing investigation of specific criminal activities or the prevention of catastrophic events or harm to the national security. Rather, their activities are typified by spontaneous action in response to the activities of individuals whom they happen to encounter in the course of their patrols and about whom they have no information other than their observations. These general enforcement responsibilities should be carried out without any consideration of race or ethnicity.

> **Example:** While parked by the side of the George Washington Parkway, a Park Police Officer notices that nearly all vehicles on the road are exceeding the posted speed limit. Although each such vehicle is committing an infraction that would legally justify a stop, the officer may not use race or ethnicity as a factor in deciding which motorists to pull over. Likewise, the officer may not use race or ethnicity in deciding which detained motorists to ask to consent to a search of their vehicles.

Some have argued that overall discrepancies in certain crime rates among racial groups could justify using race as a factor in general traffic enforcement activities and would produce a greater number of arrests for non-traffic offenses (e.g., narcotics trafficking). We emphatically reject this view. The President has made clear his concern that racial profiling is morally wrong and inconsistent with our core values and principles of fairness and justice. Even if there were overall statistical evidence of differential rates of commission of certain offenses among particular races, the affirmative use of such

generalized notions by federal law enforcement officers in routine, spontaneous law enforcement activities is tantamount to stereotyping. It casts a pall of suspicion over every member of certain racial and ethnic groups without regard to the specific circumstances of a particular investigation or crime, and it offends the dignity of the individual improperly targeted. Whatever the motivation, it is patently unacceptable and thus prohibited under this guidance for Federal law enforcement officers to act on the belief that race or ethnicity signals a higher risk of criminality. This is the core of "racial profiling" and it must not occur.

The situation is different when an officer has specific information, based on trustworthy sources, to "be on the lookout" for specific individuals identified at least in part by race or ethnicity. In such circumstances, the officer is not acting based on a generalized assumption about persons of different races; rather, the officer is helping locate specific individuals previously identified as involved in crime.

> **Example:** While parked by the side of the George Washington Parkway, a Park Police Officer receives an "All Points Bulletin" to be on the look-out for a fleeing bank robbery suspect, a man of a particular race and particular hair color in his 30s driving a blue automobile. The Officer may use this description, including the race of the particular suspect, in deciding which speeding motorists to pull over.

B. Law Enforcement Activities Related to Specific Investigations

In conducting activities in connection with a specific investigation, Federal law enforcement officers may consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization. This standard applies even where the use of race or ethnicity might otherwise be lawful.

As noted above, there are circumstances in which law enforcement activities relating to particular identified criminal incidents, schemes or enterprises may involve consideration of personal identifying characteristics of potential suspects, including age, sex, ethnicity or race. Common sense dictates that when a victim describes the assailant as being of a particular race, authorities may properly limit their search for suspects to persons of that race. Similarly, in conducting an ongoing investigation into a specific criminal organization whose membership has been identified as being overwhelmingly of one ethnicity, law enforcement should not be expected to disregard such facts in pursuing investigative leads into the organization's activities.

Reliance upon generalized stereotypes is absolutely forbidden. Rather, use of race or ethnicity is permitted only when the officer is pursuing a specific lead concerning the identifying characteristics of persons involved in an *identified* criminal activity. The rationale underlying this concept carefully limits its reach. In order to qualify as a legitimate investigative lead, the following must be true:

- The information must be relevant to the locality or time frame of the criminal activity;
- The information must be trustworthy;
- The information concerning identifying characteristics must be tied to a particular criminal incident, a particular criminal scheme, or a particular criminal organization.

The following policy statements more fully explain these principles.

1. Authorities May Never Rely on Generalized Stereotypes, But May Rely Only on Specific Race- or Ethnicity-Based Information

This standard categorically bars the use of generalized assumptions based on race.

Example: In the course of investigating an auto theft in a federal park, law enforcement authorities could not properly choose to target individuals of a particular race as suspects, based on a generalized assumption that those individuals are more likely to commit crimes. This bar extends to the use of race-neutral pretexts as an excuse to target minorities. Federal law enforcement may not use such pretexts. This prohibition extends to the use of other, facially race-neutral factors as a proxy for overtly targeting persons of a certain race or ethnicity. This concern arises most frequently when aggressive law enforcement efforts are focused on "high crime areas." The issue is ultimately one of motivation and evidence; certain seemingly race-based efforts, if properly supported by reliable, empirical data, are in fact race-neutral.

Example: In connection with a new initiative to increase drug arrests, local authorities begin aggressively enforcing speeding, traffic, and other public area laws in a neighborhood predominantly occupied by people of a single race. The choice of neighborhood was not based on the number of 911 calls, number of arrests, or other pertinent reporting data specific to that area, but only on the general assumption that more drug-related crime occurs in that neighborhood because of its racial composition. This effort would be improper because it is based on generalized stereotypes.

Example: Authorities seeking to increase drug arrests use tracking software to plot out where, if anywhere, drug arrests are concentrated in a particular city, and discover that the clear majority of drug arrests occur in particular precincts that happen to be neighborhoods predominantly occupied by people of a single race. So long as they are not motivated by racial animus, authorities can properly decide to enforce all laws aggressively in that area, including less serious quality of life ordinances, as a

means of increasing drug-related arrests. See, e.g., United States v. Montero-Camargo, 208 F.3d 1122, 1138 (9th Cir. 2000) ("We must be particularly careful to ensure that a 'high crime' area factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business, but is limited to specific, circumscribed locations where particular crimes occur with unusual regularity.").

By contrast, where authorities are investigating a crime and have received specific information that the suspect is of a certain race (e.g., direct observations by the victim or other witnesses), authorities may reasonably use that information, even if it is the only descriptive information available. In such an instance, it is the victim or other witness making the racial classification, and federal authorities may use reliable incident-specific identifying information to apprehend criminal suspects. Agencies and departments, however, must use caution in the rare instance in which a suspect's race is the only available information. Although the use of that information may not be unconstitutional, broad targeting of discrete racial or ethnic groups always raises serious fairness concerns.

Example: The victim of an assault at a local university describes her assailant as a young male of a particular race with a cut on his right hand. The investigation focuses on whether any students at the university fit the victim's description. Here investigators are properly relying on a description given by the victim, part of which included the assailant's race. Although the ensuing investigation affects students of a particular race, that investigation is not undertaken with a discriminatory purpose. Thus use of race as a factor in the investigation, in this instance, is permissible.

2. The Information Must be Relevant to the Locality or Time Frame

Any information concerning the race of persons who may

be involved in specific criminal activities must be locally or temporally relevant.

> **Example**: DEA issues an intelligence report that indicates that a drug ring whose members are known to be predominantly of a particular race or ethnicity is trafficking drugs in Charleston, SC. An agent operating in Los Angeles reads this intelligence report. In the absence of information establishing the agent may not use ethnicity as a factor in making local law enforcement decisions about individuals who are of the particular race or ethnicity that is predominant in the Charleston drug ring.

3. The Information Must be Trustworthy

Where the information concerning potential criminal activity is unreliable or is too generalized and unspecific, use of racial descriptions is prohibited.

> **Example**: ATF special agents receive an uncorroborated anonymous tip that a male of a particular race will purchase an illegal firearm at a Greyhound bus terminal in a racially diverse North Philadelphia neighborhood. Although agents surveilling the location are free to monitor the movements of whomever they choose, the agents are prohibited from using the tip information, without more, to target any males of that race in the bus terminal. Cf. Morgan v. Woessner, 997 F.2d 1244, 1254 (9th Cir. 1993) (finding no reasonable basis for suspicion where tip "made all black men suspect"). The information is neither sufficiently reliable nor sufficiently specific.

4. Race- or Ethnicity-Based Information Must Always be Specific to Particular Suspects or Incidents, or Ongoing Criminal Activities, Schemes, or Enterprises

These standards contemplate the appropriate use of both "suspect-specific" and "incident-specific" information. As noted

above, where a crime has occurred and authorities have eyewitness accounts including the race, ethnicity, or other distinguishing characteristics of the perpetrator, that information may be used. Federal authorities may also use reliable, locally relevant information linking persons of a certain race or ethnicity to a particular incident, unlawful scheme, or ongoing criminal enterprise--even absent a description of any particular individual suspect. In certain cases, the circumstances surrounding an incident or ongoing criminal activity will point strongly to a perpetrator of a certain race, even though authorities lack an eyewitness account.

> **Example**: The FBI is investigating the murder of a known gang member and has information that the shooter is a member of a rival gang. The FBI knows that the members of the rival gang are exclusively members of a certain ethnicity. This information, however, is not suspect-specific because there is no description of the particular assailant. But because authorities have reliable, locally relevant information linking a rival group with a distinctive ethnic character to the murder, Federal law enforcement officers could properly consider ethnicity in conjunction with other appropriate factors in the course of conducting their investigation. Agents could properly decide to focus on persons dressed in a manner consistent with gang activity, but ignore persons dressed in that manner who do not appear to be members of that particular ethnicity.

It is critical, however, that there be reliable information that ties persons of a particular description to a specific criminal incident, ongoing criminal activity, or particular criminal organization. Otherwise, any use of race runs the risk of descending into reliance upon prohibited generalized stereotypes.

> **Example**: While investigating a car theft ring that dismantles cars and ships the parts for sale in other states, the FBI is informed by local authorities that it is common knowledge locally that most car thefts in that

area are committed by individuals of a particular race. In this example, although the source (local police) is trustworthy, and the information potentially verifiable with reference to arrest statistics, there is no particular incident- or scheme- specific information linking individuals of that race to the particular interstate ring the FBI is investigating. Thus, without more, agents could not use ethnicity as a factor in making law enforcement decisions in this investigation.

Note that these standards allow the use of reliable identifying information about planned future crimes. Where federal authorities receive a credible tip from a reliable informant regarding a planned crime that has not yet occurred, authorities may use this information under the same restrictions applying to information obtained regarding a past incident. A prohibition on the use of reliable prospective information would severely hamper law enforcement efforts by essentially compelling authorities to wait for crimes to occur, instead of taking pro-active measures to prevent crimes from happening.

Example: While investigating a specific drug trafficking operation, DEA special agents learn that a particular methamphetamine distribution ring is manufacturing the drug in California, and plans to have couriers pick up shipments at the Sacramento, California airport and drive the drugs back to Oklahoma for distribution. The agents also receive trustworthy information that the distribution ring has specifically chosen to hire older couples of a particular race to act as the couriers. DEA agents may properly target older couples of that particular race driving vehicles with indicia such as Oklahoma plates near the Sacramento airport.

II. Guidance For Federal Officials Engaged In Law Enforcement Activities Involving Threats To National Security Or The Integrity Of The Nation's Borders

In investigating or preventing threats to national security or other catastrophic events (including the

performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation's borders, Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.

Since the terrorist attacks on September 11, 2001, the President has emphasized that federal law enforcement personnel must use every legitimate tool to prevent future attacks, protect our Nation's borders, and deter those who would cause devastating harm to our Nation and its people through the use of biological or chemical weapons, other weapons of mass destruction, suicide hijackings, or any other means. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)).

The Constitution prohibits consideration of race or ethnicity in law enforcement decisions in all but the most exceptional instances. Given the incalculably high stakes involved in such investigations, however, Federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, and other relevant factors to the extent permitted by our laws and the Constitution. Similarly, because enforcement of the laws protecting the Nation's borders may necessarily involve a consideration of a person's alienage in certain circumstances, the use of race or ethnicity in such circumstances is properly governed by existing statutory and constitutional standards. See, e.g., United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975).[6] This policy will honor the rule of law and promote vigorous protection of our national security.

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[6] Moreover, as in the traditional law enforcement context described in the second standard, supra, officials involved in homeland security may take into account specific, credible information about the descriptive characteristics of persons who are affiliated with identified organizations that are actively engaged in threatening the national security.

As the Supreme Court has stated, all racial classifications by a governmental actor are subject to the "strictest judicial scrutiny." Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224-25 (1995). The application of strict scrutiny is of necessity a fact-intensive process. Id. at 236. Thus, the legality of particular, race-sensitive actions taken by Federal law enforcement officials in the context of national security and border integrity will depend to a large extent on the circumstances at hand. In absolutely no event, however, may Federal officials assert a national security or border integrity rationale as a mere pretext for invidious discrimination. Indeed, the very purpose of the strict scrutiny test is to "smoke out" illegitimate use of race, Adarand, 515 U.S. at 226 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)), and law enforcement strategies not actually premised on bona fide national security or border integrity interests therefore will not stand.

In sum, constitutional provisions limiting government action on the basis of race are wide-ranging and provide substantial protections at every step of the investigative and judicial process. Accordingly, and as illustrated below, when addressing matters of national security, border integrity, or the possible catastrophic loss of life, existing legal and constitutional standards are an appropriate guide for Federal law enforcement officers.

> **Example**: The FBI receives reliable information that persons affiliated with a foreign ethnic insurgent group intend to use suicide bombers to assassinate that country's president and his entire entourage during an official visit to the United States. Federal law enforcement may appropriately focus investigative attention on identifying members of that ethnic insurgent group who may be present and active in the United States and who, based on other available information, might conceivably be involved in planning some such attack during the state visit.

Example: U.S. intelligence sources report that terrorists from a particular ethnic group are planning to use commercial jetliners as weapons by hijacking them at an airport in California during the next week. Before allowing men of that ethnic group to board commercial airplanes in California airports during the next week, Transportation Security Administration personnel, and other federal and state authorities, may subject them to heightened scrutiny.

Because terrorist organizations might aim to engage in unexpected acts of catastrophic violence in any available part of the country (indeed, in multiple places simultaneously, if possible), there can be no expectation that the information must be specific to a particular locale or even to a particular identified scheme.

Of course, as in the example below, reliance solely upon generalized stereotypes is forbidden.

Example: At the security entrance to a Federal courthouse, a man who appears to be of a particular ethnicity properly submits his briefcase for x-ray screening and passes through the metal detector. The inspection of the briefcase reveals nothing amiss, the man does not activate the metal detector, and there is nothing suspicious about his activities or appearance. In the absence of any threat warning, the federal security screener may not order the man to undergo a further inspection solely because he appears to be of a particular ethnicity.

Legal Ethics For Investigative Agents?[1]

There are many circumstances in which attorney conduct rules will or may have implications for investigative agents. The rules themselves are written by and for lawyers and are used to regulate the practice of law, although they require that lawyers take steps to ensure that agents and other non-lawyers with whom they are working also abide by the rules. Therefore, investigators should familiarize themselves with the requirements of these rules for two good reasons: 1) to make sure evidence is not excluded; and 2) to protect the reputations of your agencies. This memorandum is intended to give you some familiarity with those rules of professional conduct that most often come into play during investigations and to aid you in avoiding pitfalls in your investigative work.

I. What Are the Rules of Professional Conduct Anyway?

In order to practice law, a lawyer must be a member of a state bar. Each bar has adopted a set of rules that lawyers must follow. The American Bar Association is a voluntary organization of lawyers that drafts model rules, which the various state bar organizations often adopt, in whole or in part. The rules in each jurisdiction are therefore unique, although there are general principles that apply in every jurisdiction. Failure to follow those rules can result in sanctions to the lawyer, including revocation of the lawyer's license to practice law.

II. How Is It That Lawyer's Rules Apply to Investigative Agents?

There are two general rules of professional conduct that can make a lawyer responsible for the conduct of an investigative agent with whom the lawyer is working. One rule (Rule 8.4(a)) states that it is professional misconduct for a

[1] This memorandum was prepared by the Professional Responsibility Advisory Office, United States Department of Justice, Washington, DC.

lawyer to violate the rules of professional conduct through the acts of another. The second rule (Rule 5.3(c)) states that a lawyer is responsible for the conduct of a non-lawyer, if the lawyer supervised or ordered the conduct or "ratifies" the conduct or could have prevented or mitigated the effects of the conduct. While the government lawyers with whom you work do not directly supervise you, some judges may still hold them accountable for your conduct on account of the rules.[2] Oftentimes, the government lawyer will urge that, if a court finds a rule violation, any sanction be against the lawyer, not the case; but the court has discretion and sometimes does prohibit the lawyer from using evidence obtained by an agent in violation of the rules. In addition, the cases differ about when a lawyer "ratifies" the conduct of an agent or other non-lawyer. This issue comes up at trial when a defendant moves to have evidence excluded on the ground that the use of the evidence obtained by an agent in violation of a rule constitutes a ratification. The courts and legal authorities disagree on the answer to the question, but it is important for you to recognize it as an issue.

There is also a more specific rule that requires that prosecutors take special precautions to make sure that investigative agents do not make pre-trial, out-of-court statements that would have a substantial likelihood of materially prejudicing a proceeding or that would have a substantial likelihood of heightening public condemnation of the accused (Rule 3.8(f)).

When investigative agents learn about all the different requirements of the attorney conduct rules, they sometimes argue that investigators should conduct their investigations totally independently of the lawyer and in this way avoid the constraints of the attorney conduct rules. As a practical matter, given the necessary involvement of attorneys in issuing grand jury subpoenas, seeking wiretap orders, and in other

[2] Rule 5.3(b) states that a lawyer having direct supervisory power over a nonlawyer has to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

techniques used in investigating complex federal crimes, it may be impossible for an attorney not to be involved at the investigative stage. Moreover, you should be aware that, no matter how independently the agents may try to operate, courts may still apply the attorney conduct rules, either when a lawyer is consulted on a legal issue, such as constitutional questions implicated in interviewing a suspect, or not, as when the lawyer simply tries to use the evidence.

III. What Exactly Do The Most Important and Relevant Rules Provide?

For each of the following issues, you first should determine which rules of professional conduct apply and then examine the particular rule in question. You can do this by consulting an attorney in the governmental office who will handle the case.

A. Contacts with Represented Persons.

Every jurisdiction has a provision providing generally that a lawyer may not communicate with a person the lawyer knows to be represented about the subject matter of the representation (ABA Model Rule is 4.2). There are exceptions to this rule. The rule in every jurisdiction permits such a communication with the consent of the person's lawyer. The rule in every jurisdiction but two (Florida and Puerto Rico) contains language creating an exception for communications "authorized by law." The rule on its own, or read in conjunction with other rules (such as Rule 8.4(a) and 5.3(c) discussed earlier), would prohibit an agent working on a case with a lawyer from engaging in a communication when the lawyer could not.

This rule raises many questions, and there are numerous cases deciding issues relating to it. The answers to the questions differ, depending on the applicable rule and the case law in the relevant jurisdiction.

* How are you supposed to know when an individual is represented by a lawyer?

You have to pay attention to what the individual says on this issue. Also, where the individual has a lawyer on one case, for example, a state investigation of health care fraud, you probably should "know" that the individual is represented in your federal investigation of the same matter, unless there are good reasons not to think so, e.g., when a lawyer tells you he does not represent the individual in your investigation.

* What if the individual has been represented in the past by a lawyer?

This fact alone would not be enough to know that the individual is or is not represented. However, if the lawyer continues to work for the individual, then that is a fact to be considered.

* If the "individual" is a corporation that employs a general counsel, does the general counsel necessarily represent that corporation on the matter you are investigating?

Generally speaking, the fact that a corporation has a general counsel does not mean that the corporation is represented with respect to your investigation of a particular incident or practice.

* Which *persons* in the corporation does the corporation's attorney represent?

The answer to this question is going to depend on where the case is or will be tried, or where the lawyers are members of the bar. The states vary, and in some jurisdictions, such as D.C., only employees who have the power to bind the corporation with respect to the representation itself are covered by the rule's prohibition. In other states, however, even some low-level employees are considered to be represented by the corporation's attorney.

* Is a *former employee* considered to be represented by corporation's attorney?

In many jurisdictions, but not all, a former employee is not considered to be represented by the corporation's attorney. That means that you are free to communicate with former employees about most things but not about "privileged matters."

* Is it necessary to ask every individual if he or she is represented?

It usually is not necessary to ask every individual; that answer would change if you have reason to believe that someone is represented. In that case, you should inquire.

* If a corporate employee has his own counsel who would permit you to communicate with the individual, do you also have to get the consent of the corporation's attorney?

In many jurisdictions, but not all, if a corporate employee has separate counsel, then you may properly communicate with the individual if you have the consent of that person's separate counsel.

* Can the individual consent to the communication or does the lawyer have to consent?

No. Only the lawyer can consent.

* Since the rule only prohibits communications about the subject matter of the representation, are you permitted to talk with the individual about a different but related subject?

That depends on the relationship between the two.

* What is considered a "communication"? (Is a letter a communication? Can you just listen?)

Listening and writing or receiving a letter are communications.

* Does the rule even apply before an individual is charged with a crime or a law suit is filed?

The answer to this question varies, depending on which state's rules apply and on the stage of the investigation.

* When are you "authorized by law" to communicate with a represented person?

This phrase has been interpreted to mean that you may communicate with a represented individual if a specific law, a court order, or a previous decision of the court in that jurisdiction would permit it.

* If the rule applies to post-indictment communications with represented persons, and the rules applies to agents who are working with lawyers, is it permissible for agents who arrest an indicted defendant to give Miranda warnings and get a statement from him?

This is a difficult question, not susceptible to a short answer and included here so that you think about it. A few states' rules specifically permit post-arrest Mirandized communications with represented individuals; on the other hand, at least one federal case suggests that it is impermissible.

B. You Must Not Use a Method of Obtaining Evidence That Violates the Rights of Another Person.

Most jurisdictions have a rule or a number of rules that, read together, prohibit a lawyer and an agent working with a lawyer from obtaining evidence by violating the "legal rights" of another person (ABA Model Rule 4.4(a)). The "legal rights" of a third person include constitutional and statutory rights and rights recognized by case law, including privileges. For example, this rule has been used to prevent a lawyer from reviewing and copying psychiatric records of a litigant. It would prohibit you from asking questions if the answer would be privileged and the person you are asking does not have the

power to waive the privilege. The most common way in which this rule would come into play is if, in the course of an investigation, you lawfully obtain information that is "privileged." You may not always be able to determine in advance whether a document was intended to be privileged (and was inadvertently disclosed or was released by unauthorized persons), but there are some indicia that should put you on notice to ask some questions about the document. For example, if a document is on a lawyer's stationery, is addressed to a client of the lawyer, and contains a notice such as "Confidential Attorney-Client Privileged Document" then you have some idea that there might be a claim that it is privileged. Before you read that document and before you integrate it into the file, it would be smart to find out how the document came into your possession. If the client waived the privilege (as, for example, a corporation may agree to do during an investigation), there is no reason not to read it. However, if the client did not waive the privilege, there are jurisdictions that would require you to return the document and also to refrain from using it. If you have not separated out such a document and it is later found to be privileged, you then would be hard pressed to establish that the information in it did not affect other parts of the investigation. Not every jurisdiction has such a rule, and so it is important to know what the applicable jurisdiction requires.

C. Trial Publicity Rules

Every jurisdiction has a rule (either a rule of professional conduct or a court rule) that provides that a lawyer should not make a statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or should know that the statement will have a substantial likelihood of prejudicing an adjudicative proceeding (ABA Model Rule 3.6). Here, again, the rule applies to agents working with lawyers. There is another rule applicable to prosecutors (ABA Model Rule 3.8) that specifically requires the prosecutor to make efforts to prevent investigators and other law enforcement personnel from making statements outside the courtroom that the lawyer could not make. This second rule

explains that prosecutors and agents properly may make statements that inform the public about the investigation if those statements serve a legitimate law enforcement purpose but should refrain from making statements outside the courtroom that "have a substantial likelihood of heightening public condemnation of the accused." You should be aware that, in some jurisdictions, the rules do not permit an attorney (or an agent working with the attorney) to identify or display the items seized at the time of arrest or in connection with a search warrant.

Since the publicity rules are designed to assure fair proceedings, it is not surprising that the penalty for a violation of the rules can result in reversal of a conviction.

D. You Must Always Be Honest With the Court.

Every court requires those who appear before it to be honest (ABA Model Rule 3.3). Honesty means more than simply telling the truth. It may require you to make a statement, rather than leave the court with an erroneous impression. It may require you to correct the record in the court, even sometimes after a case has been closed. While you may know that the legal authorities hold sacrosanct the attorney-client relationship -- that is in part the reason for prohibiting a lawyer from disclosing the confidences of a client -- you may not know that in many jurisdictions a duty of candor to the court trumps even the a duty of confidentiality to a client. This rule is particularly exacting when the government lawyer is the only one presenting evidence to the court, that is, when involved in an *ex parte* proceeding.

You may be surprised to learn that the candor rule applies whenever the government lawyer, through you, supplies information to the court, such as when you prepare an affidavit that is filed with the court. If the affidavit does not tell the whole story, then the case could suffer consequences. Candor issues arise in many different circumstances.

Here are some examples:

* where a confidential informant identifies herself while on the stand and under oath with a name supplied by your agency but that is not her real name.

* where an affidavit in support of a wiretap does not contain a complete picture of previous methods tried and failed and alternative options for the government to obtain the information without the wiretap.

* where, after testifying in a deposition, a government witness discovers that the information provided in the deposition was incorrect.

In each of these circumstances, both your cases and your reputation can suffer from the potential consequences of such non-disclosures.

E. Practice of Law and Negotiation of Agreements

Every jurisdiction has its own definition of what constitutes the practice of law and provides that only those properly authorized may practice in that jurisdiction; some jurisdictions have criminal statutes prohibiting the unauthorized practice of law. We refer to such rules here because investigative agents who give advice to persons about possible violations of various laws, who assist in the preparation or interpretation of legal documents, or who "negotiate" criminal penalties may be engaged in the unauthorized practice of law. Only government lawyers may properly negotiate pleas of guilty, cases of civil settlement, or the granting of immunity. Agents who attempt to negotiate on behalf of the government not only may subject themselves to penalties, but they also may undermine the cases they are attempting to resolve.

Consensual Monitoring

Office of Attorney General

May 30, 2002

MEMORANDUM FOR THE HEADS AND INSPECTORS GENERAL OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM THE ATTORNEY GENERAL

SUBJECT: Procedures for Lawful. Warrantless Monitoring of Verbal Communications

By Memorandum dated October 16, 1972, the Attorney General directed all federal departments and agencies to obtain Department of Justice authorization before intercepting verbal communications without the consent of all parties to the communication. This directive was clarified and continued in force by the Attorney General's Memorandum of September 2, 1980, to Heads and Inspectors General of Executive Departments and agencies. It was then superseded with new authorization procedures and relevant rules and guidelines, including limitations on the types of investigations requiring prior written approval by the Department of Justice, in the Attorney General's Memorandum of November 7,1983.[1]

The Attorney General's Memorandum of January 20, 1998, superseded the aforementioned directives. It continued most of the authorization procedures established in the November 7, 1983, Memorandum, but reduced the sensitive circumstances under which prior written approval of senior officials of the Department of Justice's Criminal Division is required. At the same time, it continued to require oral authorization from Department of Justice attorneys, ordinarily local Assistant United States Attorneys, before the initiation of

[1] As in all of the prior memoranda except for the one dated October 16, 1972, this memorandum only applies to the consensual monitoring of oral, nonwire communications, as discussed below. "Verbal" communications will hereinafter be referred to as oral.

the use of consensual monitoring in all investigations not requiring prior written approval. In addition, that Memorandum reduced and eventually eliminated the reporting requirement imposed on departments and agencies. These changes reflected the results of the exercise of the Department's review function over many years, which showed that the departments and agencies had uniformly been applying the required procedures with great care, consistency, and good judgment, and that the number of requests for consensual monitoring that were not approved had been negligible.

This Memorandum updates and in some limited respects modifies the Memorandum of January 20, 1998. The changes are as follows:

First, Parts III.A.(8) and V. of the January 20, 1998, Memorandum required concurrence or authorization for consensual monitoring by the United States Attorney, an Assistant United States Attorney, or the previously designated Department of Justice attorney responsible for a particular investigation (for short, a "trial attorney"). This Memorandum provides instead that a trial attorney must advise that the monitoring is legal and appropriate. This continues to limit monitoring to cases in which an appropriate attorney agrees to the monitoring, but makes it clear that this function does not establish a supervisory role or require any involvement by the attorney in the conduct of the monitoring. In addition, for cases in which this advice cannot be obtained from a trial attorney for reasons unrelated to the legality or propriety of the monitoring, this Memorandum provides a fallback procedure to obtain the required advice from a designated attorney of the Criminal Division of the Department of Justice. Where there is an issue as to whether providing the advice would be consistent with applicable attorney conduct rules, the trial attorney or the designated Criminal Division attorney should consult with the Department's Professional Responsibility Advisory Office.

Second, Part V. of the Memorandum of January 20, 1998, required that an agency head or his or her designee give oral authorization for consensual monitoring, and stated that "[a]ny

designee should be a high-ranking supervisory official at headquarters level." This rule was qualified by Attorney General Order No. 1623-92 of August 31, 1992, which, in relation to the Federal Bureau of Investigation (FBI), authorized delegation of this approval function to Special Agents in Charge. Experience has shown that the requirement of Special Agent in Charge approval can result in a loss of investigative opportunities because of an overly long approval process, and indicates that allowing approval by Assistant Special Agents in Charge would facilitate FBI investigative operations. Assistant Special Agents in Charge are management personnel to whom a variety of supervisory and oversight responsibilities are routinely given; generally, they are directly involved and familiar with the circumstances relating to the propriety of proposed uses of the consensual monitoring technique. Part V. is accordingly revised in this Memorandum to provide that the FBI Director's designees for purposes of oral authorization of consensual monitoring may include both Special Agents in Charge and Assistant Special Agents in Charge. This supersedes Attorney General Order No. 1623-92, which did not allow delegation of this function below the level of Special Agent in Charge.

Third, this Memorandum omits as obsolete Part VI. of the Memorandum of January 20, 1998. Part VI. imposed a reporting requirement by agencies concerning consensual monitoring but rescinded that reporting requirement after one year.

The Fourth Amendment to the United States Constitution, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 U.S.C. §2510, et seq.), and the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §1801, et seq.) permit government agents, acting with the consent of a party to a communication, to engage in warrantless monitoring of wire (telephone) communications and oral, nonwire communications. See United States v. White, 401 U.S. 745 (1971); United States v. Caceres, 440 U.S. 741 (1979). Similarly, the Constitution and federal statutes permit federal agents to engage in warrantless monitoring of oral, nonwire communications when the communicating parties have no

justifiable expectation of privacy.[2] Because such monitoring techniques are particularly effective and reliable, the Department of Justice encourages their use by federal agents for the purpose of gathering evidence of violations of federal law, protecting informants or undercover law enforcement agents, or fulfilling other, similarly compelling needs. While these techniques are lawful and helpful, their use in investigations is frequently sensitive, so they must remain the subject of careful, self-regulation by the agencies employing them.

The sources of authority for this Memorandum are Executive Order No. 11396 ("Providing for the Coordination by the Attorney General of Federal Law Enforcement and Crime Prevention Programs"); Presidential Memorandum ("Federal Law Enforcement Coordination, Policy and Priorities") of September 11, 1979; Presidential Memorandum (untitled) of June 30, 1965, on, inter alia, the utilization of mechanical or electronic devices to overhear nontelephone conversations; the Paperwork Reduction Act of 1980 and the Paperwork Reduction Reauthorization Act of 1986, as amended; and the inherent authority of the Attorney General as the chief law enforcement officer of the United States.

I. DEFINITIONS

As used in this Memorandum, the term "agency" means all of the Executive Branch departments and agencies, and specifically includes United States Attorneys' Offices which utilize their own investigators, and the Offices of the Inspectors General.

[2] As a general rule, nonconsensual interceptions of wire communications violate 18 U.S.C. § 2511 regardless of the communicating parties' expectation of privacy, unless the interceptor complies with the court-authorization procedures of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2510, et seq.) or with the provisions of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801 et seq.).

As used in this Memorandum, the terms "interception" and "monitoring" mean the aural acquisition of oral communications by use of an electronic, mechanical, or other device. Cf. 18 U.S.C. § 2510(4).

As used in this Memorandum, the term "public official" means an official of any public entity of government, including special districts, as well as all federal, state, county, and municipal governmental units.

II. NEED FOR WRITTEN AUTHORIZATION

A. Investigations Where Written Department of Justice Approval is Required

A request for authorization to monitor an oral communication without the consent of all parties to the communication must be approved in writing by the Director or Associate Director of the Office of Enforcement Operations, Criminal Division, U.S. Department of Justice, when it is known that:

(1) the monitoring relates to an investigation of a member of Congress, a federal judge, a member of the Executive Branch at Executive Level IV or above, or a person who has served in such capacity within the previous two years;

(2) the monitoring relates to an investigation of the Governor, Lieutenant Governor, or Attorney General of any State or Territory, or a judge or justice of the highest court of any State or Territory, and the offense investigated is one involving bribery, conflict of interest, or extortion relating to the performance of his or her official duties;

(3) any party to the communication is a member of the diplomatic corps of a foreign country;

(4) any party to the communication is or has been a member of the Witness Security Program and that fact is known to the agency involved or its officers;

(5) the consenting or nonconsenting person is in the custody of the Bureau of Prisons or the United States Marshals Service; or

(6) the Attorney General, Deputy Attorney General, Associate Attorney General, any Assistant Attorney General, or the United States Attorney in the district where an investigation is being conducted has requested the investigating agency to obtain prior written consent before conducting consensual monitoring in a specific investigation.

In all other cases, approval of consensual monitoring will be in accordance with the procedures set forth in part V. below.

B. Monitoring Not Within Scope of Memorandum

Even if the interception falls within one of the six categories above, the procedures and rules in this Memorandum do not apply to:

(1) extraterritorial interceptions;

(2) foreign intelligence interceptions, including interceptions pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801, et seq.);

(3) interceptions pursuant to the court-authorization procedures of Title III of the Omnibus Crime Control and Safe Streets Act

of 1968, as amended (18 U.S.C. § 2510, et seq.);

(4) routine Bureau of Prisons monitoring of oral communications that are not attended by a justifiable expectation of privacy;

(5) interceptions of radio communications; and

(6) interceptions of telephone communications.

III. AUTHORIZATION PROCEDURES AND RULES

A. Required Information

The following information must be set forth in any request to monitor an oral communication pursuant to part II.A.:

(1) Reasons for the Monitoring. The request must contain a reasonably detailed statement of the background and need for the monitoring.

(2) Offense. If the monitoring is for investigative purposes, the request must include a citation to the principal criminal statute involved.

(3) Danger. If the monitoring is intended to provide protection to the consenting party, the request must explain the nature of the danger to the consenting party.

(4) Location of Devices. The request must state where the monitoring device will be hidden: on the person, in personal effects, or in a fixed location.

(5) Location of Monitoring. The request must specify the location and primary judicial district where the monitoring will take place.

A monitoring authorization is not restricted to the original district. However, if the location of monitoring changes, notice should be promptly given to the approving official. The record maintained on the request should reflect the location change.

(6) Time. The request must state the length of time needed for the monitoring. Initially, an authorization may be granted for up to 90 days from the day the monitoring is scheduled to begin. If there is the need for continued monitoring, extensions for additional periods of up to 90 days may be granted. In special cases (e.g., "fencing" operations run by law enforcement agents or long-term investigations that are closely supervised by the Department's Criminal Division) authorization for up to 180 days may be granted with similar extensions.

(7) Names. The request must give the names of persons, if known, whose communications the department or agency expects to monitor and the relation of such persons to the matter under investigation or to the need for the monitoring.

(8) Attorney Advice. The request must state that the facts of the surveillance have been discussed with the United States Attorney, an Assistant United States Attorney, or the previously designated Department of Justice attorney responsible for a particular investigation, and that such attorney advises that the use of consensual monitoring is appropriate under this Memorandum (including the date of such advice). The attorney must also advise that the use of consensual monitoring under the facts of the

investigation does not raise the issue of entrapment. Such statements may be made orally. If the attorneys described above cannot provide the advice for reasons unrelated to the legality or propriety of the consensual monitoring, the advice must be sought and obtained from an attorney of the Criminal Division of the Department of Justice designated by the Assistant Attorney General in charge of that Division. Before providing such advice, a designated Criminal Division Attorney shall notify the appropriate United States Attorney or other attorney who would otherwise be authorized to provide the required advice under this paragraph.

(9) Renewals. A request for renewal authority to monitor oral communications must contain all the information required for an initial request. The renewal request must also refer to all previous authorizations and explain why an additional authorization is needed, as well as provide an updated statement that the attorney advice required under paragraph (8) has been obtained in connection with the proposed renewal.

B. Oral Requests

Unless a request is of an emergency nature, it must be in written form and contain all of the information set forth above. Emergency requests in cases in which written Department of Justice approval is required may be made by telephone to the Director or an Associate Director of the Criminal Division's Office of Enforcement Operations, or to the Assistant Attorney General, the Acting Assistant Attorney General, or a Deputy Assistant Attorney General for the Criminal Division, and should later be reduced to writing

and submitted to the appropriate headquarters official as soon as practicable after authorization has been obtained. An appropriate headquarters filing system is to be maintained for consensual monitoring requests that have been received and approved in this manner. Oral requests must include all the information required for written requests as set forth above.

C. Authorization

Authority to engage in consensual monitoring in situations set forth in part II.A. of this Memorandum may be given by the Attorney General, the Deputy Attorney General, the Associate Attorney General, the Assistant Attorney General or Acting Assistant Attorney General in charge of the Criminal Division, a Deputy Assistant Attorney General in the Criminal Division, or the Director or an Associate Director of the Criminal Division's Office of Enforcement Operations. Requests for authorization will normally be submitted by the headquarters of the department or agency requesting the consensual monitoring to the Office of Enforcement Operations for review.

D. Emergency Monitoring

If an emergency situation requires consensual monitoring at a time when one of the individuals identified in part III.B. above cannot be reached, the authorization may be given by the head of the responsible department or agency, or his or her designee. Such department or agency must then notify the Office of Enforcement Operations as soon as practicable after the emergency monitoring is authorized, but not later than three working days after the emergency authorization.

The notification shall explain the emergency and shall contain all other items required for a nonemergency request for authorization set forth in part III.A. above.

IV. SPECIAL LIMITATIONS

When a communicating party consents to the monitoring of his or her oral communications, the monitoring device may be concealed on his or her person, in personal effects, or in a fixed location. Each department and agency engaging in such consensual monitoring must ensure that the consenting party will be present at all times when the device is operating. In addition, each department and agency must ensure: (1) that no agent or person cooperating with the department or agency trespasses while installing a device in a fixed location, unless that agent or person is acting pursuant to a court order that authorizes the entry and/or trespass, and (2) that as long as the device is installed in the fixed location, the premises remain under the control of the government or of the consenting party. See United States v. Yonn, 702 F.2d 1341, 1347 (11th Cir.), cert. denied, 464 U.S. 917 (1983) (rejecting the First Circuit's holding in United States v. Padilla, 520 F.2d 526 (1st Cir. 1975), and approving use of fixed monitoring devices that are activated only when the consenting party is present). But see United States v. Shabazz, 883 F. Supp. 422 (D. Minn. 1995).

Outside the scope of this Memorandum are interceptions of oral, nonwire communications when no party to the communication has consented. To be lawful, such interceptions generally may take place only when no party to the communication has a justifiable expectation of privacy,[3] or when authorization to intercept such

[3] For example, burglars, while committing a burglary, have no justifiable expectation of privacy. Cf. United States v. Pui Kan Lam, 483 F.2d 1202 (2d. Cir. 1973), cert. denied, 415 U.S. 984 (1974).

communications has been obtained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2510, et seq.) or the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801 et seq.). Each department or agency must ensure that no communication of any party who has a justifiable expectation of privacy is intercepted unless proper authorization has been obtained.

V. PROCEDURES FOR CONSENSUAL MONITORING WHERE NO WRITTEN APPROVAL IS REQUIRED

Prior to receiving approval for consensual monitoring from the head of the department or agency or his or her designee, a representative of the department or agency must obtain advice that the consensual monitoring is both legal and appropriate from the United States Attorney, an Assistant United States Attorney, or the Department of Justice attorney responsible for a particular investigation. The advice may be obtained orally from the attorney. If the attorneys described above cannot provide this advice for reasons unrelated to the legality or propriety of the consensual monitoring, the advice must be of Executive Departments and Agencies sought and obtained from an attorney of the Criminal Division of the Department of Justice designated by the Assistant Attorney General in charge of that Division. Before providing such advice, a designated Criminal Division Attorney shall notify the appropriate United States Attorney or other attorney who would otherwise be authorized to provide the required advice under this paragraph.

Even in cases in which no written authorization is required because they do not involve the sensitive circumstances discussed above, each agency must continue to maintain internal procedures for supervising, monitoring, and approving all consensual monitoring of oral communications. Approval for consensual monitoring must come from the head of the agency or his or her

designee. Any designee should be a high-ranking supervisory official at headquarters level, but in the case of the FBI may be a Special Agent in Charge or Assistant Special Agent in Charge.

Similarly, each department or agency shall establish procedures for emergency authorizations in cases involving non-sensitive circumstances similar to those that apply with regard to cases that involve the sensitive circumstances described in part III.D., including obtaining follow-up oral advice of an appropriate attorney as set forth above concerning the legality and propriety of the consensual monitoring.

Records are to be maintained by the involved departments or agencies for each consensual monitoring that they have conducted. These records are to include the information set forth in part III.A. above.

VI. GENERAL LIMITATIONS

This Memorandum relates solely to the subject of consensual monitoring of oral communications except where otherwise indicated. This Memorandum does not alter or supersede any current policies or directives relating to the subject of obtaining necessary approval for engaging in nonconsensual electronic surveillance or any other form of nonconsensual interception.

Giglio Policy

Office of the Attorney General
Washington, D.C. 20530

Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses[1]

Preface

The following policy is established for: the Federal Bureau of Investigation, Drug Enforcement Administration, Immigration and Naturalization Service, the United States Marshals Service, the Department of Justice Office of the Inspector General, and the Department of Justice Office of Professional Responsibility ("the investigative agencies"). It addresses their disclosure of potential impeachment information to the United States Attorneys' Offices and Department of Justice litigating sections with authority to prosecute criminal cases ("Department of Justice prosecuting offices"). The purpose of this policy is to ensure that prosecutors receive sufficient information to meet their obligations under Giglio v. United States, 405 U.S. 150 (1972), while protecting the legitimate privacy rights of Government employees.[2]

The exact parameters of potential impeachment information are not easily determined. Potential impeachment information, however, has been generally defined as impeaching information which is material to the defense. This information may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form

[1] Located at the DOJ website (http://www.usdoj.gov/ag/readingroom/agmemo.htm)

[2] This policy is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. United States v. Caceres, 440 U.S. 741 (1979).

of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased.

This policy is not intended to replace the obligation of individual agency employees to inform prosecuting attorneys with whom they work of potential impeachment information prior to providing a sworn statement or testimony in any investigation or case. In the majority of investigations and cases in which agency employees may be affiants or witnesses, it is expected that the prosecuting attorney will be able to obtain all potential impeachment information directly from agency witnesses during the normal course of investigations and/or preparation for hearings or trials.

Procedures for Disclosing Potential Impeachment Information Relating to Department of Justice Employees

1. Obligation to Disclose Potential Impeachment Information. It is expected that a prosecutor generally will be able to obtain all potential impeachment information directly from potential agency witnesses and/or affiants. Each investigative agency employee is obligated to inform prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case. Each investigative agency should ensure that its employees fulfill this obligation. Nevertheless, in some cases, a prosecutor may also decide to request potential impeachment information from the investigative agency. This policy sets forth procedures for those cases in which a prosecutor decides to make such a request.

2. Agency Officials. Each of the investigative agencies shall designate an appropriate official(s) to serve as the point(s) of contact concerning Department of Justice employees' potential impeachment information ("the Agency Official"). Each Agency Official shall consult periodically with the relevant Requesting Officials about Supreme Court caselaw, circuit caselaw, and

district court rulings and practice governing the definition and disclosure of impeachment information.

3. Requesting Officials. Each of the Department of Justice prosecuting offices shall designate an appropriate senior official(s) to serve as the point(s) of contact concerning potential impeachment information ("the Requesting Official"). Each Requesting Official shall inform the relevant Agency Officials about Supreme Court caselaw, circuit caselaw, and district court rulings and practice governing the definition and disclosure of impeachment information.

4. Request to Agency Officials. When a prosecutor determines that it is necessary to request potential impeachment information from an Agency Official(s) relating to an agency employee identified as a potential witness or affiant ("the employee") in a specific criminal case or investigation, the prosecutor shall notify the appropriate Requesting Official. Upon receiving such notification, the Requesting Official may request potential impeachment information relating to the employee from the employing Agency Official(s) and the designated Agency Official(s) in the Department of Justice Office of the Inspector General ("OIG") and the Department of Justice Office of Professional Responsibility ("DOJ-OPR").

5. Agency Review and Disclosure. Upon receiving the request described in Paragraph 4, the Agency Official(s) from the employing agency, the OIG and DOJ-OPR shall each conduct a review, in accordance with its respective agency plan, for potential impeachment information regarding the identified employee. The employing Agency Official(s), the OIG, and DOJ-OPR shall advise the Requesting Official of: (a) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry; (b) any past or pending criminal charge brought against the employee; and (c) any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee that is the subject of a pending investigation.

6. Treatment of Allegations Which Are Unsubstantiated, Not Credible, or Have Resulted in Exoneration. Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information. Upon request, such information which reflects upon the truthfulness or bias of the employee, to the extent maintained by the agency, will be provided to the prosecuting office under the following circumstances: (a) when the Requesting Official advises the Agency Official that it is required by a Court decision in the district where the investigation or case is being pursued; (b) when, on or after the effective date of this policy: (i) the allegation was made by a federal prosecutor, magistrate judge, or judge; or (ii) the allegation received publicity; (c) when the Requesting Official and the Agency Official agree that such disclosure is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the agency witness; or (d) when disclosure is otherwise deemed appropriate by the agency. The agency is responsible for advising the prosecuting office, to the extent determined, whether any aforementioned allegation is unsubstantiated, not credible, or resulted in the employee's exoneration.

Note: With regard to allegations disclosed to a prosecuting office under this paragraph, the head of the prosecuting office shall ensure that special care is taken to protect the confidentiality of such information and the privacy interests and reputations of agency employee-witnesses, in accordance with paragraph 13 below. At the conclusion of the case, if such information was not disclosed to the defense, the head of the prosecuting office shall ensure that all materials received from an investigative agency regarding the allegation, including any and all copies, are expeditiously returned to the investigative agency. This does not prohibit a prosecuting office from keeping motions, responses, legal memoranda, court orders, and internal office memoranda or correspondence, in the relevant criminal case file(s).

7. Prosecuting Office Records. Department of Justice prosecuting offices shall not retain in any system of records that

can be accessed by the identity of an employee, potential impeachment information that was provided by an agency, except where the information was disclosed to defense counsel. This policy does not prohibit Department of Justice prosecuting offices from keeping motions and Court orders and supporting documents in the relevant criminal case file.

8. Copies to Agencies. When potential impeachment information received from Agency Officials has been disclosed to a Court or defense counsel, the information disclosed, along with any judicial rulings and related pleadings, shall be provided to the Agency Official that provided the information and to the employing Agency Official for retention in the employing agency's system of records. The agency shall maintain judicial rulings and related pleadings on information that was disclosed to the Court but not to the defense in a manner that allows expeditious access upon the request of the Requesting Official.

9. Record Retention. When potential impeachment information received from Agency Officials has been disclosed to defense counsel, the information disclosed, along with any judicial rulings and related pleadings, may be retained by the Requesting Official, together with any related correspondence or memoranda, in a system of records that can be accessed by the identity of the employee.

10. Updating Records. Before any federal prosecutor uses or relies upon information included in the prosecuting office's system of records, the Requesting Official shall contact the relevant Agency Official(s) to determine the status of the potential impeachment information and shall add any additional information provided to the prosecuting office's system of records.

11. Continuing Duty to Disclose. Each agency plan shall include provisions which will assure that, once a request for potential impeachment information has been made, the prosecuting office will be made aware of any additional potential impeachment information that arises after such request and

during the pendency of the specific criminal case or investigation in which the employee is a potential witness or affiant. A prosecuting office which has made a request for potential impeachment information shall promptly notify the relevant agency when the specific criminal case or investigation for which the request was made ends in a judgment or declination, at which time the agency's duty to disclose shall cease.

12. Removal of Records upon Transfer, Reassignment, or Retirement of Employee. Upon being notified that an employee has retired, been transferred to an office in another judicial district, or been reassigned to a position in which the employee will neither be an affiant nor witness, and subsequent to the resolution of any litigation pending in the prosecuting office in which the employee could be an affiant or witness, the Requesting Official shall remove from the prosecuting office's system of records any record that can be accessed by the identity of the employee.

13. Prosecuting Office Plans to Implement Policy. Within 120 days of the effective date of this policy, each prosecuting office shall develop a plan to implement this policy. The plan shall include provisions that require: (a) communication by the prosecuting office with the agency about the disclosure of potential impeachment information to the Court or defense counsel, including allowing the agency to express its views on whether certain information should be disclosed to the Court or defense counsel; (b) preserving the security and confidentiality of potential impeachment information through proper storage and restricted access within a prosecuting office; (c) when appropriate, seeking an *ex parte*, in camera review and decision by the Court regarding whether potential impeachment information must be disclosed to defense counsel; (d) when appropriate, seeking protective orders to limit the use and further dissemination of potential impeachment information by defense counsel; and, (e) allowing the relevant agencies the timely opportunity to fully express their views.

14. Investigative Agency Plans to Implement Policy. Within 120 days of the effective date of this policy, each of the investigative agencies shall develop a plan to effectuate this policy.

Date: 12/9/96[3]

This policy is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. United States v. Caceres, 440 U.S. 741 (1979).

[3] This policy remains in effect, as of April 2010.

Grand Jury Handbook

HANDBOOK FOR FEDERAL GRAND JURORS

PURPOSE OF THIS HANDBOOK

This Handbook will acquaint persons who have been selected to serve on a federal grand jury with the general nature and importance of their role as grand jurors. It explains some of the terms that grand jurors will encounter during their service and offers some suggestions helpful to them in performing this important public service. It is intended that this Handbook will, to a degree, repeat and provide a permanent record of much of the information presented in the grand jury orientation film, The People's Panel, which in most districts is shown to grand jurors at the commencement of their service. Grand jurors are encouraged to refer to this Handbook periodically throughout their service to reacquaint themselves with their duties and responsibilities.

This Handbook is designed as an aid only to persons serving on a federal-not a state–grand jury. The federal grand jury is concerned only with federal crimes; it derives its authority from the Constitution of the United States, national laws, and the rules of the federal courts. There are also grand juries impaneled in many of the states, but those grand juries investigate only state crimes; they derive their authority from the constitutions, laws, and rules of court of the states where they are impaneled.

ORIGIN AND HISTORY OF THE GRAND JURY

The grand jury has a long and honorable tradition. It was recognized in the Magna Carta, the first English constitutional document, which King John granted in 1215 at the demand of his subjects. The first English grand jury consisted of twelve men selected from the knights or other freemen, who were summoned to inquire into crimes alleged to have been

committed in their local community. Thus, grand jurors originally functioned as accusers or witnesses, rather than as judges.

Over the years, the hallmarks of our modern grand jury developed in England. For example, grand jury proceedings became secret, and the grand jury became independent of the Crown. As a result, a grand jury is able to vote an indictment or refuse to do so, as it deems proper, without regard to the recommendations of judge, prosecutor, or any other person. This independence from the will of the government was achieved only after a long hard fight. It can best be illustrated by the celebrated English case involving the Earl of Shaftasbury, who, in 1681, fell under the suspicion of the Crown. Displeased with him, the Crown presented to the grand jury a proposed bill of indictment for high treason and recommended that it be voted and returned. After hearing the witnesses, the grand jury voted against the bill of indictment and returned it to the King, holding that it was not true.

When the English colonists came to America, they brought with them many of the institutions of the English legal system, including the grand jury. Thus, the English tradition of the grand jury was well established in the American colonies long before the American Revolution. Indeed, the colonists used it as a platform from which to assert their independence from the pressures of colonial governors. In 1735, for example, the Colonial Governor of New York demanded that a grand jury indict for libel John Zenger, editor of a newspaper called "The Weekly Journal," because he had held up to scorn certain acts of the Royal Governor. The grand jury flatly refused.

The grand jury as an institution was so firmly established in the traditions of our forebears that they included it in the Bill of Rights. The Fifth Amendment to the Constitution of the United States provides in part that "(n)o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." Moreover, the grand jury system is also recognized in the constitutions of many of the states of the Union.

NATURE OF THE GRAND JURY

The powers and functions of the federal grand jury differ from those of the federal trial jury, which is called the petit jury. The petit jury listens to the evidence offered by the prosecution and the defense (if it chooses to offer any) during a criminal trial and returns a verdict of guilty or not guilty. The grand jury, on the other hand, does not determine guilt or innocence, but only whether there is probable cause to believe that a crime was committed and that a specific person or persons committed it. If the grand jury finds probable cause to exist, then it will return a written statement of the charges called an "indictment." After that, the accused will go to trial.

The grand jury normally hears only that evidence presented by an attorney for the government which tends to show the commission of a crime. The grand jury must determine from this evidence, and usually without hearing evidence for the defense, whether a person should be tried for a serious federal crime, referred to in the Bill of Rights as an "infamous crime." An infamous crime is one which may be punished by imprisonment for more than one year. As a general rule, no one can be prosecuted for a serious crime unless the grand jury decides that the evidence it has heard so requires. In this way, the grand jury operates both as a "sword," authorizing the government's prosecution of suspected criminals, and also as a "shield," protecting citizens from unwarranted or inappropriate prosecutions. A person may, however, waive grand jury proceedings and agree to be prosecuted by a written charge of crime called an information.

The grand jury is not completely free to compel a trial of anyone it chooses. The United States Attorney must sign the indictment before one may be prosecuted. Thus, the government and the grand jury act as checks upon each other. This assures that neither may arbitrarily wield the awesome power to indict a person of a crime.

(1) The Grand Jury's Tasks

As stated above, the federal grand jury's function is to determine whether a person shall be tried for a serious federal crime alleged to have been committed within the district where it sits. Matters may be brought to its attention in three ways: (1) by the United States Attorney or an Assistant United States Attorney; (2) by the court that impaneled it; and (3) from the personal knowledge of a member of the grand jury or from matters properly brought to a member's personal attention. In all these cases, the grand jury must hear evidence before taking action.

After it has received evidence against a person, the grand jury must decide whether the evidence presented justifies an indictment, or "true bill," which is the formal criminal charge returned by the grand jury. Upon the indictment's being filed in court, the person accused must either plead guilty or nolo contendere or stand trial.

If the evidence does not persuade the grand jury that there is probable cause to believe the person committed a crime, the grand jury will vote a "no bill," or "not a true bill." When this occurs, the person is not required to plead to a criminal charge, and no trial is required.

(2) Investigation

The major portion of the grand jury's work is concerned with evidence brought to its attention by an attorney for the government. The grand jury may consider additional matters otherwise brought to its attention, but should consult with the United States Attorney or the court before undertaking a formal investigation of such matters. This is necessary because the grand jury has no investigative staff, and legal assistance will be necessary in the event an indictment is voted.

It should be borne in mind that a federal grand jury can take action only upon federal crimes that have been committed within the district in which it has been impaneled.

Furthermore, a federal grand jury (except a special grand jury impaneled under 18 U.S.C. §§ 3331-3334) is not authorized to investigate situations involving the conduct of individuals, public officials, agencies or institutions that the grand jury believes is subject to mere criticism rather than a violation of federal criminal statutes. Its concern must be devoted solely to ascertaining whether there is probable cause to believe that a federal crime has been committed and to report accordingly to the court.

SELECTION OF GRAND JURORS

Federal law requires that a grand jury be selected at random from a fair cross section of the community in the district or division in which the federal grand jury convenes. Thus, all citizens have an equal opportunity and obligation to serve.

Pursuant to law, the names of prospective grand jurors are drawn at random from lists of registered voters or lists of actual voters, or other sources when necessary, under procedures designed to ensure that all groups in the community will have a fair chance to serve. Those persons whose names have been drawn and who are not exempt or excused from service are summoned to appear for duty as grand jurors. When these persons appear before the court, the presiding judge may consider any further requests to be excused. The judge will then direct the selection of 23 qualified persons to become the members of the grand jury.

ORGANIZATION, OATH, AND OFFICERS OF THE FEDERAL GRAND JURY

After the proper number of persons have been qualified as grand jurors, the court will appoint one of them to be the foreperson, or presiding officer, of the grand jury. A deputy foreperson will also be appointed, so that he or she can act as presiding officer in the foreperson's absence.

The foreperson, the deputy foreperson, and the remaining members of the grand jury are sworn in by the Clerk of the Court. Those persons who do not wish to swear may affirm.

The oath taken by the grand jurors binds them to inquire diligently and objectively into all federal crimes committed within the district of which they have or may obtain evidence and to conduct such inquiry without malice, fear, hatred, or other emotion.

After the grand jurors have been sworn, the presiding judge advises the grand jury of its obligations and how best to perform its duties. This is called the charge to the grand jury. Careful attention must be paid to the charge, for it and any additional instructions that may be given by the court contain the rules and directions the grand jury must follow during its term of service.

After the grand jury has been charged, it is taken to the grand jury room, where it will hear testimony and consider documentary evidence in the cases brought to its attention by the United States Attorney or an Assistant United States Attorney.

PROCEDURE

(1) Quorum

Sixteen of the 23 members of the grand jury constitute a quorum for the transaction of business. If fewer than this number are present, even for a moment, the proceedings of the grand jury must stop. This shows how important it is that each grand juror conscientiously attend the meetings. If an emergency will prevent a grand juror's attendance at the meeting, he or she must promptly advise the grand jury foreperson. If the juror's absence will prevent the grand jury from acting, the grand juror should, if at all possible, attend the meeting.

(2) Evidence Before the Grand Jury

Much of the grand jury's time is spent hearing testimony by witnesses and examining documentary or other evidence in order to determine whether such evidence justifies an indictment.

Each federal court district has a United States Attorney whose duty it is to represent the United States in federal matters within the district and to prosecute those accused of federal crimes. In the usual case, the United States Attorney or one of the Assistant United States Attorneys will present the evidence of alleged violations of the law to the grand jury. These attorneys also advise grand jurors as to what witnesses should be called and what documentary evidence should be produced for examination by the grand jury. The grand jury may ask that additional witnesses be called if it believes this necessary. The United States Attorney will also prepare the formal written indictments that the grand jury wishes to present. But neither the United States Attorney nor any Assistant United States Attorney may remain in the room while the grand jury deliberates and votes on an indictment.

(3) Questioning the Witness

Witnesses are called to testify one after another. Upon appearing to give testimony, each witness will be sworn by the grand jury foreperson or, in the foreperson's absence, the deputy foreperson. The witness will then be questioned. Ordinarily, the attorney for the government questions the witness first, followed next by the foreperson of the grand jury. Then, the other members of the grand jury may question the witness.

All questions asked of each witness must be relevant and proper, relating only to the case under investigation. If doubt should arise as to whether a question is appropriate, the advice of the United States Attorney may be sought. If necessary, a ruling may be obtained from the court.

Because of the need for secrecy, described in more detail in the following section, the law forbids anyone other than authorized persons from being present in the grand jury room while evidence is being presented. This means that only the grand jury, the United States Attorney or the Assistant United States Attorney, the witness under examination, the court reporter, and the interpreter (if the foreperson determines one is required) may be present. If an indictment should ultimately be voted, the presence of unauthorized persons in the grand jury room could invalidate it.

Occasionally, prior to answering a question, a witness may ask to leave the grand jury room to consult with his or her attorney. The grand jury is to draw no adverse inference from such conduct, for every witness has the right to confer with counsel even though counsel may not be present in the grand jury room. In fact, a witness may confer with counsel after each question, as long as he or she does not make a mockery of the proceedings or does not, by such, make an attempt to impede the orderly progress of the grand jury investigation.

Additionally, a witness who is appearing before the grand jury may invoke the Fifth Amendment privilege against self-incrimination and refuse to answer a question. In such a situation, the grand jurors may bring the matter before the court in order to obtain a ruling as to whether or not the answer may be compelled. One manner in which an answer may be compelled is by granting the witness immunity from prosecution in exchange for the witness' testimony.

(4) Calling the Person Under Investigation as a Witness

Normally, neither the person under investigation (sometimes referred to as the "accused," although this does not imply he or she is guilty of any crime) nor any witness on the accused's behalf will testify before the grand jury.

Upon request, preferably in writing, an accused may be given the opportunity by the grand jury to appear before it. An accused who does so appear cannot be forced to testify because

of the constitutional privilege against self-incrimination. If the grand jury attempts to force the accused to testify, an indictment returned against that person may be nullified.

Because the appearance of an accused before the grand jury may raise complicated legal problems, a grand jury that desires to request or to permit an accused to appear before it should consult with the United States Attorney and, if necessary, the court before proceeding.

Even if the accused is willing to testify voluntarily, it is recommended that he or she first be warned of the right not to testify. Also, he or she may be required to sign a formal waiver of this right. The grand jury should be completely satisfied that the accused fully understands what he or she is doing.

(5) The Evidence Needed Before a "True Bill" May Be Voted

It is the responsibility of the grand jury to weigh the evidence presented to it in order to determine whether this evidence, usually without any explanation being offered by the accused, persuades it that there is probable cause to believe that a crime has been committed and that the accused was the person who committed it. Remember that the grand jury is not responsible for determining whether the accused is guilty beyond a reasonable doubt, but only whether there is sufficient evidence of probable cause to justify bringing the accused to trial. Only the evidence presented to the grand jury in the grand jury room may be considered in determining whether to vote an indictment.

(6) Deliberations

When the grand jury has received all the evidence on a given charge, all persons other than the members of the grand jury must leave the room so that the grand jury may begin its deliberations. The presence of any other person in the grand jury room while the grand jury deliberates or votes may nullify an indictment returned on the accusation. After all persons

other than the grand jury members have left the room, the foreperson will ask the grand jury members to discuss and vote upon the question of whether the evidence persuades the grand jury that a crime has probably been committed by the person accused and that an indictment should be returned. Every grand juror has the right to express his or her view of the matter under consideration, and grand jurors should listen to the comments of all their fellow grand jurors before making up their mind. Only after each grand juror has been given the opportunity to be heard will the vote be taken. It should be remembered that at least 16 jurors must be present and 12 members must vote in favor of the indictment before it may be returned.

The foreperson of the grand jury must keep a record of the number of jurors concurring in the finding of every indictment and file the record with the Clerk of the Court. If an indictment is found, the grand jury will report it to the judge or a magistrate in open court. It will likewise report any "not true bills," or decisions not to indict. A decision not to indict should immediately be reported to the court in writing by the foreperson so that the accused may promptly be released from jail or freed from bail.

SECRECY

The law imposes upon each grand juror a strict obligation of secrecy. This obligation is emphasized in the oath each grand juror takes and in the charge given to the grand jury by the judge.

The tradition of secrecy continues as a vital part of the grand jury system for many reasons. It protects the grand jurors from being subjected to pressure by persons who may be subjects of investigations by the grand jury or associates of such persons. It prevents the escape of those against whom an indictment is being considered. It encourages witnesses before the grand jury to give full and truthful information as to the commission of a crime. It also prevents tampering with or intimidation of such witnesses before they testify at trial.

Finally, it prevents the disclosure of investigations that result in no action by the grand jury and avoids any stigma the public might attach to one who is the subject of a mere investigation by the grand jury.

Essentially, the grand jury may disclose matters occurring before it only to the attorneys for the government for use in the performance of their duties, but even attorneys for the government may not be informed of what took place during the grand jury's deliberations and voting. The only other time matters occurring before the grand jury may be disclosed to anyone is when disclosure is ordered by the court in the interests of justice. Disclosure of such matters may never be made to grand juror's friends or family, including a grand juror's spouse.

PROTECTION OF GRAND JURORS

The secrecy imposed upon grand jurors is a major source of protection for them. In addition, no inquiry may be made to learn what grand jurors said or how they voted, except upon order of the court.

The law gives the members of a grand jury broad immunity for actions taken by them within the scope of their authority as grand jurors.

Because of this immunity, all grand jurors must perform their duties with the highest sense of responsibility.

PRACTICAL SUGGESTIONS FOR GRAND JURORS

Each grand juror should attend the grand jury sessions regularly, in order to ensure that a quorum of 16 members will be present to conduct the grand jury's business.

Each grand juror should be on time for each meeting so that others are not kept waiting. The time of meetings should be scheduled so as to be convenient for the grand jury, the United States Attorney, and the witnesses.

Witnesses should be treated courteously when they appear before the grand jury. Questions should be put to them in an orderly fashion. The United States Attorney should complete his or her questioning of each witness before the foreperson asks questions. The remaining grand jurors will then have a chance to ask relevant and proper questions.

Each grand juror has an equal voice in determining whether or not an indictment should be returned. Therefore, it is important that all grand jurors pay close attention to the testimony and other evidence presented.

Each grand juror must be absolutely fair in his or her judgment of the facts. Otherwise, the grand juror will defeat the democratic purpose the grand jury is designed to serve.

During deliberations on a case, each grand juror should feel free to express his or her opinion based upon the evidence.

Each juror has equal duties and responsibilities, and each is entitled to be satisfied with the evidence before being called upon to vote. No juror has the right to dismiss a witness or to shut off proper discussion if other jurors wish to pursue the matter further.

No grand jury should undertake to investigate matters outside its proper scope merely because someone suggested an investigation, or because the investigation would be interesting.

No grand juror should discuss the cases under investigation with anyone, except fellow grand jurors and the United States .Attorney or the Assistant United States Attorney, and then only in the grand jury room. Of course, the grand jurors may always seek the advice of the judge.

Finally, every citizen who is selected to serve on a federal grand jury should bring to this task the determination to participate in a responsible manner and to make every effort to ensure that the grand jury will be a credit not only to the community it represents but to the United States.

GLOSSARY OF TERMS

Accused:

The person accused of the commission of a federal crime. Use of this term does not imply the person under investigation is guilty of any crime. After a person is indicted by the grand jury, that person is referred to as the "defendant."

Charge to the Grand Jury:

Given by the judge presiding over the selection and organization of the grand jury, the charge is the court's instructions to the grand jury as to its duties, functions, and obligations, and how to best perform them.

Deliberations:

The discussion by the grand jury members as to whether or not to return an indictment on a given charge against an accused. During deliberations no one except the grand jury members may be present.

District:

The geographical area over which the federal district court where the grand jury sits and the grand jury itself have jurisdiction. The territorial limitations of the district will be explained to the grand jury by the district judge.

Evidence:

Testimony of witnesses, documents, and exhibits as presented to the grand jury by an attorney for the government or otherwise properly brought before it. In some instances, the person under investigation may also testify.

Federal:

The national government as distinguished from the state governments.

Grand Jurors' Immunity:

Immunity is granted to all grand jurors for their authorized actions while serving on a federal grand jury and means that no grand juror may be penalized for actions taken within the scope of his or her service as a grand juror.

Indictment:

The written formal charge of a crime by the grand jury, returned when 12 or more grand jurors vote in favor of it.

Information:

The written formal charge of crime by the United States Attorney, filed against an accused who, if charged with a serious crime, must have knowingly waived the requirements that the evidence first be presented to a grand jury.

"No Bill":

Also referred to as "not a true bill," the "no bill" is the decision by the grand jury not to indict a person.

Petit Jury:

The trial jury, composed of 12 members, that hears a case after indictment and renders a verdict or decision after hearing the prosecution's entire case and whatever evidence the defendant chooses to offer.

Probable Cause:

The finding necessary in order to return an indictment against a person accused of a federal crime. A finding of

probable cause is proper only when the evidence presented to the grand jury, without any explanation being offered by the accused, persuades 12 or more grand jurors that a federal crime has probably been committed by the person accused.

Quorum for Grand Jury to Conduct Business:

Sixteen of the 23 members of a federal grand jury must at all times be present at a grand jury session in order for the grand jury to be able to conduct business.

United States Attorney:

The chief legal officer for the United States government in each federal district.

HIPAA Fact Sheet

U.S. Department of Justice

FACT SHEET: WHAT LAW ENFORCEMENT OFFICERS "NEED TO KNOW" ABOUT THE FEDERAL MEDICAL RECORDS PRIVACY REGULATION AND ACCESS TO "PROTECTED HEALTH INFORMATION "

• On April 14, 2003, a new federal regulation that gives new federal privacy protections to medical records became enforceable (45 Code of Federal Regulations – Parts 160 & 164).

• The new regulation places legal obligations on doctors, hospitals, pharmacies, insurance companies, etc., governing their ability to disclose medical information about a suspect or victim and may, in some situations, make them unable to give you such information.

• This FACT SHEET will help law enforcement officers understand how to obtain personal medical evidence needed for investigations, within the bounds of federal law.

Health Insurance Portability and Accountability Act of 1996 (HIPAA): Standards for Confidentiality of Individually Identifiable Health Information (HIPAA Privacy Rule)

• HIPAA's "Standards for Confidentiality of Individually Identifiable Health Information" governs how and when a "***Covered Entity***" can use or disclose "individually identifiable health (medical) information (in whatever form) concerning an individual person (in HIPAA terminology: "***protected health information***").

• There are three types of ***Covered Entities***, under HIPAA: (1) health plans: group and individual health insurance, HMOs, Medicare, Medicaid and other government health plans; (2) health care clearinghouses: billing services and providers; (3) health care providers: doctors, nurses, paramedics and other emergency services personnel; hospitals and clinics; pharmacies (see 45 CFR 160.103).

• ***Protected health information*** is "individually identifiable health information" which is transmitted by electronic media, or maintained in any electronic medium (defined at 45 CFR 162.103), or transmitted or maintained in any other form or medium (essentially all health records identifiable by a patient name or other personal identifier – such as a Social Security Number – is ***protected health information***!).

• As a general rule, ***Covered Entities*** may not use or disclose ***protected health information*** unless permitted by a provision of the rules, such as the

- patient provides ***written authorization*** (permission) for the disclosure disclosure is for a ***health oversight*** purpose
- disclosure is for a certain ***law enforcement*** purpose (listed on back of this Fact Sheet)
- disclosure is otherwise ***required by law***, e.g., statute, subpoena, court order.

• The behavior of government agencies that are ***not*** covered entities (e.g., law enforcement) is not regulated by the HIPAA Privacy Rule, but when ***law enforcement agencies*** seek protected health information from covered entities, the rules will dictate how the covered entities respond to law enforcement requests for ***protected health information***.

The HIPAA Privacy Rule provides several "***law enforcement exceptions***" to the new requirement that patients previously authorize a Covered Entity's disclosure of their protected health information. So, if a Covered Entity or a person speaking on behalf of a Covered Entity, says: ***"Sorry, officer, I can't give you that information because of the new privacy regulations..."***

You can respond with one of the following responses, IF it applies***..."Yes, [Covered Entity], you can give me the information I need because [one of the following law enforcement exceptions applies] ..."***

1. **Required by law** [45 CFR 164.512(f)(1)(i)] ***"the laws of this State require reporting of [certain types of wounds or other physical injuries...] to law enforcement agencies..."***

2. **Court order, or warrant, subpoena or summons issued by a judicial officer** [45 CFR 164.512(f)(1)(ii)(A)] ***"I am serving a court-ordered subpoena on you, so can (and must) produce the medical records I am seeking."***

3. **Grand jury subpoena** [45 CFR 164.512(f)(1)(ii)(B)] ***"I am serving a grand jury subpoena on you, so you can (and must) produce the medical records that I seek."***

4. **Administrative subpoena or request**, **but only if 3 specific requirements are met** [45 CFR 164.512(f)(1)(ii)(C)] ***"because I am serving an administrative subpoena on you, and you will see that the subpoena states that it meets the three-part test...*** *(1) the information sought is material to a legitimate law enforcement inquiry); (2) the request is specific and limited in scope to the purpose for which it is being sought; and (3) de-identified information could not reasonably be used (i.e., without SSN or name, the information would be useless as evidence).*

5. **Locate or identify** [45 CFR 164.512(f)(2***)"I am trying to locate OR identify a suspect... fugitive...material witness...OR a missing person."*** This exception will permit access to 8 types individually identifiable information (but excludes DNA, dental records, body fluid, or tissue; a subpoena would be necessary).

6. **Information about a victim of a crime** [45 CFR 164.512(f)(3) ***"I need this information about this person, who is or I suspect is a victim of a crime...or to determine if someone else committed a crime...that cannot be delayed until the victim approves the disclosure... "***

7. **Crime on premises** [45 CFR 164.512(f)(5)] ***"the [covered entity] believes that the information is evidence of a crime that occurred on the premises" (e.g. a nursing home, hospital, etc.)***

8. **Reporting crime in emergencies** [45 CFR 164.512(f)(6)] ***"you are an emergency health care worker who responded to a medical emergency outside the hospital (etc.) and you can tell law enforcement about the commission and nature of the crime; location of the crime and victims; the identity, description or location of the perpetrator..."***

9. **Victims of abuse, neglect, domestic violence** [45 CFR 164.512(c)] This exception is limited to four specific scenarios; if possible, get a subpoena or the individual's agreement to use his/her medical information instead of relying on this exception.

10. **Coroners** [45 CFR 164.512(g)(1)] ***"because the coroner or medical examiner needs the information to determine the cause of death or perform his other duties."***

11. **To avert a serious threat to health/safety** [45 CFR 164.512(j) ***"the disclosure is necessary to avert a serious and imminent threat to a person's safety or the public...; OR to identify or apprehend an individual ... because that individual admitted participating in a violent crime that may have caused serious physical harm to the victim"; OR "to identify or apprehend someone who escaped from a correctional institution or from lawful custody."***

12. **Other important miscellaneous exceptions**: national security and intelligence; protective services for the President and others; ***jails, prisons, law enforcement custody*** to safeguard the person/s in custody or corrections employees who are in proximity of the person/s in custody.

Remember to show your badge, that you need to satisfy only **ONE** of the **law enforcement exceptions**, AND that you also must familiarize yourself with the requirements of your state's medical records privacy laws. To stop a Covered Entity from disclosing to patients that you have their medical information, (1) make an oral request that the entity not make a disclosure to the patient and (2) follow up with a written request, on official letterhead, within 30 days.

Wray Memorandum
on Garrity / Kalkines Warnings

U.S. Department of Justice

Criminal Division

Assistant Attorney General *Washington, D.C. 20530*

May 6, 2005

MEMORANDUM

To: All Federal Prosecutors

From: Christopher A. Wray
Assistant Attorney General

Re: The Increasing Role of the Offices of Inspector General, and Uniform Advice of Rights Forms for Interviews of Government Employees

This memorandum is intended to highlight the increasing role of the Offices of Inspector General in the investigation of criminal conduct involving federal employees and agencies, and to provide you with information regarding the advice of rights forms that should be used by Inspector General agents when interviewing government employees.

Increased Role of the Offices of Inspector General

Over the past several years, we have seen a substantial increase in the role and presence of the Offices of Inspector General in the investigation of criminal conduct involving federal departments and agencies. The Offices of Inspector General have embraced their increased role, and they have been provided with additional tools to help them. First, the Homeland Security Act provided statutory law enforcement powers to Inspector General agents, including additional authority to carry firearms, make arrests, and execute search warrants. The Attorney General promulgated detailed guidelines for Inspector General agents in exercising these new powers, and the guidelines provide that Inspector General agents should receive additional law enforcement training on a regular basis. The Inspector General Criminal Investigator Training Academy has crafted a detailed training regimen to satisfy the Attorney General's requirements and to insure that Inspector General agents have the knowledge and skills that they need to carry out their expanding duties.

In addition, the Offices of Inspector General have been authorized to conduct undercover operations, and the Public Integrity Section is working closely with the Inspector General Community to develop a comprehensive set of undercover guidelines that will provide effective procedures for the initiation and completion of undercover operations by the Offices of Inspector General.

In light of the increased presence and role of the Offices of Inspector General, you should anticipate more frequent contact with Inspector General agents, and I encourage each U.S. Attorney's Office to reach out to their offices in your districts in order to establish an effective partnership with them.

Uniform Advice of Rights Forms

I also wish to bring to your attention an issue that is presented whenever Inspector General agents interview government employees. In 1967, the Supreme Court held that if government employees are compelled to answer questions under the threat of losing their government employment, then the government may not use the employees' statements or any evidence derived from those statements in any criminal prosecution. Garrity v. New Jersey, 385 U.S. 493 (1967). Such statements are effectively "immunized." This type of immunity will be found if an employee has an objectively reasonable belief that he or she will be disciplined if he or she refuses to answer questions. The risk of creating such immunity is particularly acute when interviews are conducted by Inspector General agents because they handle both criminal investigations and investigations that lead to administrative discipline.

In order to address these concerns, when a federal employees is interviewed during the course of an investigation being conducted by an Office of Inspector General, the agents should provide the employee with an advice of rights form that is designed to preserve the government's ability to use the employee's statements by advising the employee that the interview is voluntary and that the employee will not be disciplined solely for refusing to answer questions. This is commonly referred to as the "Garrity" warning.

On the other hand, in investigations where the government has chosen to forgo any criminal prosecution of a government employee, and instead pursue administrative remedies and discipline, the government may compel the employee to answer questions. Under well-established case law, in such instances the employee must be assured that his or her statements may not be used against the employee in any criminal proceeding. Kalkines v. United States, 472 F.2d 1391 (Ct. Cl. 1973). To address this issue, when Inspector General agents wish to compel a federal employee to answer questions, they provide the employee with a warning form that is commonly referred to as a "Kalkines" warning. If an employee refuses to answer questions when presented with the Kalkines warning, the employee may be terminated for that refusal. Any answers that the employee provides may be used for administrative purposes, but not for any

criminal prosecution. If an employee lies during a compelled interview, however, the employee may be prosecuted for lying. In any interview of a government employee by an Inspector General agent, either the Garrity or the Kalkines warnings should be given. In custodial interviews, of course, the employees should also be provided with Miranda warnings.

Recently, the President's Council on Integrity and Efficiency formed a working group including representatives from the Inspector General community and the Public Integrity Section to examine the advice of rights forms that are currently being used by the Offices of Inspector General. The group found a patchwork of different forms, many of which contain language that is outdated and unnecessary. As a result, the working group devised uniform Garrity and Kalkines advice of rights forms, and those forms have now been approved by the Attorney General. Copies of the uniform advice of rights forms are attached for your reference. Although it remains the responsibility of the individual Offices of Inspector General to prepare and issue the advice of rights forms, they should be encouraged to use these uniform advice of rights forms as models.

Conclusion

The Offices of Inspector General have assumed a greater role in the investigation of criminal activity that affects the integrity, security, and effective operation of the federal government. We welcome their commitment to addressing this serious criminal activity, and I encourage all of you to establish strong working relationships with the Offices of Inspector General in your districts.

Attachments

WARNINGS AND ASSURANCES TO EMPLOYEE REQUESTED TO PROVIDE INFORMATION ON A VOLUNTARY BASIS (GARRITY)

You are being asked to provide information as part of an investigation being conducted by the Office of the Inspector General into alleged misconduct and/or improper performance of official duties. This investigation is being conducted pursuant to the Inspector General Act of 1978, as amended.

This is a voluntary interview. Accordingly, you do not have to answer questions. No disciplinary action will be taken against you solely for refusing to answer questions.

Any statement you furnish may be used as evidence in any future criminal proceeding or agency disciplinary proceeding, or both.

ACKNOWLEDGMENT

I understand the warnings and assurances stated above and I am willing to make a statement and answer questions. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

_____	_____
Office of Inspector General Special Agent	**Employee's Signature**
Witness: _____	**Date:** _____
Time: _____	**Location:** _____

WARNINGS AND ASSURANCES TO EMPLOYEE REQUIRED TO PROVIDE INFORMATION (KALKINES)

You are being asked to provide information as part of an investigation being conducted by the Office of the Inspector General into alleged misconduct and/or improper performance of your official duties. The investigation involves the following:

_____

_____

The purpose of this interview is to obtain information which will assist in the determination of whether administrative action is warranted. This investigation, is being conducted pursuant to the Inspector General Act of 1978, as amended.

- You are going to be asked a number of specific questions concerning the performance of your official duties.
- You have a duty to reply to these questions, and agency disciplinary action, including dismissal, may be undertaken if you refuse to answer, or fail to reply fully and truthfully.
- The answers you furnish and any information or evidence resulting therefrom may be used in the course of civil or administrative proceedings.
- Neither your answers nor any information or evidence which is gained by reason of such statements can be used against you in any criminal proceedings, except that if you knowingly and willfully provide false statements or information in your answers, you may be criminally prosecuted for that action.

ACKNOWLEDGMENT

_____ **Office of Inspector General Special Agent**

_____ **Employee's Signature**

Witness: _____ **Date:** _____

Time: _____ **Location:** _____

Fisher Memorandum
on Garrity / Kalkines Warnings

U.S. Department of Justice

Criminal Division

Assistant Attorney General *Washington, D.C. 20530*

January 11, 2006

The Honorable Gregory H. Friedman
Vice Chair, President's Council on Integrity and Efficiency
Department of Energy, Office of Inspector General
1000 Independence Avenue, SW
Washington, DC 20585

The Honorable Barry R. Snyder
Vice Chair, Executive Council on Integrity and Efficiency
Federal Reserve Board, Office of Inspector General
Mail Stop 300
20th Street and Constitution Avenue, NW
Washington, DC 20551

Dear Messrs. Vice Chairs:

This letter is intended to provide clarification to the members of the Inspector General community regarding the use of model Garrity and Kalkines advice of rights forms that were approved by the Attorney General in April 2005. The Department of Justice places great value on its partnership with the Inspector General community in the enforcement of federal law, and we welcome the opportunity to provide additional guidance on this important issue.

In 2004, the Assistant Inspector General for Investigations Subcommittee of the Investigations Committee, Presidents Council on Integrity and Efficiency (PCIE), established a working group to evaluate the existing Garrity and Kalkines warning forms being used by inspector general agents, and to develop model warning forms. The working group was headed by the Assistant Inspector General for Investigations at the Federal Deposit Insurance Corporation, and included representatives from several Offices of Inspector General and the Public Integrity Section of the Department of Justice.

The working group produced model Garrity and Kalkines forms, which were approved by Attorney General Alberto Gonzales on April 14, 2005. On May 6, 2005, my predecessor, Assistant Attorney General Christopher A. Wray, distributed a memorandum to all federal prosecutors highlighting the increasing role that Inspector General agents play in enforcing criminal law, and notifying federal prosecutors of the model Garrity and Kalkines warning forms.

I understand that members of the Inspector General community have expressed concerns regarding the interpretation of the Wray memorandum, and the proper use of the model warning forms. In particular, we have been asked whether the Offices of Inspector General are required to

adopt and use the model warning forms without modification, and whether Inspector General agents are required to provide warnings to government employees in every interview, regardless of whether the employee is a subject of investigation at the time of the interview. This letter is intended to provide clarification on those matters.

The primary goals of the working group were to achieve a greater degree of uniformity among the warning forms that are used by Inspector General agents in the various departments and agencies, and to make the forms more effective. In order to achieve those goals, the working group drafted models containing simplified and more streamlined warnings that would preserve the government's ability to use statements in criminal proceedings, and at the same time free the Offices of Inspector General from the obligation to include in their warnings the unnecessary and stark language that applies in the custodial interrogation setting under Miranda v. Arizona. It is our hope that the Offices of Inspector General will find the model warning forms helpful, and they are encouraged to use the models. The Wray memorandum recognized, however, that it remains the responsibility of the Offices of Inspector General to prepare specific advice of rights forms for use in their agencies, and we understand that individual Offices of Inspector General may find a need to modify the model warnings to fit the particular investigative needs within their agencies. There is no prohibition against doing so.

The Wray memorandum also emphasized the importance of providing appropriate warnings to government employees who are interviewed by inspector general agents. As you know, when a government employee is interviewed without the proper warnings, the resulting statement may be deemed compelled, which forecloses our ability to bring criminal charges and may taint an entire investigation or prosecution. In order to minimize this risk, consistent with the guidance issued by Attorney General Civiletti in 1980, the Wray memorandum encouraged the use of Garrity warnings whenever inspector general agents conduct interviews of government employees. We continue to believe that the use of such warnings is the best and preferred practice.

We recognize, however, that the Offices of Inspector General serve many functions in their agencies, and that they must maintain the ability to gather information effectively from witnesses who are government employees. The Wray memorandum was not intended undermine or change the existing authority of the Offices of Inspector General to exercise their professional judgment regarding the specific circumstances under which the Garrity warnings must be given.

I hope that this clarification will be of assistance. We look forward to continuing our strong working relationship with the Inspector General community.

Sincerely,

Alice S. Fisher
Assistant Attorney General

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Department of Homeland Security

Use of Deadly Force Policy

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

July 1, 2004

MEMORANDUM FOR: Deputy Secretary
Under Secretaries
Director, U.S. Secret Service
Commandant, U.S. Coast Guard
Assistant Secretary, ICE
Commissioner, CBP
Acting Administrator, TSA

FROM: Tom Ridge

SUBJECT: Use of Deadly Force Policy

Attached is the Department of Homeland Security (DHS) Use of Deadly Force Policy which I issued today. The policy, applicable to all DHS law enforcement officers and agents, is intended to provide the standard for all DHS components. Officials and supervisors should take appropriate steps to ensure that pre-existing use of force policies comply with this new standard and incorporate its core principles.

The following Use of Deadly Force Policy was developed by a Task Force comprised of DHS headquarters and component representatives to unify to the extent feasible and practicable existing DHS agency policies. The resulting umbrella policy reflects the components' different law enforcement missions and activities, and permits the agencies to adopt more detailed operational guidance with DHS approval.

www.dhs.gov

38686

DEPARTMENT OF HOMELAND SECURITY POLICY ON THE
USE OF DEADLY FORCE

June 25, 2004

By virtue of the authority vested in the Secretary of the Department of Homeland Security, including the authority vested by 6 U.S.C. §112(a), I hereby establish a Department of Homeland Security policy on the use of deadly force for law enforcement. The policy set forth herein is intended to set uniform standards and provide broad guidelines for the use of force by law enforcement officers and agents of the Department of Homeland Security performing law enforcement missions. The provisions of this Order apply to all law enforcement officers and agents of the Department of Homeland Security.

I. GENERAL PRINCIPLES

Law enforcement officers and agents of the Department of Homeland Security may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.

A. Fleeing subjects. Deadly force may not be used solely to prevent the escape of a fleeing suspect.

B. Firearms may not be fired solely to disable moving vehicles, vessels, aircraft, and other conveyances, except as follows:

1. United States Secret Service agents and officers, in exercising the United States Secret Service's protective responsibilities, may discharge firearms to disable moving vehicles, vessels, and other conveyances. United States Secret Service agents and officers may discharge firearms to disable aircraft in flight, only if the use of deadly force against the occupants of the aircraft would be authorized under this policy.

2. U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection and U.S. Coast Guard law enforcement officers and agents, when conducting maritime law enforcement, may fire firearms to disable moving vessels or other conveyances.

C. If feasible and if to do so would not increase the danger to the officer or others, a warning to submit to the authority of the officer shall be given prior to the use of deadly force.

D. Warning shots are not permitted, except as follows:

1. Warning shots may be used by United States Secret Service agents and officers in exercising the United States Secret Service's protective responsibilities.

2. Warning shots may be used by U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection and U.S. Coast Guard law enforcement officers and agents when conducting maritime law enforcement only as a signal to a vessel to stop.

3. Warning shots may be used by U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection and U.S. Coast Guard law enforcement officers and agents when conducting aviation law enforcement operations only as a signal to an aircraft to change course and follow direction to leave airspace.

E. Officers will be trained in alternative methods and tactics for handling resisting subjects which must be used when the use of deadly force is not authorized by this policy.

II. GUIDELINES

A. Homeland Security Directorates and Agencies shall, to the extent necessary, supplement this policy with policy statements or guidance consistent with this policy. Such policy statements shall be subject to review and approval by appropriate departmental offices, including the Office of General Counsel, to ensure consistency with law and departmental standards and policies.

B. The respective Homeland Security Directorate Under Secretaries, the Commandant of the United States Coast Guard, and the Director of the United States Secret Service shall approve guidelines for weaponless control techniques, intermediate weapons, and firearms or lethal weapons with non-lethal munitions, in accordance with this policy and that directorate's or agency's unique law enforcement mission, training, and equipment.

III. MILITARY ACTIVITIES

This policy shall not apply to the United States Coast Guard when engaged in warfighting, the military defense of the United States, or other military activities where Standing Rules of Engagement apply or to other operations at sea addressed by other policies or direction.

IV. SAVINGS

To the extent agency and component policies and procedures in place prior to the creation of the Department of Homeland Security are consistent with this policy, they remain in full force and effect unless otherwise revoked or modified.

V. APPLICATION OF THE POLICY

This Policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

Tom Ridge

Tom Ridge

Department of State

Consular Notification and Access Reference:
Instructions for Arrests and Detentions of Foreign Nationals

This section summarizes for law enforcement officials the basic consular notification procedures to follow upon the arrest or detention of a foreign national. For more detailed instructions and legal material, see the Department of State publication Consular Notification and Access. *The complete publication is available at http://travel.state.gov/law/notify.html. Questions may also be addressed to:*

Office of Public Affairs and
Policy Coordination
CA/P, Room 4800
Bureau of Consular Affairs
U.S. Department of State
Washington, DC 20520

Telephone: (202) 647-4415
Fax: (202) 736-7559

Urgent after-hours inquiries may be
Directed to (202) 647-1512
(State Department Operations Center)

(06/04)

Steps To Follow When a Foreign National Is Arrested or Detained[1]

1. Determine the foreign national's country. Normally, this is the country on whose passport or other travel document the foreign national travels.

2. If the foreign national's country is **not** on the mandatory notification countries list on the following page:

   (I) Offer, without delay, to notify the foreign national's consular officials of the arrest/detention. (Statement 1 at end of this document)

   (II) If the foreign national asks that consular notification be given, notify the nearest consular officials of the foreign national's country without delay.

3. If the foreign national's country **is** on the list of mandatory notification countries on the following page:

   (I) Notify that country's nearest consular officials, without delay, of the arrest/detention.

   (II) Tell the foreign national that you are making this notification. (Statement 2 at end of this document)

4. Keep a written record of the provision of notification and actions taken.

[1] These steps should be followed for all foreign nationals, regardless of their immigration status.

Mandatory Notification Countries and Jurisdictions

Algeria
Antigua and Barbuda
Armenia
Azerbaijan
Bahamas, The
Barbados
Belarus
Belize
Brunei
Bulgaria
China[3]
Costa Rica
Cyprus
Czech Republic
Dominica
Fiji
Gambia, The
Georgia
Ghana
Grenada
Guyana
Hong Kong
Hungary
Jamaica
Kazakhstan
Kiribati
Kuwait
Kyrgyzstan
Malaysia
Malta
Mauritius
Moldova
Mongolia
Nigeria
Philippines
Poland[2]
Romania
Russia
Saint Kitts and Nevis
Saint Lucia
Saint Vincent/Grenadines
Seychelles
Sierra Leone
Singapore
Slovakia
Tajikistan
Tanzania
Tonga
Trinidad and Tobago
Tunisia
Turkmenistan
Tuvalu
Ukraine
United Kingdom
U.S.S.R.[4]
Uzbekistan
Zambia
Zimbabwe

[2] Mandatory for non-permanent residents only.
[3] Does not include Republic of China (Taiwan) passport holders.
[4] Passports may still be in use.

Suggested Statements to Arrested or Detained Foreign Nationals

Statement 1: For All Foreign Nationals Except Those From List Countries

As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your country's consular officers here in the United States of your situation. You are also entitled to communicate with your consular officers. A consular officer may be able to help you obtain legal representation, and may contact your family and visit you in detention, among other things. If you want us to notify your country's consular officers, you can request this notification now, or at any time in the future. Do you want us to notify your consular officers at this time?

Statement 2: For Foreign Nationals From List Countries

Because of your nationality, we are required to notify your country's consular officers here in the United States that you have been arrested or detained. We will do that as soon as possible. In addition, you are entitled to communicate with your consular officers. You are not required to accept their assistance, but your consular officers may be able to help you obtain legal representation, and may contact your family and visit you in detention, among other things.

This material is an adaptation of the information available at http://www.travel.state.gov/law/consul_notify.html. It has been reproduced with the permission of the United States Department of State. For more guidance on any of these issues, please contact the Office of Public Affairs and Policy Coordination of the Department of State at (202) 647-4415.

Selected Federal Rules of Criminal Procedure

Rule 1. Scope; Definitions

(a) Scope.
(1) In General.
These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States.
(2) State or Local Judicial Officer.
When a rule so states, it applies to a proceeding before a state or local judicial officer.
(3) Territorial Courts.
These rules also govern the procedure in all criminal proceedings in the following courts:
(A) the district court of Guam;
(B) the district court for the Northern Mariana Islands, except as otherwise provided by law; and
(C) the district court of the Virgin Islands, except that the prosecution of offenses in that court must be by indictment or information as otherwise provided by law.
(4) Removed Proceedings.
Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.
(5) Excluded Proceedings.
Proceedings not governed by these rules include:
(A) the extradition and rendition of a fugitive;
(B) a civil property forfeiture for violating a federal statute;
(C) the collection of a fine or penalty;
(D) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise;
(E) a dispute between seamen under 22 U.S.C. §§ 256-258; and
(F) a proceeding against a witness in a foreign country under 28 U.S.C. § 1784.
(b) Definitions.
The following definitions apply to these rules:
(1) "Attorney for the government" means:
(A) the Attorney General or an authorized assistant;

(B) a United States attorney or an authorized assistant;
(C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and
(D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.
(2) "Court" means a federal judge performing functions authorized by law.
(3) "Federal judge" means:
(A) a justice or judge of the United States as these terms are defined in 28 U.S.C. § 451;
(B) a magistrate judge; and
(C) a judge confirmed by the United States Senate and empowered by statute in any commonwealth, territory, or possession to perform a function to which a particular rule relates.
(4) "Judge" means a federal judge or a state or local judicial officer.
(5) "Magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631–639.
(6) "Oath" includes an affirmation.
(7) "Organization" is defined in 18 U.S.C. § 18.
(8) "Petty offense" is defined in 18 U.S.C. § 19.
(9) "State" includes the District of Columbia, and any commonwealth, territory, or possession of the United States.
(10) "State or local judicial officer" means:
(A) a state or local officer authorized to act under 18 U.S.C. § 3041; and
(B) a judicial officer empowered by statute in the District of Columbia or in any commonwealth, territory, or possession to perform a function to which a particular rule relates.
(11) "Victim" means a **"crime victim"** as defined in 18 U.S.C. § 3771(e).
(c) Authority of a Justice or Judge of the United States.
When these rules authorize a magistrate judge to act, any other federal judge may also act.

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.

Rule 4. Arrest Warrant Or Summons On A Complaint

(a) Issuance.
If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If a defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant.
(b) Form.
(1) Warrant.
A warrant must:
(A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty;
(B) describe the offense charged in the complaint;
(C) command that the defendant be arrested and brought without unnecessary delay before a magistrate judge or, if none is reasonably available, before a state or local judicial officer; and
(D) be signed by a judge.
(2) Summons.
A summons must be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.
(c) Execution or Service, and Return.
(1) By whom.
Only a marshal or other authorized officer may execute a

warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.

(2) Location.

A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest.

(3) Manner.

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. A copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

(4) Return.

(A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local judicial officer.

(B) The person to whom a summons was delivered for service must return it on or before the return day.

(C) At the request of an attorney for the government, a judge may deliver an unexecuted warrant, an un-served summons, or a copy of the warrant or summons to the marshal or other authorized person for execution or service.

Rule 5. Initial Appearance

(a) In General.
(1) Appearance Upon an Arrest.
(A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.
(B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise.
(2) Exceptions.
(A) An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if:
(i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and
(ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint.
(B) If a defendant is arrested for violating probation or supervised release, Rule 32.1 applies.
(C) If a defendant is arrested for failing to appear in another district, Rule 40 applies.
(3) Appearance Upon a Summons. When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.
(b) Arrest Without a Warrant. If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.
(c) Place of Initial Appearance; Transfer to Another District.
(1) Arrest in the District Where the Offense Was Allegedly Committed. If the defendant is arrested in the district where the offense was allegedly committed:
(A) the initial appearance must be in that district; and
(B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

(2) Arrest in a District Other Than Where the Offense Was Allegedly Committed.
If the defendant was arrested in a district other than where the offense was allegedly committed, the initial appearance must be:
(A) in the district of arrest; or
(B) in an adjacent district if:
(i) the appearance can occur more promptly there;
or
(ii) the offense was allegedly committed there and the initial appearance will occur on the day of arrest.
(3) Procedures in a District Other Than Where the Offense Was Allegedly Committed.
If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:
(A) the magistrate judge must inform the defendant about the provisions of Rule 20;
(B) if the defendant was arrested without a warrant, the district court where the offense was allegedly committed must first issue a warrant before the magistrate judge transfers the defendant to that district;
(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1;
(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:
(i) the government produces the warrant, a certified copy of the warrant, or a reliable electronic form of either; and
(ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and
(E) when a defendant is transferred and discharged, the clerk must promptly transmit the papers and any bail to the clerk in the district where the offense was allegedly committed.
(d) Procedure in a Felony Case.
(1) Advice.
If the defendant is charged with a felony, the judge must inform the defendant of the following:
(A) the complaint against the defendant, and any affidavit filed with it;

(B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;
(C) the circumstances, if any, under which the defendant may secure pretrial release;
(D) any right to a preliminary hearing; and
(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant.

(2) Consulting with Counsel.
The judge must allow the defendant reasonable opportunity to consult with counsel.

(3) Detention or Release.
The judge must detain or release the defendant as provided by statute or these rules.

(4) Plea.
A defendant may be asked to plead only under Rule 10.

(e) Procedure in a Misdemeanor Case.
If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).

(f) Video Teleconferencing.
Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.

Rule 5.1. Preliminary Hearing

(a) In general. If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless:
(1) the defendant waives the hearing;
(2) the defendant is indicted;
(3) the government files an information under Rule 7(b) charging the defendant with a felony;
(4) the government files an information charging the defendant with a misdemeanor; or
(5) the defendant is charged with a misdemeanor and consents to trial before a magistrate judge.

(b) Selecting a District. A defendant arrested in a district other than where the offense was allegedly committed may elect to have the preliminary hearing conducted in the district where the prosecution is pending.

(c) Scheduling. The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 14 days after the initial appearance if the defendant is in custody and no later than 21 days if not in custody.

(d) Extending the Time. With the defendant's consent and upon a showing of good cause--taking into account the public interest in the prompt disposition of criminal cases--a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, the magistrate judge may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.

(e) Hearing and Finding. At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.

(f) Discharging the Defendant. If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.

(g) Recording the Proceedings. The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon any payment required by applicable Judicial Conference regulations.

(h) Producing a Statement.

(1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause rules otherwise in a particular case.

(2) Sanctions for Not Producing a Statement. If a party disobeys a Rule 26.2 order to deliver a statement to the moving

party, the magistrate judge must not consider the testimony of a witness whose statement is withheld.

RULE 6. The Grand Jury

(a) Summoning a Grand Jury.
(1) In General. When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement.
(2) Alternate Jurors. When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.
(b) Objection to the Grand Jury or to a Grand Juror.
(1) Challenges. Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.
(2) Motion to Dismiss an Indictment. A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by *28 U.S.C. § 1867(e)*. The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.
(c) Foreperson and Deputy Foreperson. The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson--or another juror designated by the foreperson--will record the

number of jurors concurring in every indictment and will file the record with the clerk, but the record may not be made public unless the court so orders.

(d) Who May Be Present.

(1) While the Grand Jury Is in Session. The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.

(2) During Deliberations and Voting. No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosing the Proceedings.

(1) Recording the Proceedings. Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii);

(3) Exceptions.

(A) Disclosure of a grand-jury matter--other than the grand jury's deliberations or any grand juror's vote--may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel--including those of a state, state subdivision, Indian tribe, or foreign government--that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by *18 U.S.C. § 3322*.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in *50 U.S.C. § 401(a)*, or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines

issued by the Attorney General and the Director of National Intelligence.
(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.
(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:
(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent; or
- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to-

- the national defense or the security of the United States; or
- the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure--at a time, in a manner, and subject to any other conditions that it directs--of a grand-jury matter:
(i) preliminarily to or in connection with a judicial proceeding;
(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;
(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;
(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte--as it may be when the government is the petitioner--the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(4) Sealed Indictment. The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) Sealed Records. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) Contempt. A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the

Director of National Intelligence under Rule 6, may be punished as a contempt of court.

(f) Indictment and Return. A grand jury may indict only if at least 12 jurors concur. The grand jury--or its foreperson or deputy foreperson--must return the indictment to a magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

(g) Discharging the Grand Jury. A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.

(h) Excusing a Juror. At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror.

(i) "Indian Tribe" Defined. "Indian tribe" means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under *25 U.S.C. § 479a-1*.

Rule 16. Discovery And Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

(A) Defendant's Oral Statement. Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) Defendant's Written or Recorded Statement. Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following

(i) any relevant written or recorded statement by the defendant if: the statement is within the government's possession, custody, or control; and the attorney for the government knows-

-or through due diligence could know—that the statement exists;
(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and
(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.
(C) Organizational Defendant. Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:
(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or
(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.
(D) Defendant's Prior Record. Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows--or through due diligence could know--that the record exists.
(E) Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
(i) the item is material to preparing the defense;
(ii) the government intends to use the item in its case-in-chief at trial; or
(iii) the item was obtained from or belongs to the defendant.
(F) Reports of Examinations and Tests. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical

or mental examination and of any scientific test or experiment if:
(i) the item is within the government's possession, custody, or control;
(ii) the attorney for the government knows—or through due diligence could know—that the item exists; and
(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.
(G) Expert Testimony. Upon a defendant's request, the government must give the defendant a written summary of any testimony the government intends to use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.
(2) Information Not Subject to Disclosure.
Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.
(3) Grand Jury Transcripts. This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.
(b) Defendant's Disclosure.
(1) Information Subject to Disclosure.
(A) Documents and Objects. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:
(i) the item is within the defendant's possession, custody, or control; and
(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.
(B) Reports of Examinations and Tests. If a defendant requests disclosure under Rule 16(a)(1)(F) and the government

complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:
(i) the item is within the defendant's possession, custody, or control; and
(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.
(C) Expert Testimony. If a defendant requests disclosure under Rule 16(a)(1)(G) and the government complies, the defendant must give the government, upon request, a written summary of any testimony the defendant intends to use as evidence at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.
(2) Information Not Subject to Disclosure. Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:
(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or
(B) a statement made to the defendant, or the defendant's attorney or agent, by:
(i) the defendant;
(ii) a government or defense witness; or
(iii) a prospective government or defense witness.
(c) Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:
(1) the evidence or material is subject to discovery or inspection under this rule; and
(2) the other party previously requested, or the court ordered, its production.
(d) Regulating Discovery.
(1) Protective and Modifying Orders. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may

permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(2) Failure to Comply. If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

Rule 26.2. Producing A Witness's Statement

(a) Motion to Produce.

After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

(b) Producing the Entire Statement.

If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.

(c) Producing a Redacted Statement.

If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any privileged or unrelated portions, the court must order delivery of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.

(d) Recess to Examine a Statement.
The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.
(e) Sanction for Failure to Produce or Deliver a Statement.
If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If an attorney for the government disobeys the order, the court must declare a mistrial if justice so requires.
(f) "Statement" Defined.
As used in this rule, a witness's "statement" means:
(1) a written statement that the witness makes and signs, or otherwise adopts or approves;
(2) a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or
(3) the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.
(g) Scope.
This rule applies at trial, at a suppression hearing under Rule 12, and to the extent specified in the following rules:
(1) Rule 5.1(h) (preliminary hearing);
(2) Rule 32(i)(2) (sentencing);
(3) Rule 32.1(e) (hearing to revoke or modify probation or supervised release);
(4) Rule 46(j) (detention hearing); and
(5) Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255.

Rule 41. Search And Seizure

(a) Scope and Definitions.
(1) Scope. This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.
(2) Definitions. The following definitions apply under this rule:
(A) "**Property**" includes documents, books, papers, any other tangible objects, and information.
(B) "**Daytime**" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(C) "**Federal law enforcement officer**" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.
(D) "**Domestic terrorism**" and "**international terrorism**" have the meanings set out in 18 U.S.C. § 2331.
(E) "**Tracking device**" has the meaning set out in 18 U.S.C. § 3117(b).
(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:
(1) a magistrate judge with authority in the district--or if none is reasonably available, a judge of a state court of record in the district--has authority to issue a warrant to search for and seize a person or property located within the district;
(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed;
(3) a magistrate judge -- in an investigation of domestic terrorism or international terrorism -- with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district;
(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both; and
(5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of Columbia, may issue a warrant for property that is located outside the jurisdiction of any state or district, but within any of the following:
(A) a United States territory, possession, or commonwealth;
(B) the premises -- no matter who owns them -- of a United States diplomatic or consular mission in a foreign state, including any appurtenant building, part of a building, or land used for the mission's purposes; or

(C) a residence and any appurtenant land owned or leased by the United States and used by United States personnel assigned to a United States diplomatic or consular mission in a foreign state.

(c) Persons or Property Subject to Search or Seizure. A warrant may be issued for any of the following:

(1) evidence of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) Obtaining a Warrant.

(1) In General. After receiving an affidavit or other information, a magistrate judge--or if authorized by Rule 41(b), a judge of a state court of record--must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device.

(2) Requesting a Warrant in the Presence of a Judge.

(A) Warrant on an Affidavit. When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) Warrant on Sworn Testimony. The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(C) Recording Testimony. Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(3) Requesting a Warrant by Telephonic or Other Means.

(A) In General. A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

(B) Recording Testimony. Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and
(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.
(C) Certifying Testimony. The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.
(D) Suppression Limited.
Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.
(e) Issuing the Warrant.
(1) In General. The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.
(2) Contents of the Warrant.
(A) Warrant to Search for and Seize a Person or Property. Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:
(i) execute the warrant within a specified time no longer than 14 days;
(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and
(iii) return the warrant to the magistrate judge designated in the warrant.
(B) Warrant Seeking Electronically Stored Information. A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any

later off-site copying or review.

(C) Warrant for a Tracking Device. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.

(3) Warrant by Telephonic or Other Means. If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) Preparing a Proposed Duplicate Original Warrant. The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) Preparing an Original Warrant. If the applicant reads the contents of the proposed duplicate original warrant, the magistrate judge must enter those contents into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.

(C) Modification. The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly.

(D) Signing the Warrant. Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) Warrant to Search for and Seize a Person or Property.

(A) Noting the Time. The officer executing the warrant must enter on it the exact date and time it was executed.

(B) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

(C) Receipt. The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property.

(D) Return. The officer executing the warrant must promptly return it--together with a copy of the inventory--to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) Warrant for a Tracking Device.

(A) Noting the Time. The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(B) Return. Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant.

(C) Service. Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's

residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

(3) Delayed Notice. Upon the government's request, a magistrate judge--or if authorized by Rule 41(b), a judge of a state court of record--may delay any notice required by this rule if the delay is authorized by statute.

(4) Return. The officer executing the warrant must promptly return it--together with a copy of the inventory--to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(g) Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(h) Motion to Suppress. A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.

(i) Forwarding Papers to the Clerk. The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.

Selected Federal Rules of Evidence

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonestly or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse

party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Rule 901. Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is

satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.
(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.
(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If

reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice.
A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.
(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—
(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice.
The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:
(1) Writings and recordings. "Writings" and "recordings"

consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or
(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Selected Federal Statutes

Title 18 – Crimes and Criminal Procedure

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.
(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§ 3. Accessory after the fact

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding § 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years.

§ 4. Misprision of felony

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

§ 7. Special maritime and territorial jurisdiction of the United States defined

The term **"special maritime and territorial jurisdiction of the United States"**, as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of

Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.
(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.
(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.
(9) With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act [8 USCS § 1101]
(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and
(B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title [18 USCS § 3261(a)].

§ 13. Laws of States adopted for areas within Federal jurisdiction (Assimilative Crimes Act)

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title [18 USCS § 7], or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is

guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(b) (1) Subject to paragraph (2) and for purposes of subsection (a) of this section, that which may or shall be imposed through judicial or administrative action under the law of a State, territory, possession, or district, for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law. Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection shall apply only to the special maritime and territorial jurisdiction of the United States.

(2) (A) In addition to any term of imprisonment provided for operating a motor vehicle under the influence of a drug or alcohol imposed under the law of a State, territory, possession, or district, the punishment for such an offense under this section shall include an additional term of imprisonment of not more than 1 year, or if serious bodily injury of a minor is caused, not more than 5 years, or if death of a minor is caused, not more than 10 years, and an additional fine under this title, or both, if-

(i) a minor (other than the offender) was present in the motor vehicle when the offense was committed; and

(ii) the law of the State, territory, possession, or district in which the offense occurred does not provide an additional term of imprisonment under the circumstances described in clause (i).

(B) For the purposes of subparagraph (A), the term **"minor"** means a person less than 18 years of age.

(c) Whenever any waters of the territorial sea of the United States lie outside the territory of any State, Commonwealth, territory, possession, or district, such waters (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) shall be deemed, for purposes of subsection (a), to lie within the area of the State, Commonwealth, territory, possession, or district that it would lie within if the boundaries of such State, Commonwealth,

territory, possession, or district were extended seaward to the outer limit of the territorial sea of the United States.

§ 111. Assaulting, resisting, or impeding certain officers or employees

(a) In general. Whoever—
(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or
(2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service, shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.
(b) Enhanced penalty. Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

§ 113. Assaults within maritime and territorial jurisdiction

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:
(1) Assault with intent to commit murder, by imprisonment for not more than twenty years.
(2) Assault with intent to commit any felony, except murder or a felony under chapter 109A [18 USCS §§ 2241 et seq.], by a fine under this title or imprisonment for not more than ten years, or both.
(3) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by a fine under this

title or imprisonment for not more than ten years, or both.
(4) Assault by striking, beating, or wounding, by a fine under this title or imprisonment for not more than six months, or both.
(5) Simple assault, by a fine under this title or imprisonment for not more than six months, or both, or if the victim of the assault is an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 1 year, or both.
(6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.
(7) Assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 5 years, or both.
(b) As used in this subsection [section]—
(1) the term **"substantial bodily injury"** means bodily injury which involves—
(A) a temporary but substantial disfigurement; or
(B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty; and
(2) the term **"serious bodily injury"** has the meaning given that term in section 1365 of this title [18 USCS § 1365].

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section—
(1) the term **"public official"** means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;
(2) the term **"person who has been selected to be a public official"** means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and
(3) the term **"official act"** means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought

before any public official, in such official's official capacity, or in such official's place of trust or profit.
(b)Whoever—
(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent:
(A) to influence any official act; or
(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;
(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:
(A) being influenced in his the performance of any official act;
(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
(C) being induced to do or omit to do any act in violation of the official duty of such official or person;
(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;
(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being

influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom; shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(c)Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom; shall be fined under this title or imprisoned for not more than two years, or both.

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the

payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or, in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.
(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

§ 241. Conspiracy against rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

§ 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are

prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

§ 286. Conspiracy to defraud the government with respect to claims

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined under this title or imprisoned not more than ten years, or both.

§ 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the

conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 641. Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

The word **"value"** means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

§ 661. (Theft) Within special maritime and territorial jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, takes and carries away, with intent to steal or purloin, any personal property of another shall be punished as follows:

If the property taken is of a value exceeding $ 1,000, or is taken from the person of another, by a fine under this title, or

imprisonment for not more than five years, or both; in all other cases, by a fine under this title or by imprisonment not more than one year, or both.

If the property stolen consists of any evidence of debt, or other written instrument, the amount of money due thereon, or secured to be paid thereby and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, shall be the value of the property stolen.

§ 666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists—
(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—
(i) is valued at $5,000 or more, and
(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or
(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or
(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.
(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.
(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.
(d) As used in this section—
(1) the term **"agent"** means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;
(2) the term **"government agency"** means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;
(3) the term **"local"** means of or pertaining to a political subdivision within a State;
(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and
(5) the term **"in any one-year period"** means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

§ 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
shall be fined under this title or imprisoned not more than 5 years, or both.
(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.
(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—
(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

§ 1002. Possession of false papers to defraud United States

Whoever, knowingly and with intent to defraud the United States, or any agency thereof, possesses any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money, shall be fined under this title or imprisoned not more than five years, or both.

§ 1028. Fraud and related activity in connection with identification documents, authentication features, and information

(a) Whoever, in a circumstance described in subsection (c) of this section-
(1) knowingly and without lawful authority produces an identification document, authentication feature, or a false identification document;
(2) knowingly transfers an identification document, authentication feature, or a false identification document knowing that such document or feature was stolen or produced without lawful authority;
(3) knowingly possesses with intent to use unlawfully or transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor), authentication features, or false identification documents;
(4) knowingly possesses an identification document (other than one issued lawfully for the use of the possessor), authentication feature, or a false identification document, with the intent such document or feature be used to defraud the United States;
(5) knowingly produces, transfers, or possesses a document-making implement or authentication feature with the intent such document-making implement or authentication feature will be used in the production of a false identification document or another document-making implement or authentication feature which will be so used;
(6) knowingly possesses an identification document or authentication feature that is or appears to be an identification document or authentication feature of the United States or a sponsoring entity of an event designated as a special event of national significance which is stolen or produced without lawful authority knowing that such document or feature was stolen or produced without such authority;
(7) knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law; or

(8) knowingly traffics in false or actual authentication features for use in false identification documents, document-making implements, or means of identification;
shall be punished as provided in subsection (b) of this section.
(b) The **punishment** for an offense under subsection (a) of this section is—
(1) except as provided in paragraphs (3) and (4), a fine under this title or imprisonment for not more than 15 years, or both, if the offense is—
(A) the production or transfer of an identification document, authentication feature, or false identification document that is or appears to be—
(i) an identification document or authentication feature issued by or under the authority of the United States; or
(ii) a birth certificate, or a driver's license or personal identification card;
(B) the production or transfer of more than five identification documents, authentication features, or false identification documents;
(C) an offense under paragraph (5) of such subsection; or
(D) an offense under paragraph (7) of such subsection that involves the transfer, possession, or use of 1 or more means of identification if, as a result of the offense, any individual committing the offense obtains anything of value aggregating $ 1,000 or more during any 1-year period;
(2) except as provided in paragraphs (3) and (4), a fine under this title or imprisonment for not more than 5 years, or both, if the offense is—
(A) any other production, transfer, or use of a means of identification, an identification document,[,] authentication features, or a false identification document; or
(B) an offense under paragraph (3) or (7) of such subsection;
(3) a fine under this title or imprisonment for not more than 20 years, or both, if the offense is committed—
(A) to facilitate a drug trafficking crime (as defined in section 929(a)(2) [18 USCS § 929(a)(2)]);
(B) in connection with a crime of violence (as defined in section 924(c)(3) [18 USCS § 924(c)(3)]); or
(C) after a prior conviction under this section becomes final;
(4) a fine under this title or imprisonment for not more than 30

years, or both, if the offense is committed to facilitate an act of domestic terrorism (as defined under section 2331(5) of this title [18 USCS § 2331(5)]) or an act of international terrorism (as defined in section 2331(1) of this title [18 USCS § 2331(1)]);
(5) in the case of any offense under subsection (a), forfeiture to the United States of any personal property used or intended to be used to commit the offense; and
(6) a fine under this title or imprisonment for not more than one year, or both, in any other case.
(c) The circumstance referred to in subsection (a) of this section is that—
(1) the identification document, authentication feature, or false identification document is or appears to be issued by or under the authority of the United States or a sponsoring entity of an event designated as a special event of national significance or the document-making implement is designed or suited for making such an identification document, authentication feature, or false identification document;
(2) the offense is an offense under subsection (a)(4) of this section; or
(3) either—
(A) the production, transfer, possession, or use prohibited by this section is in or affects interstate or foreign commerce, including the transfer of a document by electronic means; or
(B) the means of identification, identification document, false identification document, or document-making implement is transported in the mail in the course of the production, transfer, possession, or use prohibited by this section.
(d) In this section and section 1028A [18 USCS § 1028A]—
(1) the term **"authentication feature"** means any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters, or other feature that either individually or in combination with another feature is used by the issuing authority on an identification document, document-making implement, or means of identification to determine if the document is counterfeit, altered, or otherwise falsified;
(2) the term **"document-making implement"** means any implement, impression, template, computer file, computer disc, electronic device, or computer hardware or software, that is specifically configured or primarily used for making an

identification document, a false identification document, or another document-making implement;
(3) the term **"identification document"** means a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State, a sponsoring entity of an event designated as a special event of national significance, a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals;
(4) the term **"false identification document"** means a document of a type intended or commonly accepted for the purposes of identification of individuals that—
(A) is not issued by or under the authority of a governmental entity or was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit; and
(B) appears to be issued by or under the authority of the United States Government, a State, a political subdivision of a State, a sponsoring entity of an event designated by the President as a special event of national significance, a foreign government, a political subdivision of a foreign government, or an international governmental or quasi-governmental organization;
(5) the term **"false authentication feature"** means an authentication feature that—
(A) is genuine in origin, but, without the authorization of the issuing authority, has been tampered with or altered for purposes of deceit;
(B) is genuine, but has been distributed, or is intended for distribution, without the authorization of the issuing authority and not in connection with a lawfully made identification document, document-making implement, or means of identification to which such authentication feature is intended to be affixed or embedded by the respective issuing authority; or
(C) appears to be genuine, but is not;
(6) the term **"issuing authority"**—
(A) means any governmental entity or agency that is authorized to issue identification documents, means of identification, or authentication features; and

(B) includes the United States Government, a State, a political subdivision of a State, a sponsoring entity of an event designated by the President as a special event of national significance, a foreign government, a political subdivision of a foreign government, or an international government or quasi-governmental organization;

(7) the term **"means of identification"** means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any—

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(C) unique electronic identification number, address, or routing code; or

(D) telecommunication identifying information or access device (as defined in section 1029(e) [18 USCS § 1029(e)]);

(8) the term **"personal identification card"** means an identification document issued by a State or local government solely for the purpose of identification;

(9) the term **"produce"** includes alter, authenticate, or assemble;

(10) the term **"transfer"** includes selecting an identification document, false identification document, or document-making implement and placing or directing the placement of such identification document, false identification document, or document-making implement on an online location where it is available to others;

(11) the term **"State"** includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession, or territory of the United States; and

(12) the term **"traffic"** means—

(A) to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value; or

(B) to make or obtain control of with intent to so transport, transfer, or otherwise dispose of.

(e) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under chapter 224 of this title [18 USCS §§ 3521 et seq.].

(f) Attempt and conspiracy. Any person who attempts or conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(g) Forfeiture procedures. The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 [18 USCS § 413] (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853).

(h) Forfeiture; disposition. In the circumstance in which any person is convicted of a violation of subsection (a), the court shall order, in addition to the penalty prescribed, the forfeiture and destruction or other disposition of all illicit authentication features, identification documents, document-making implements, or means of identification.

(i) Rule of construction. For purpose of subsection (a)(7), a single identification document or false identification document that contains 1 or more means of identification shall be construed to be 1 means of identification.

§ 1071. Concealing person from arrest

Whoever harbors or conceals any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person, shall be fined under this title or imprisoned not more than one year, or both; except that if the warrant or process issued on a charge of felony, or after conviction of such person of any offense, the punishment shall be a fine under this title, or imprisonment for not more than five years, or both.

§ 1072. Concealing escaped prisoner

Whoever willfully harbors or conceals any prisoner after his escape from the custody of the Attorney General or from a Federal penal or correctional institution, shall be imprisoned not more than three years.

§ 1114. Protection of officers and employees of the United States

Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished—
(1) in the case of murder, as provided under section 1111 [18 USCS § 1111];
(2) in the case of manslaughter, as provided under section 1112 [18 USCS § 1112]; or
(3) in the case of attempted murder or manslaughter, as provided in section 1113 [18 USCS § 1113].

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or

commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—
(1) to defraud a financial institution; or
(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

§ 1363. Buildings or property within special maritime and territorial jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, willfully and maliciously destroys or injures any structure, conveyance, or other real or personal property, or attempts or conspires to do such an act, shall be fined under this title or imprisoned not more than five years, or both, and if the building be a dwelling, or the life of any person be placed in jeopardy, shall be fined under this title or imprisoned not more than twenty years, or both.

§ 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and
(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

§ 1510. Obstruction of criminal investigations

(a) Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be fined under this title, or imprisoned not more than five years, or both.
(b) (1) Whoever, being an officer of a financial institution, with the intent to obstruct a judicial proceeding, directly or indirectly notifies any other person about the existence or contents of a subpoena for records of that financial institution, or information that has been furnished to the grand jury in response to that subpoena, shall be fined under this title or imprisoned not more than 5 years, or both.
(2) Whoever, being an officer of a financial institution, directly or indirectly notifies—
(A) a customer of that financial institution whose records are sought by a grand jury subpoena; or
(B) any other person named in that subpoena;
about the existence or contents of that subpoena or information that has been furnished to the grand jury in response to that subpoena, shall be fined under this title or imprisoned not more than one year, or both.
(3) As used in this subsection—
(A) the term **"an officer of a financial institution"** means an officer, director, partner, employee, agent, or attorney of or for a financial institution; and
(B) the term **"subpoena for records"** means a Federal grand jury subpoena or a Department of Justice subpoena (issued under section 3486 of title 18), for customer records that has been served relating to a violation of, or a conspiracy to violate—

(i) section 215, 656, 657, 1005, 1006, 1007, 1014, 1344, 1956, 1957, or chapter 53 of title 31 [31 USCS §§ 5301 et seq.]; or
(ii) section 1341 or 1343 affecting a financial institution.
(c) As used in this section, the term **"criminal investigator"** means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.
(d) (1) Whoever—
(A) acting as, or being, an officer, director, agent or employee of a person engaged in the business of insurance whose activities affect interstate commerce, or
(B) is engaged in the business of insurance whose activities affect interstate commerce or is involved (other than as an insured or beneficiary under a policy of insurance) in a transaction relating to the conduct of affairs of such a business, with intent to obstruct a judicial proceeding, directly or indirectly notifies any other person about the existence or contents of a subpoena for records of that person engaged in such business or information that has been furnished to a Federal grand jury in response to that subpoena, shall be fined as provided by this title or imprisoned not more than 5 years, or both.
(2) As used in paragraph (1), the term **"subpoena for records"** means a Federal grand jury subpoena for records that has been served relating to a violation of, or a conspiracy to violate, section 1033 of this title.

§ 1512. Tampering with a witness, victim, or an informant

(a) (1) Whoever kills or attempts to kill another person, with intent to—
(A) prevent the attendance or testimony of any person in an official proceeding;
(B) prevent the production of a record, document, or other object, in an official proceeding; or
(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or

release pending judicial proceedings; shall be punished as provided in paragraph (3).
(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—
(A) influence, delay, or prevent the testimony of any person in an official proceeding;
(B) cause or induce any person to—
(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;
(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
(iv) be absent from an official proceeding to which that person has been summoned by legal process; or
(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (3).
(3) The punishment for an offense under this subsection is—
(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112;
(B) in the case of—
(i) an attempt to murder; or
(ii) the use or attempted use of physical force against any person;
imprisonment for not more than 20 years; and
(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 10 years.
(b) Whoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—
(1) influence, delay or prevent the testimony of any person in an official proceeding;
(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
(D) be absent from an official proceeding to which such person has been summoned by legal process; or
(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings; shall be fined under this title or imprisoned not more than ten years, or both.
(c) Whoever corruptly—
(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.
(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—
(1) attending or testifying in an official proceeding;
(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;
(3) arresting or seeking the arrest of another person in connection with a Federal offense; or
(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding; or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate [United States magistrate judge], a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

§ 1513. Retaliating against a witness, victim, or an informant

(a) (1) Whoever kills or attempts to kill another person with intent to retaliate against any person for—
(A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or
(B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings,
shall be punished as provided in paragraph (2).
(2) The punishment for an offense under this subsection is—
(A) in the case of a killing, the punishment provided in sections 1111 and 1112; and
(B) in the case of an attempt, imprisonment for not more than 20 years.
(b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—
(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or
(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer; or attempts to do so, shall be fined under this title or imprisoned not more than ten years, or both.
(c) If the retaliation occurred because of attendance at or testimony in a criminal case, the maximum term of imprisonment which may be imposed for the offense under this section shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.
(d) There is extraterritorial Federal jurisdiction over an offense under this section.

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.
[(f)](e) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

§ 1546. Fraud and misuse of visas, permits, and other documents

(a) Whoever, knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact—

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title [18 USCS § 2331])), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title [18 USCS § 929(a)])), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

(b) Whoever uses—

(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,

(2) an identification document knowing (or having reason to know) that the document is false, or

(3) a false attestation, for the purpose of satisfying a requirement of section 274A(b) of the Immigration and

Nationality Act [8 USCS § 1324a(b)], shall be fined under this title, imprisoned not more than 5 years, or both.

(c) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481). For purposes of this section, the term "State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

§ 2231. Assault or resistance

(a) Whoever forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants or to make searches and seizures while engaged in the performance of his duties with regard thereto or on account of the performance of such duties, shall be fined under this title or imprisoned not more than three years, or both; and—
(b) Whoever, in committing any act in violation of this section, uses any deadly or dangerous weapon, shall be fined under this title or imprisoned not more than ten years, or both.

§ 2232. Destruction or removal of property to prevent seizure

(a) Destruction or removal of property to prevent seizure. Whoever, before, during, or after any search for or seizure of property by any person authorized to make such search or seizure, knowingly destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control or to continue holding such property under its lawful custody and control, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Impairment of in rem jurisdiction. Whoever, knowing that property is subject to the in rem jurisdiction of a United States court for purposes of civil forfeiture under Federal law, knowingly and without authority from that court, destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of impairing or defeating the court's continuing in rem jurisdiction over the property, shall be fined under this title or imprisoned not more than 5 years, or both.

(c) Notice of search or execution of seizure warrant or warrant of arrest in rem. Whoever, having knowledge that any person authorized to make searches and seizures, or to execute a seizure warrant or warrant of arrest in rem, in order to prevent the authorized seizing or securing of any person or property, gives notice or attempts to give notice in advance of the search, seizure, or execution of a seizure warrant or warrant of arrest in rem, to any person shall be fined under this title or imprisoned not more than 5 years, or both.

(d) Notice of certain electronic surveillance. Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 [18 USCS §§ 2510 *et seq.*] to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

(e) Foreign intelligence surveillance. Whoever, having knowledge that a Federal officer has been authorized or has applied for authorization to conduct electronic surveillance under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801, et seq.), in order to obstruct, impede, or prevent such activity, gives notice or attempts to give notice of the possible activity to any person shall be fined under this title or imprisoned not more than five years, or both.

§ 2233. Rescue of seized property

Whoever forcibly rescues, dispossesses, or attempts to rescue or dispossess any property, articles, or objects after the same shall have been taken, detained, or seized by any officer or other person under the authority of any revenue law of the United States, or by any person authorized to make searches and seizures, shall be fined under this title or imprisoned not more than two years, or both.

§ 2234. Authority exceeded in executing warrant

Whoever, in executing a search warrant, willfully exceeds his authority or exercises it with unnecessary severity, shall be fined under this title or imprisoned not more than one year, or both.

§ 2235. Search warrant procured maliciously

Whoever maliciously and without probable cause procures a search warrant to be issued and executed, shall be fined under this title or imprisoned not more than one year, or both.

§ 2236. Searches without warrant

Whoever, being an officer, agent, or employee of the United States or any department or agency thereof, engaged in the enforcement of any law of the United States, searches any private dwelling used and occupied as such dwelling without a warrant directing such search, or maliciously and without reasonable cause searches any other building or property without a search warrant, shall be fined under this title for a first offense; and, for a subsequent offense, shall be fined under this title or imprisoned not more than one year, or both.
This section shall not apply to any person—
(a) serving a warrant of arrest; or
(b) arresting or attempting to arrest a person committing or attempting to commit an offense in his presence, or who has committed or is suspected on reasonable grounds of having committed a felony; or

(c) making a search at the request or invitation or with the consent of the occupant of the premises.

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting (ITSP)

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $ 5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $ 5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined under this title or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or

other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government. This section also shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of any bank note or bill issued by a bank or corporation of any foreign country which is intended by the laws or usage of such country to circulate as money.

§ 2331. Definitions (Terrorism)

As used in this chapter [18 USCS §§ 2331 et seq.] –
(1) the term **"international terrorism"** means activities that—
(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
(B) appear to be intended—
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and
(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;
(2) the term **"national of the United States"** has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act [8 USCS § 1101(a)(22)];
(3) the term **"person"** means any individual or entity capable of holding a legal or beneficial interest in property;
(4) the term **"act of war"** means any act occurring in the course of—
(A) declared war;
(B) armed conflict, whether or not war has been declared, between two or more nations; or
(C) armed conflict between military forces of any origin; and
(5) the term "domestic terrorism" means activities that—
(A) involve acts dangerous to human life that are a violation of

the criminal laws of the United States or of any State;
(B) appear to be intended—
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
(C) occur primarily within the territorial jurisdiction of the United States.

§ 2510. Definitions

As used in this chapter [18 USCS §§ 2510 et seq.]—
(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce;
(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;
(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;
(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.[;]
(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than—
(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the

subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter [18 USCS §§ 2510 et seq.], and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications;

(10) "communication common carrier" has the meaning given that term in section 3 of the Communications Act of 1934 [47 USCS § 153];

(11) "aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed;

(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—

(A) any wire or oral communication;
(B) any communication made through a tone-only paging device;
(C) any communication from a tracking device (as defined in section 3117 of this title [18 USCS § 3117]); or
(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;
(13) "user" means any person or entity who—
(A) uses an electronic communication service; and
(B) is duly authorized by the provider of such service to engage in such use;
(14) "electronic communications system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;
(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications;
(16) "readily accessible to the general public" means, with respect to a radio communication, that such communication is not—
(A) scrambled or encrypted;
(B) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;
(C) carried on a subcarrier or other signal subsidiary to a radio transmission;
(D) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication; or
(E) transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio;

(17) "electronic storage" means—
(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication;
(18) "aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception;
(19) "foreign intelligence information", for purposes of section 2517(6) of this title [18 USCS § 2517(6)], means—
(A) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—
(i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
(ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or
(iii) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
(B) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—
(i) the national defense or the security of the United States; or
(ii) the conduct of the foreign affairs of the United States;
(20) "protected computer" has the meaning set forth in section 1030 [18 USCS § 1030]; and
(21) "computer trespasser"—
(A) means a person who accesses a protected computer without authorization and thus has no reasonable expectation of privacy in any communication transmitted to, through, or from the protected computer; and
(B) does not include a person known by the owner or operator of the protected computer to have an existing contractual relationship with the owner or operator of the protected computer for access to all or part of the protected computer.

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter [18 USCS §§ 2510 et seq.] any person who—
(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—
(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or
(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or
(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or
(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or
(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;
(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e)(i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b)-(c), 2511(2)(e), 2516, and 2518 of this chapter [18 USCS §§ 2511(2)(a)(ii), 2511(2)(b)-(c), 2511(2)(e), 2516, and 2518],
(ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation,
(iii) having obtained or received the information in connection with a criminal investigation, and
(iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation, shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).
(2)(a)(i) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.
(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 [50 USCS § 1801] if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—
(A) a court order directing such assistance or a court order pursuant to section 704 of the Foreign Intelligence Surveillance

Act of 1978 [50 USCS § 1881c] signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title [18 USCS § 2518(7)] or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required, setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished an order or certification under this subparagraph, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in section 2520 [18 USCS § 2520]. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order, statutory authorization, or certification under this chapter [18 USCS §§ 2510 et seq.].

(iii) If a certification under subparagraph (ii)(B) for assistance to obtain foreign intelligence information is based on statutory authority, the certification shall identify the specific statutory provision and shall certify that the statutory requirements have been met.

(b) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 [47 USCS §§ 151 et seq.] of the United States Code, to

intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934 [47 USCS § 605 or 606], it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 [50 USCS § 1801], as authorized by that Act [50 USCS §§ 1801 et seq.].

(f) Nothing contained in this chapter or chapter 121 or 206 of this title [18 USCS §§ 2510 et seq., or 2701 et seq., or 3121 et seq.], or section 705 of the Communications Act of 1934 [47 USCS § 605], shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 [50 USCS § 1801], and procedures in this chapter or chapter 121 or 206 of this title [18 USCS §§ 2510 et seq., or 2701 et seq., or 3121 et seq.] and the Foreign Intelligence Surveillance Act of 1978 [50 USCS §§ 1801 et seq.] shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act [50 USCS § 1801], and the

interception of domestic wire, oral, and electronic communications may be conducted.

(g) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] or chapter 121 of this title [18 USCS §§ 2701 et seq.] for any person—

(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;(ii) to intercept any radio communication which is transmitted—

(I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) by any marine or aeronautical communications system;

(iii) to engage in any conduct which—

(I) is prohibited by section 633 of the Communications Act of 1934 [47 USCS § 553]; or

(II) is excepted from the application of section 705(a) of the Communications Act of 1934 [47 USCS § 605(a)] by section 705(b) of that Act [47 USCS § 605(b)];

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

(v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(h) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.]—

(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206 (relating to pen registers and trap and trace devices) of this title) [18 USCS

§§ 3121 et seq.]; or
(ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.
(i) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser transmitted to, through, or from the protected computer, if—
(I) the owner or operator of the protected computer authorizes the interception of the computer trespasser's communications on the protected computer;
(II) the person acting under color of law is lawfully engaged in an investigation;
(III) the person acting under color of law has reasonable grounds to believe that the contents of the computer trespasser's communications will be relevant to the investigation; and
(IV) such interception does not acquire communications other than those transmitted to or from the computer trespasser.
(3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.
(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication—
(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title [18 USCS § 2511(2)(a) or 2517];
(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;
(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or
(iv) which were inadvertently obtained by the service provider

and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted—

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

(5)(a) (i) If the communication is—

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter [18 USCS §§ 2510 et seq.] is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter [18 USCS §§ 2510 et seq.] is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection—

(A) if the violation of this chapter [18 USCS §§ 2510 et seq.] is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title [18 USCS § 2520], the Federal

Government shall be entitled to appropriate injunctive relief; and
(B) if the violation of this chapter [18 USCS §§ 2510 et seq.] is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520 [18 USCS § 2520], the person shall be subject to a mandatory $ 500 civil fine.
(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $ 500 for each violation of such an injunction.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter [18 USCS §§ 2510 et seq.].

§ 2516. Authorization for interception of wire, oral, or electronic communications

(1) The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division or National Security Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter [18 USCS § 2518] an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the

application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2122 and 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), section 2284 of title 42 of the United States Code (relating to sabotage of nuclear facilities or fuel), or under the following chapters of this title: chapter 10 [18 USCS §§ 175 et seq.] (relating to biological weapons)[,] chapter 37 [18 USCS §§ 791 et seq.] (relating to espionage), chapter 55 [18 USCS §§ 1201 et seq.] (relating to kidnapping), chapter 90 [18 USCS §§ 1831 et seq.] (relating to protection of trade secrets), chapter 105 [18 USCS §§ 2151 et seq.] (relating to sabotage), chapter 115 [18 USCS §§ 2381 et seq.] (relating to treason), chapter 102 [18 USCS §§ 2101 et seq.] (relating to riots), chapter 65 [18 USCS §§ 1361 et seq.] (relating to malicious mischief), chapter 111 [18 USCS §§ 2271 et seq.] (relating to destruction of vessels), or chapter 81 [18 USCS §§ 1621 et seq.] (relating to piracy);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 37 [18 USCS § 37] (relating to violence at international airports), section 43 [18 USCS § 43] (relating to animal enterprise terrorism), section 81 [18 USCS § 81] (arson within special maritime and territorial jurisdiction), section 201 [18 USCS § 201] (bribery of public officials and witnesses), section 215 [18 USCS § 215] (relating to bribery of bank officials), section 224 [18 USCS § 2224] (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 [18 USCS § 844] (unlawful use of explosives), section 1032 [18 USCS § 1032] (relating to concealment of assets), section 1084 [18 USCS § 1032] (transmission of wagering information), section 751 [18 USCS § 751] (relating to escape), section 832 [18 USCS § 832] (relating to nuclear and weapons of mass destruction threats), section 842 [18 USCS § 842] (relating to explosive materials), section 930 [18 USCS § 930] (relating to

possession of weapons in Federal facilities), section 1014 [18 USCS § 1014] (relating to loans and credit applications generally; renewals and discounts), section 1114 [18 USCS § 1114] (relating to officers and employees of the United States), section 1116 [18 USCS § 1116] (relating to protection of foreign officials), sections 1503, 1512, and 1513 [18 USCS §§ 1503, 1512, and 1513] (influencing or injuring an officer, juror, or witness generally), section 1510 [18 USCS § 1510] (obstruction of criminal investigations), section 1511 [18 USCS § 1511] (obstruction of State or local law enforcement), section 1591 [18 USCS § 1591] (sex trafficking of children by force, fraud, or coercion), section 1751 [18 USCS § 1751] (Presidential and Presidential staff assassination, kidnapping, and assault), section 1951 [18 USCS § 1951] (interference with commerce by threats or violence), section 1952 [18 USCS § 1952] (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1958 [18 USCS § 1958] (relating to use of interstate commerce facilities in the commission of murder for hire), section 1959 [18 USCS § 1959] (relating to violent crimes in aid of racketeering activity), section 1954 [18 USCS § 1954] (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 [18 USCS § 1955] (prohibition of business enterprises of gambling), section 1956 [18 USCS § 1956] (laundering of monetary instruments), section 1957 [18 USCS § 1957] (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 659 [18 USCS § 659] (theft from interstate shipment), section 664 [18 USCS § 664] (embezzlement from pension and welfare funds), section 1343 [18 USCS § 1343] (fraud by wire, radio, or television), section 1344 [18 USCS § 1344] (relating to bank fraud), section 1992 [18 USCS § 1992] (relating to terrorist attacks against mass transportation), sections 2251 and 2252 [18 USCS §§ 2251 and 2252] (sexual exploitation of children), section 2251A [18 USCS § 2251A] (selling or buying of children), section 2252A [18 USCS § 2252A] (relating to material constituting or containing child pornography), section 1466A [18 USCS § 1466A] (relating to child obscenity), section 2260 [18 USCS § 2260] (production of sexually explicit depictions of a minor for importation into the United States), sections 2421, 2422, 2423, and 2425 [18 USCS

§§ 2421, 2422, 2423, and 2425] (relating to transportation for illegal sexual activity and related crimes), sections 2312, 2313, 2314, and 2315 [18 USCS §§ 2312, 2313, 2314, and 2315] (interstate transportation of stolen property), section 2321 [18 USCS § 2321] (relating to trafficking in certain motor vehicles or motor vehicle parts), section 2340A [18 USCS § 2340A] (relating to torture), section 1203 [18 USCS § 1203] (relating to hostage taking), section 1029 [18 USCS § 1029] (relating to fraud and related activity in connection with access devices), section 3146 [18 USCS § 3146] (relating to penalty for failure to appear), section 3521(b)(3) [18 USCS § 3521(b)(3)] (relating to witness relocation and assistance), section 32 [18 USCS § 32] (relating to destruction of aircraft or aircraft facilities), section 38 [18 USCS § 38] (relating to aircraft parts fraud), section 1963 [18 USCS § 1963] (violations with respect to racketeer influenced and corrupt organizations), section 115 [18 USCS § 115] (relating to threatening or retaliating against a Federal official), section 1341 [18 USCS § 1341] (relating to mail fraud), a felony violation of section 1030 [18 USCS § 1030] (relating to computer fraud and abuse), section 351 [18 USCS § 351] (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, and assault), section 831 [18 USCS § 831] (relating to prohibited transactions involving nuclear materials), section 33 [18 USCS § 33] (relating to destruction of motor vehicles or motor vehicle facilities), section 175 [18 USCS § 175] (relating to biological weapons), section 175c (relating to variola virus), section 956 [18 USCS § 956] (conspiracy to harm persons or property overseas), [section] a felony violation of section 1028 [18 USCS § 1028] (relating to production of false identification documentation), section 1425 [18 USCS § 1425] (relating to the procurement of citizenship or nationalization unlawfully), section 1426 [18 USCS § 1426] (relating to the reproduction of naturalization or citizenship papers), section 1427 [18 USCS § 1427] (relating to the sale of naturalization or citizenship papers), section 1541 [18 USCS § 1541] (relating to passport issuance without authority), section 1542 [18 USCS § 1542] (relating to false statements in passport applications), section 1543 [18 USCS § 1543] (relating to forgery or false use of passports), section 1544 [18 USCS § 1544] (relating to misuse of passports), or section 1546 [18 USCS § 1546]

(relating to fraud and misuse of visas, permits, and other documents);
(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title [18 USCS § 471, 472, or 473];
(e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;
(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title [18 USCS § 892, 893, or 894];
(g) a violation of section 5322 of title 31, United States Code (dealing with the reporting of currency transactions), or section 5324 of title 31, United States Code (relating to structuring transactions to evade reporting requirement prohibited);
(h) any felony violation of sections 2511 and 2512 [18 USCS §§ 2511 and 2512] (relating to interception and disclosure of certain communications and to certain intercepting devices) of this title;
(i) any felony violation of chapter 71 (relating to obscenity) of this title [18 USCS §§ 1460 et seq.];
(j) any violation of section 60123(b) (relating to destruction of a natural gas pipeline), section 46502 (relating to aircraft piracy), the second sentence of section 46504 (relating to assault on a flight crew with dangerous weapon), or section 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life, by means of weapons on aircraft) of title 49;
(k) any criminal violation of section 2778 of title 22 (relating to the Arms Export Control Act);
(l) the location of any fugitive from justice from an offense described in this section;
(m) a violation of section 274, 277, or 278 of the Immigration and Nationality Act (8 U.S.C. 1324, 1327, or 1328) (relating to the smuggling of aliens);
(n) any felony violation of sections 922 and 924 of title 18, United States Code [18 USCS §§ 922 and 924] (relating to firearms);

(o) any violation of section 5861 of the Internal Revenue Code of 1986 [26 USCS § 5861] (relating to firearms); or
(p) a felony violation of section 1028 [18 USCS § 1028] (relating to production of false identification documents), section 1542 [18 USCS § 1542] (relating to false statements in passport applications), section 1546 [18 USCS § 1546] (relating to fraud and misuse of visas, permits, and other documents), section 1028A [18 USCS § 1028A] (relating to aggravated identity theft) of this title or a violation of section 274, 277, or 278 of the Immigration and Nationality Act [8 USCS § 1324, 1327, or 1328] (relating to the smuggling of aliens); [or]
(q) any criminal violation of section 229 [18 USCS § 229] (relating to chemical weapons) or section 2332, 2332a, 2332b, 2332d, 2332f, 2332g, 2332h[,] 2339, 2339A, 2339B, 2339C, or 2339D of this title [18 USCS § 2332, 2332a, 2332b, 2332d, 2332f, 2332g, 2332h, 2339, 2339A, 2339B, 2339C, or 2339D] (relating to terrorism);
(r) any criminal violation of section 1 (relating to illegal restraints of trade or commerce), 2 (relating to illegal monopolizing of trade or commerce), or 3 (relating to illegal restraints of trade or commerce in territories or the District of Columbia) of the Sherman Act (15 U.S.C. 1, 2, 3); or
(s) any conspiracy to commit any offense described in any subparagraph of this paragraph.
(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter [18 USCS § 2518] and with the applicable State statute an order authorizing, or approving the interception of wire, oral or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other

dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

(3) Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant, in conformity with section 2518 of this title [18 USCS § 2518], an order authorizing or approving the interception of electronic communications by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of any Federal felony.

§ 2517. Authorization for disclosure and use of intercepted wire, oral, or electronic communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter [18 USCS §§ 2510 et seq.], has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter [18 USCS §§ 2510 et seq.], has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter [18 USCS §§ 2510 et seq.], any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter [18 USCS §§ 2510 et seq.] may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any

proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter [18 USCS §§ 2510 et seq.] shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter [18 USCS §§ 2510 et seq.]. Such application shall be made as soon as practicable.

(6) Any investigative or law enforcement officer, or attorney for the Government, who by any means authorized by this chapter [18 USCS §§ 2510 et seq.], has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official to the extent that such contents include foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in subsection (19) of section 2510 of this title [18 USCS § 2510]), to assist the official who is to receive that information in the performance of his official duties. Any Federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.

(7) Any investigative or law enforcement officer, or other Federal official in carrying out official duties as such Federal official, who by any means authorized by this chapter, has obtained

knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents or derivative evidence to a foreign investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure, and foreign investigative or law enforcement officers may use or disclose such contents or derivative evidence to the extent such use or disclosure is appropriate to the proper performance of their official duties.

(8) Any investigative or law enforcement officer, or other Federal official in carrying out official duties as such Federal official, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents or derivative evidence to any appropriate Federal, State, local, or foreign government official to the extent that such contents or derivative evidence reveals a threat of actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, domestic or international sabotage, domestic or international terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by an agent of a foreign power, within the United States or elsewhere, for the purpose of preventing or responding to such a threat. Any official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information, and any State, local, or foreign official who receives information pursuant to this provision may use that information only consistent with such guidelines as the Attorney General and Director of Central Intelligence shall jointly issue.

§ 2518. Procedure for interception of wire, oral, or electronic communications

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter [18 USCS §§ 2510 et seq.] shall be made in writing

upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter [18 USCS § 2516];

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter [18 USCS §§ 2510 et seq.] shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application;

and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire, oral, or electronic communication under this chapter [18 USCS §§ 2510 et seq.] shall, upon request of the applicant, direct that a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider, landlord, custodian, or person is according the person whose communications are to be intercepted. Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance. Pursuant to section 2522 of this chapter [18 USCS § 2522], an order may also be issued to enforce the assistance capability and capacity requirements under the Communications Assistance for Law Enforcement Act [47 USCS §§ 1001 et seq.].

(5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize

the interception of communications not otherwise subject to interception under this chapter [18 USCS §§ 2510 et seq.], and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter [18 USCS §§ 2510 et seq.] may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(6) Whenever an order authorizing interception is entered pursuant to this chapter [18 USCS §§ 2510 et seq.], the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter [18 USCS §§ 2510 et seq.], any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists that involves—

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interest, or

(iii) conspiratorial activities characteristic of organized crime,

that requires a wire, oral, or electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter [18 USCS §§ 2510 et seq.] to authorize such interception,

may intercept such wire, oral, or electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter [18 USCS §§ 2510 et seq.], and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter [18 USCS §§ 2510 et seq.] shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter [18 USCS § 2517] for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517 [18 USCS § 2517].

(b) Applications made and orders granted under this chapter [18 USCS §§ 2510 et seq.] shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent

jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) [18 USCS § 2518(7)(b)] which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire, oral, or electronic communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter [18 USCS §§ 2510 et seq.] or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter [18 USCS §§ 2510 et seq.], or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter [18 USCS §§ 2510 et seq.]. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

(c) The remedies and sanctions described in this chapter [18 USCS §§ 2510 et seq.] with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter [18 USCS §§ 2510 et seq.] involving such communications.

(11) The requirements of subsections (1)(b)(ii) and (3)(d) of this section relating to the specification of the facilities from which, or the place where, the communication is to be intercepted do not apply if—

(a) in the case of an application with respect to the interception of an oral communication—

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and

(iii) the judge finds that such specification is not practical; and

(b) in the case of an application with respect to a wire or electronic communication—

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing that there is probable cause to believe that the person's actions could have the effect of thwarting interception from a specified facility;

(iii) the judge finds that such showing has been adequately made; and

(iv) the order authorizing or approving the interception is limited to interception only for such time as it is reasonable to presume that the person identified in the application is or was reasonably proximate to the instrument through which such communication will be or was transmitted.

(12) An interception of a communication under an order with respect to which the requirements of subsections (1)(b)(ii) and (3)(d) of this section do not apply by reason of subsection (11)(a) shall not begin until the place where the communication is to be intercepted is ascertained by the person implementing the

interception order. A provider of wire or electronic communications service that has received an order as provided for in subsection (11)(b) may move the court to modify or quash the order on the ground that its assistance with respect to the interception cannot be performed in a timely or reasonable fashion. The court, upon notice to the government, shall decide such a motion expeditiously.

§ 2703. Required disclosure of customer communications or records.

(a) Contents of wire or electronic communications in electronic storage. A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b) Contents of wire or electronic communications in a remote computing service.

(1) A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection—

(A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant; or

(B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity—

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or
(ii) obtains a court order for such disclosure under subsection (d) of this section;
except that delayed notice may be given pursuant to section 2705 of this title [18 USCS § 2705].
(2) Paragraph (1) is applicable with respect to any wire or electronic communication that is held or maintained on that service—
(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and
(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.
(c) Records concerning electronic communication service or remote computing service.
(1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—
(A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant;
(B) obtains a court order for such disclosure under subsection (d) of this section;
(C) has the consent of the subscriber or customer to such disclosure;
(D) submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of such provider, which subscriber or customer is engaged in telemarketing (as such term is defined in section

2325 of this title [18 USCS § 2325]); or
(E) seeks information under paragraph (2).
(2) A provider of electronic communication service or remote computing service shall disclose to a governmental entity the—
(A) name;
(B) address;
(C) local and long distance telephone connection records, or records of session times and durations;
(D) length of service (including start date) and types of service utilized;
(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and
(F) means and source of payment for such service (including any credit card or bank account number),
of a subscriber to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under paragraph (1).
(3) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.
(d) Requirements for court order. A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.
(e) No cause of action against a provider disclosing information under this chapter. No cause of action shall lie in

any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter [18 USCS §§ 2701 et seq.].

(f) Requirement to preserve evidence.

(1) In general. A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process.

(2) Period of retention. Records referred to in paragraph (1) shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

(g) Presence of officer not required. Notwithstanding section 3105 of this title [18 USCS § 3105], the presence of an officer shall not be required for service or execution of a search warrant issued in accordance with this chapter [18 USCS §§ 2701 et seq.] requiring disclosure by a provider of electronic communications service or remote computing service of the contents of communications or records or other information pertaining to a subscriber to or customer of such service.

§ 2705. Delayed notice

(a) Delay of notification.

(1) A governmental entity acting under section 2703(b) of this title may—

(A) where a court order is sought, include in the application a request, which the court shall grant, for an order delaying the notification required under section 2703(b) of this title for a period not to exceed ninety days, if the court determines that there is reason to believe that notification of the existence of the court order may have an adverse result described in paragraph (2) of this subsection; or

(B) where an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury subpoena is obtained, delay the notification required under section 2703(b)

of this title for a period not to exceed ninety days upon the execution of a written certification of a supervisory official that there is reason to believe that notification of the existence of the subpoena may have an adverse result described in paragraph (2) of this subsection.
(2) An adverse result for the purposes of paragraph (1) of this subsection is—
(A) endangering the life or physical safety of an individual;
(B) flight from prosecution;
(C) destruction of or tampering with evidence;
(D) intimidation of potential witnesses; or
(E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.
(3) The governmental entity shall maintain a true copy of certification under paragraph (1)(B).
(4) Extensions of the delay of notification provided in section 2703 of up to ninety days each may be granted by the court upon application, or by certification by a governmental entity, but only in accordance with subsection (b) of this section.
(5) Upon expiration of the period of delay of notification under paragraph (1) or (4) of this subsection, the governmental entity shall serve upon, or deliver by registered or first-class mail to, the customer or subscriber a copy of the process or request together with notice that—
(A) states with reasonable specificity the nature of the law enforcement inquiry; and
(B) informs such customer or subscriber—
(i) that information maintained for such customer or subscriber by the service provider named in such process or request was supplied to or requested by that governmental authority and the date on which the supplying or request took place;
(ii) that notification of such customer or subscriber was delayed;
(iii) what governmental entity or court made the certification or determination pursuant to which that delay was made; and
(iv) which provision of this chapter allowed such delay.
(6) As used in this subsection, the term **"supervisory official"** means the investigative agent in charge or assistant investigative agent in charge or an equivalent of an investigating agency's headquarters or regional office, or the chief prosecuting attorney or the first assistant prosecuting attorney

or an equivalent of a prosecuting attorney's headquarters or regional office.

(b) Preclusion of notice to subject of governmental access. A governmental entity acting under section 2703, when it is not required to notify the subscriber or customer under section 2703(b)(1), or to the extent that it may delay such notice pursuant to subsection (a) of this section, may apply to a court for an order commanding a provider of electronic communications service or remote computing service to whom a warrant, subpoena, or court order is directed, for such period as the court deems appropriate, not to notify any other person of the existence of the warrant, subpoena, or court order. The court shall enter such an order if it determines that there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result in—

(1) endangering the life or physical safety of an individual;
(2) flight from prosecution;
(3) destruction of or tampering with evidence;
(4) intimidation of potential witnesses; or
(5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

§ 3105. Persons authorized to serve search warrant

A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

§ 3109. Breaking doors or windows for entry or exit

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

§ 3117. Mobile tracking devices

(a) In general. If a court is empowered to issue a warrant or other order for the installation of a mobile tracking device, such order may authorize the use of that device within the jurisdiction of the court, and outside that jurisdiction if the device is installed in that jurisdiction.
(b) Definition. As used in this section, the term **"tracking device"** means an electronic or mechanical device which permits the tracking of the movement of a person or object.

§ 3500. Demands for production of statements and reports of witnesses (Jencks Act)

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding,

and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term **"statement"**, as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

§ 3771. Crime victims' rights

(a) Rights of crime victims. A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and

convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
(5) The reasonable right to confer with the attorney for the Government in the case.
(6) The right to full and timely restitution as provided in law.
(7) The right to proceedings free from unreasonable delay.
(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
(b) Rights afforded. In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.
(c) Best efforts to accord rights.
(1) Government. Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).
(2) Advice of attorney. The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).
(3) Notice. Notice of release otherwise required pursuant to this chapter [this section] shall not be given if such notice may endanger the safety of any person.
(d) Enforcement and limitations.
(1) Rights. The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter [this section].

(2) Multiple crime victims. In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter [this section] that does not unduly complicate or prolong the proceedings.
(3) Motion for relief and writ of mandamus. The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter [this section]. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.
(4) Error. In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.
(5) Limitation on relief. In no case shall a failure to afford a right under this chapter [this section] provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—
(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;
(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and
(C) in the case of a plea, the accused has not pled to the highest offense charged.
This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.
(6) No cause of action. Nothing in this chapter [this section] shall be construed to authorize a cause of action for damages or

to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter [this section] shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions. For the purposes of this chapter [this section], the term **"crime victim"** means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter [this section], but in no event shall the defendant be named as such guardian or representative.

(f) Procedures to promote compliance.

(1) Regulations. Not later than 1 year after the date of enactment of this chapter [enacted Oct. 30, 2004], the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) Contents. The regulations promulgated under paragraph (1) shall—

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

Title 21 – Food and Drugs

§ 841. Prohibited acts A (Drug Manufacture/Distribution/ Possession with Intent to Distribute)

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.
(b) Penalties. (Omitted)
(This section contains a very detailed scheme of punishments based on factors including the drug, the drug schedule, the amount, manufacture on federal property, prior felony drug convictions, injury or death, and use of boobytraps).

§ 844. Penalty for simple possession

(a) Unlawful acts; penalties. It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 303 of this title [21 USCS § 823] or section 1008 of title III [21 USCS § 958] if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this title or title III, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than

15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this title or title III, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, United States Code, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

(b) [Repealed]

(c) "Drug or narcotic offense" defined. As used in this section, the term "drug, narcotic, or chemical offense" means any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or

conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this title.

§ 879. Search warrants

A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate [United States magistrate judge] issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time.

Title 42 – The Public Health and Welfare

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 10607. Services to victims

(a) Designation of responsible officials. The head of each department and agency of the United States engaged in the detection, investigation, or prosecution of crime shall designate by names and office titles the persons who will be responsible for identifying the victims of crime and performing the services described in subsection (c) at each stage of a criminal case.

(b) Identification of victims. At the earliest opportunity after the detection of a crime at which it may be done without interfering with an investigation, a responsible official shall—

(1) identify the victim or victims of a crime;

(2) inform the victims of their right to receive, on request, the services described in subsection (c); and

(3) inform each victim of the name, title, and business address and telephone number of the responsible official to whom the victim should address a request for each of the services described in subsection (c).

(c) Description of services.
(1) A responsible official shall—
(A) inform a victim of the place where the victim may receive emergency medical and social services;
(B) inform a victim of any restitution or other relief to which the victim may be entitled under this or any other law and [the] manner in which such relief may be obtained;
(C) inform a victim of public and private programs that are available to provide counseling, treatment, and other support to the victim; and
(D) assist a victim in contacting the persons who are responsible for providing the services and relief described in subparagraphs (A), (B), and (C).
(2) A responsible official shall arrange for a victim to receive reasonable protection from a suspected offender and persons acting in concert with or at the behest of the suspected offender.
(3) During the investigation and prosecution of a crime, a responsible official shall provide a victim the earliest possible notice of—
(A) the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation;
(B) the arrest of a suspected offender;
(C) the filing of charges against a suspected offender;
(D) the scheduling of each court proceeding that the witness is either required to attend or, under section 1102(b)(4), is entitled to attend;
(E) the release or detention status of an offender or suspected offender;
(F) the acceptance of a plea of guilty or nolo contendere or the rendering of a verdict after trial; and
(G) the sentence imposed on an offender, including the date on which the offender will be eligible for parole.
(4) During court proceedings, a responsible official shall ensure that a victim is provided a waiting area removed from and out of the sight and hearing of the defendant and defense witnesses.
(5) After trial, a responsible official shall provide a victim the earliest possible notice of—

(A) the scheduling of a parole hearing for the offender;
(B) the escape, work release, furlough, or any other form of release from custody of the offender; and
(C) the death of the offender, if the offender dies while in custody.
(6) At all times, a responsible official shall ensure that any property of a victim that is being held for evidentiary purposes be maintained in good condition and returned to the victim as soon as it is no longer needed for evidentiary purposes.
(7) The Attorney General or the head of another department or agency that conducts an investigation of a sexual assault shall pay, either directly or by reimbursement of payment by the victim, the cost of a physical examination of the victim which an investigating officer determines was necessary or useful for evidentiary purposes. The Attorney General shall provide for the payment of the cost of up to 2 anonymous and confidential tests of the victim for sexually transmitted diseases, including HIV, gonorrhea, herpes, chlamydia, and syphilis, during the 12 months following sexual assaults that pose a risk of transmission, and the cost of a counseling session by a medically trained professional on the accuracy of such tests and the risk of transmission of sexually transmitted diseases to the victim as the result of the assault. A victim may waive anonymity and confidentiality of any tests paid for under this section.
(8) A responsible official shall provide the victim with general information regarding the corrections process, including information about work release, furlough, probation, and eligibility for each.
(d) No cause of action or defense. This section does not create a cause of action or defense in favor of any person arising out of the failure of a responsible person to provide information as required by subsection (b) or (c).
(e) Definitions. For the purposes of this section—
(1) the term **"responsible official"** means a person designated pursuant to subsection (a) to perform the functions of a responsible official under that section; and
(2) the term **"victim"** means a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime, including—

(A) in the case of a victim that is an institutional entity, an authorized representative of the entity; and
(B) in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, one of the following (in order of preference):
(i) a spouse;
(ii) a legal guardian;
(iii) a parent;
(iv) a child;
(v) a sibling;
(vi) another family member; or
(vii) another person designated by the court.

The USA PATRIOT Act
(Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism)
P.L. 107–56—OCTOBER 2001

The USA PATRIOT Act (the Act) was passed in the aftermath of September 11, 2001. Though the primary concern of the Act was combating terrorism, many of the provisions apply to any criminal investigation. The Act recognizes that terrorists often commit various crimes on the path to the ultimate terrorist act, and to effectively combat terrorism, law enforcement must have the tools to learn of non-terrorist crimes to detect an act of terrorism *before* it occurs. For example, terrorists may illegally enter the country, obtain false identification documents, engage in money laundering to finance their activities, make false statements to government officials, obtain explosives and other contraband, and otherwise engage in crimes that are not strictly terrorism-related. Unless specifically indicated, the provisions discussed in this supplement apply to any criminal investigation, and not just those relating to terrorism.

The Act provides you with enhanced tools to detect both terrorism-related and non-terrorism related crimes. The Act also modified the language in some existing federal law because court decisions had limited the original intent of the provisions, or because the original law had been written in an ambiguous way.

The Act has almost 150 sections that affect many provisions of the U.S. Code concerning money laundering and anti-terrorist financing provisions, immigration, intelligence investigations, border protection, enhanced surveillance and search procedures, and enhanced infrastructure protection. This supplement will address primarily those provisions of interest to all or most federal agents and officers.

Covert entry ("sneak and peek") search warrants. There are times when you want to execute a search warrant without tipping off suspects or jeopardizing an investigation. In this

situation, you want to delay letting the owner of the property know that you entered by delaying when a "return" had to be provided to the owner. The authority to delay the return has been variously known as sneak and peek, or covert entry, warrants. Prior law governing delaying the return was a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction. The Act specifically authorizes a delay in providing a return if you request the delay, and the judge issuing the warrant approves the request. If no evidence is to be seized, you must establish "reasonable necessity" to delay the return. If evidence is seized, you must establish "reasonable cause" to delay the return. The reasonable cause or necessity can include endangering life (such as the identity of a confidential informant), flight from prosecution, evidence tampering, witness intimidation, or seriously jeopardizing an investigation. How long the return may be delayed is up to the judge.
See 18 U.S.C. § 3103(a).

> Covert entry warrants, when approved by the judge, permit you to delay notice that a search warrant has been executed to avoid tipping off suspects or jeopardizing an investigation.

Single-jurisdiction search warrants involving terrorism. Prior to the Act, a federal judge could issue a search warrant only for property within the judge's district or locations where the property might move after the warrant was requested. The Act allows a federal judge to issue a nationwide search warrant in cases of domestic or international terrorism so long as the issuing judge is in a district in which activities related to the terrorism may have occurred. (The "activity" does not itself have to be a crime). The definitions of international and domestic terrorism are contained in 18 U.S.C. § 2331, and include activities that involve acts dangerous to human life that are a violation of the federal or state criminal law. The crime must also be intended, or appear to be intended, to intimidate or coerce a civilian population by influencing the policy of a government by intimidation or coercion, or affecting the conduct of a government by mass destruction, assassination, or kidnapping. See Federal Rule of Criminal Procedure 41(a).

DNA identification of terrorists and other violent offenders. The FBI maintains a DNA index/database of persons convicted of certain crimes. The database is available to investigators to obtain a "cold hit" by comparing DNA material of an unknown suspect to the DNA database. The Act expands the crimes that would require convicted offenders to submit DNA samples by adding crimes of terrorism and any federally defined "crime of violence." Because the DNA database is larger, you can expect more cold hits. See 42 U.S.C. § 14135a.

Pen registers and trap and trace applied to e-mail. Court orders have long been available to learn the telephone numbers dialed by a suspect (pen register) or to learn the telephone numbers of persons who called a suspect (trap and trace). The Act recognizes that suspects are using e-mail for many of the purposes for which they formerly used telephones. The Act makes two major changes outlined below. (These provisions do not affect how the *content* of an e-mail can be obtained).

The Act allows you to obtain court orders authorizing pen registers and trap and trace devices, or technology, to capture the e-mail address of a suspect's e-mail correspondents.

For both e-mail and telephone calls, a single court order issued by a federal judge with jurisdiction over the crime under investigation is valid nationwide. Such an order issued in one judicial district is made valid in any other district upon your certification. See 18 U.S.C. §§ 3121, 3123, 3124, and 3127.

Scope of subpoenas for electronic evidence. The Act makes it more efficient for you to obtain information about those who use the Internet. Under the Act, new categories of information that can be obtained by subpoena include:

- How the subscriber of an Internet Service Provider (ISP) - like AOL or EarthLink - paid for the services whether by credit card or bank information.
- Session times and duration (when and for how long a person was logged onto to the ISP).

- Temporarily assigned Internet addresses (IPs). See 18 U.S.C. § 2703(c).

Nationwide search warrants for stored e-mail. Federal Rule of Criminal Procedure 41 limits the authority of judges to issue search warrants for property in their districts, or might move to another district after the warrant is requested. When applied to obtaining e-mails in temporary electronic storage held by ISPs, there is often no way to determine precisely what district an ISPs e-mail server might be in. To avoid having to obtain multiple warrants, the Act permits a nationwide warrant issued by any judge with jurisdiction over the investigation. See 18 U.S.C. § 2703(a).

> You may obtain a nationwide search warrant to search for stored e-mails.

Obtaining voice mails that are e-mail attachments. Under prior law, acquiring a voice mail attachment to a stored electronic communication (e-mail) was interpreted by some courts to require a Title III wiretap order, whereas obtaining the e-mail itself required only a search warrant. The Act now allows voice mail attachments to e-mail to be obtained with a search warrant. See 18 U.S.C. § 2703.

Wiretaps in Computer Fraud and Abuse Act violations. Prior law did not list the Computer Fraud and Abuse Act (18 U.S.C. § 1030) as a "predicate" offense authorizing a Title III wiretap for oral or wire communications. The Act permits an application for such a wiretap in computer hacking and intrusion cases. See 18 U.S.C. § 2516(1).

> You can now obtain Title III **wiretaps** for oral and wire communications in computer fraud investigations.

Allowing law enforcement to monitor hackers. Before the Act, the law allowed computer owners to monitor their systems, equipment, and networks to detect and stop intruders (hackers). It was unclear, however, whether the owners could

ask *law enforcement* to monitor the equipment if an intrusion attempt was detected. The Act now makes clear that owners can call in law enforcement to monitor a hacker's attempts if certain criteria are met. These include that there are "reasonable grounds" to believe an intrusion is being attempted, the owner invites the law enforcement monitoring, and that law enforcement is conducting an ongoing investigation. See 18 U.S.C. § 2511.

Cable companies that provide Internet access treated the same as other Internet Service Providers. The Cable Act had stringent procedures - requiring advanced notice to customers - to obtain customer records. These special provisions were intended to protect a customer's First Amendment rights with respect to a customer's television viewing habits. Many cable companies now provide Internet access and e-mail. Some cable companies claimed that the Cable Act provisions extend to not only the records revealing what customers watched on television, but also to the customer's e-mail and Internet activities. The Act now treats the e-mail side of a cable company's activities the same as traditional e-mail providers are treated. See 47 U.S.C. § 551.

Better sharing of information obtained through the Foreign Intelligence Surveillance Act (FISA). FISA governs how the government may obtain "foreign intelligence information" as defined by 50 U.S.C. § 1801(e). Generally, this is information relating to national security or foreign intelligence activities. Historically, the Department of Justice, as well as certain components of the Intelligence Community were concerned about the possible abuse of FISA authority by the law enforcement community when, for some reason, Title III wiretap authority was unavailable in a particular criminal case. Because surveillance and collecting evidence under FISA may not require the same degree or type of information that gives rise to probable cause or a warrant as the 4th Amendment would require in a non-FISA investigation, DOJ built a "wall" between FISA and non-FISA investigations. This wall made it difficult for FISA information to be shared with those who were not conducting a FISA investigation. Prior law might, for

example, inhibit the use of FISA in a case where there is a parallel criminal investigation of a planned terrorism bombing. Under previous interpretation of the law, a FISA wiretap or physical search was only permissible when *the* purpose (or, some courts said, the "primary purpose") of the investigation was obtaining information about foreign intelligence activities. In 2002, the Foreign Intelligence Surveillance Court of Review issued an opinion in which it held that the use of FISA electronic surveillance and physical search authority was appropriate where "a significant purpose" thereof was the collection of foreign intelligence information. The Court further concluded that, as long as that threshold was met, there was no need to maintain a wall between the intelligence and law enforcement/prosecution authorities, thus allowing the intelligence community, in its pursuit of foreign intelligence, to do so in a way that directly assisted law enforcement in pursuit of a parallel criminal investigation. In addition, the USA PATRIOT Act revised Federal Rule of Criminal Procedure 6(e) to permit the sharing by the United States Attorneys of grand jury information concerning terrorism. The Homeland Security Act provisions went further permitting officers conducting FISA investigations to consult with designated federal, state, and local law enforcement officers to coordinate efforts to investigate or protect against actual or potential attacks or other grave hostile acts of a foreign power. See Federal Rule of Criminal Procedure 6(e) and FISA.

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