

A Non-Lawyers Guide to the Police Use of Evidence, Search and Seizure: Hey, Can They Do That?

<i>INTRODUCTION</i>	6
<i>The Anglo-American System of Justice</i>	7
1. Who are the participants?	7
2. The primary concern underlying the Rules of Evidence	7
<i>The Role of the Law of Evidence in Criminal Trials</i>	8
1. The Substantive Criminal Law	8
2. The Rules of Evidence	9
<i>Basic Concepts of the Kind or Type, Form and Function of Evidence</i>	11
1. Kind or Type of Evidence	11
(a) Direct Evidence	11
(b) Indirect or Circumstantial Evidence	12
2. The Form By Which The Evidence is Offered	12
(a) Testimonial Evidence	12
(b) Tangible Evidence	12
(1) Real Evidence	13
(2) Fact Finder	13

3.	Is it Admissible Evidence?	13
(a)	Competency	13
(1)	Foundation for Testimonial Evidence	13
(a)	<i>In general</i>	14
(b)	<i>Special factors</i>	14
	Foundation required for tangible (real) evidence	15
(a)	Relevancy	16
(1)	The Concept of Relevancy	16
	Several questions must always be asked in determining relevance	16
a.	The Constitution	18
b.	The Rules of Evidence	18
(1)	Pertinent Rules of Evidence	18
	Rule 403	18
	Rule 501 – Privileges	19
	Fifth Amendment privilege	19
	Rule 801-804 Hearsay	19
	Hybrid Evidence Concept	20
	Judicial Notice – rule 201	20
	The Law Against Unreasonable Search and Seizure	22
1.	The Controlling Constitutional Amendments	23

(a)	Fourth Amendment to the United States Constitution	23
(b)	State Constitutional Provisions, i.e. Article 3, Section 23 Mississippi Constitution	23
2.	The Sanctions for Abuse	24
(a)	Judge Made Law (Exclusionary)	24
(b)	Federal Law	24
(1)	2 U.S.C. 1983 (civil penalties)	24
(2)	18 U.S.C. 242 (criminal penalties)	24
	<i>The Concept of Law</i>	24
	<i>The Tort Law</i>	26
	<i>The burden placed on the public police</i>	27
	Analysis of the Fourth Amendment’s Constitutional Concepts: A Law Enforcement Officers Friend or Foe?	28
(c)	Arrest Defined	29
(d)	Elements of Arrest	30
(e)	Authority to make arrests	31
(f)	Contacts and Stops are not Arrests	32
(1)	The degree of intrusion defines a Stop	34
(2)	Officers must articulate facts to show reasonable suspicion	35
(3)	Terry stands for two primary propositions	35
3.	Probable Cause, Search and Seizure	36
(a)	PROBABLE CAUSE REQUIREMENT	36

(b)	THE LAW OF ARREST AND THE MIRANDA DECISION	37
	(1) Custody	38
	(2) Interrogations	38
	(3) Warnings	39
	(4) Waiver	39
(c)	SEARCH AND SEIZURE	42
	(1) Logic concept	42
	(2) Is there a search?	43
	(a) <i>The right to privacy</i>	43
	(b) <i>Governmental conduct</i>	43
	(c) <i>Reasonable expectation</i>	44
(d)	COMMON FACTUAL PATTERNS THAT MAY NOT CONSTITUTE A SEARCH	44
(e)	PROBABLE CAUSE/WARRANT REQUIREMENTS	46
	(1) There are several other specific requirements which must be met before a warrant is factually valid.	48
	(2) Other requirements for serving warrants	48
(f)	EXCEPTIONS TO THE WARRANT REQUIREMENT	49
	(1) IMMEDIATE CIRCUMSTANCES	49
	(a) <i>Hot pursuit of a fleeing felon</i>	49
	(b) <i>Mobile vehicle searches</i>	49
	© <i>If there is probable cause to search and probable cause to believe evidence is threatened with immediate removal or destruction, no warrant is needed</i>	50

<p>(c) <i>Emergency searches are also authorized during any other emergency, which justifies entry without a warrant; but entry must be limited to responding to the emergency</i></p>	50
<p>(2) SEARCH INCIDENT TO ARREST</p>	50
<p>(g) STOP AND FRISK</p>	53
<p>(h) VIEW</p>	53
<p>APPENDIX</p>	54
<p>BERNER’S SERIES</p>	55
<p>TABLE OF CASES</p>	56

A Non-Lawyers Guide to the Police Use of Evidence, Search and Seizure: Hey, Can They Do That?

INTRODUCTION

The role of the public law enforcement officer in our free society is becoming increasingly complex. The prevalence of violent crime caused a present desire in our society for the police to become more aggressive in the fight against crime in general. Yet, at the same time the public demands a greater restraint on conduct of the police. The individual officer perceives, as their daily routine, a continual war against the criminal element. Fighting a daily battle, in our city streets and alleys, the law enforcement officer is perceived by the citizens, in far too many instances, as part of the problem rather than a solution. In the final analysis, the perception is that the police are on one side, the criminal on the other side, and in the middle, are the rest of us who don't carry a badge.

What appears to be a clear contradiction in societal goals, wanting a more aggressive and law enforceable police, yet restraining their conduct, is best explained in a three word phase: A DEMOCRATIC SOCIETY.

Arguably not the most efficient method of solving the problems of crime in our society, but the restraint on police conduct must continue. Public law enforcement officers in a democratic society must recognize and accept this concept as the virtual cornerstone upon which our government was founded. Individual civil liberties must be protected against unreasonable governmental restraint. Public law enforcement in a democratic society virtually possesses the key to the storehouse of liberty. It is, therefore, obligatory upon each individual officer to safeguard that key from those who would abuse their positions of authority. We cannot allow over zealous or corrupt police to abuse the constitutional rights of citizens.

When the public law enforcement officer turns his head to such abuse, he or she is unwittingly unlocking the storehouse door so those unprincipled individuals can loot and steal our democratic heritage. A heritage of liberties bought and paid for with the most precious commodity of all, the blood of our forefathers.

This book is not designed to assist anyone in circumventing the law, but rather to make the officer and the citizen aware of police procedure or police behavior, which may violate the rights of the citizen, while at the same time demonstrating how hard it is to police in a free society.

The Anglo-American System of Justice

1. Who are the participants?

In our system of justice there is a large group of individuals who participate in the system. For the purposes of this book we will limit our discussion to the primary participants in a trial:

JUDGE: The judge in a jury case acts as a referee or umpire. Their applies the procedural rules to the lawyers and explains the substantive propositions of law to the jurors. If neither side wants a trial by jury, the judge then determines the facts and applies the substantive law, the part of law that creates, defines and regulates rights.

JURY: The jury will apply the facts, as found by them, and the law, as the judge in his instructions has explained it to them. The jurors alone decide what facts have been established (proved) beyond a reasonable doubt by the “evidence” produced in court.

THE LAWYERS: The parties to a criminal case, through their lawyers, produce information, which the jury is to consider in arriving at its verdict. The lawyers decide what facts they are going

to attempt to prove. Facts cannot be proven unless and until they are admitted into evidence. Once this has occurred, the jury may then view the facts as evidence and only those facts in evidence can be used to establish the guilt or innocence of the accused. The lawyer's role becomes that of a theatrical producer calculating what facts he wishes to offer and what facts he will attempt to conceal.

2. The primary concern underlying the Rules of Evidence

Given the supposed inequities in all systems of justice, the Anglo-American criminal justice system endeavors to insure a fair and impartial arena. This is where the accused may be assumed innocent and his/her side of the controversy be heard by a jury of his/her peers. The primary objective of the jury is to ascertain the "truth." However, juries are made up of people--human beings who have been influenced by their own experiences and who may be unduly influenced by efforts of flamboyant trial lawyers. The assumption is that inexperienced fact finders must be carefully shielded from misleading or prejudicial influences that might lead them to arrive at an incorrect verdict. Therefore, the rules of evidence that govern which facts are admitted into evidence are designed so as to insure the most objective verdict that human beings can attain.

"These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth, and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." (FRE 102)

The Role of the Law of Evidence In Criminal Trials

In our criminal justice system a trial is designed to seek truth, and ultimately to determine the

guilt or innocence of the accused. That a trier of fact makes determination--this trier of fact can either be a judge sitting alone in what is known as a “bench trial” or, as in a majority of instances in criminal trials, the trier of fact is a jury. The jury is composed of 12 men and women drawn from a pool of qualified electors representing a cross section of the community. The jury of 12 is selected from a venire or pool of qualified jurors through the preliminary examination and election of these jurors, a process known as *voir dire*.

Once on the jury, the members make their determination by watching the prosecutor create a picture of his case by systematically laying out pieces of the picture before the jury. Very much like a puzzle, the pieces of evidence should combine to reveal the legal elements of the crime and the facts, or occurrences, which support those elements. The successful outcome of a criminal trial, therefore, is largely determined by the ability of the prosecutor, or the defense lawyer to present the pieces of the puzzle (evidence) which best depict their theory of the case. There are two very important areas of the law that must be addressed when determining which pieces of the puzzle should be offered; They are:

- The Substantive criminal law, and;
- The Rules of evidence, as interpreted by case law and controlled by the court.

1. The Substantive Criminal Law

To better understand the criminal law, consider each violation of the criminal law a picture. To successfully complete the picture, the government, represented by a prosecutor, must have a piece of information for each element of the particular offense that the defendant is charged. If the prosecutor leaves out one of those pieces, then the picture is incomplete and the jury will not get an opportunity to decide on what they have seen. The defense attorney makes a motion for acquittal (release) on the grounds that the government has failed to prove all the elements of the offense. If

the motion is granted, the defendant is free to go!

To avoid having a case thrown out, the prosecutor must know all the elements of the offense. It is important then, for the law enforcement officer also to be aware of those elements so they can provide the necessary puzzle pieces to ensure the prosecutor provides the most accurate picture for the jury. At trial, however, the prosecutor may not be able to use all of those pieces of information. In order to determine which ones can be used, and how they may be used, the second major area of the law must be addressed.

2. The Rules of Evidence

The “rules of evidence” determine which pieces of information may be presented to the trier of fact and how it may be presented. The purpose of the trial is to seek the truth; the rules of evidence provide a fair method to learn the truth.

The federal rules of evidence have been adopted, almost in their entirety, by most states. The uniform set of rules adopted by the Federal Court System in 1975 was designed to eliminate the confusion caused by conflicting evidence rules in state and federal courts. (Mississippi adopted the Mississippi Rules of Evidence, the MRE, in 1986.)

It is the judge’s determination which information is presented to the jury. Under the rules of evidence, only the trial judge handles any interpretation and/or enforcement of the procedural requirements. The interpretation of a rule and the outcome of an objection based on a rule, depend on the individual judge, and the court where they are sitting. Therefore, a public law enforcement officer cannot rely solely on the codified (recorded) rules of evidence, but should also be aware of the customary practices of local judges.

Basic Concepts of the Kind (Type), Form and Function of Evidence

A public law enforcement officer should understand the concepts of the law of evidence. It is vital to the outcome of most criminal cases. This basic understanding will enable the officer to focus the investigative efforts to make optimum use of the facts, as revealed by the investigation. The primary goal of the investigation is not simply to detect and apprehend, but to insure a successful prosecution at trial. There are three areas of concern that an investigator should be keenly aware of when gathering evidence for prosecution. They are:

- ◆ What kind of evidence is it?
- ◆ Is it admissible evidence?
- ◆ If so, how will it be admitted?

1. Kind or Type of Evidence

Evidence is defined as any piece of information, which will help to prove or disprove a fact.

The law of evidence classifies all evidence in the following two ways:

- By type, and;
- By the form in which the evidence is offered.

a) Direct Evidence:

Direct evidence leads the jury right to a conclusion without the need to consider any inferences from another fact.

EXAMPLE: An investigator is trying to prove that Defendant X sold two baggies of cocaine to Mr.

Y on the corner of 14th and I streets yesterday afternoon. Direct evidence would be a confession by Defendant X or the testimony of Mr. Y.

b) Indirect or Circumstantial Evidence:

Indirect or circumstantial evidence is indirect proof that a fact exists. A conclusion is reached by inferring the existence of one fact from other facts.

EXAMPLE: Circumstantial evidence of the transaction in the example above would be testifying that the Defendant was seen at the corner yesterday afternoon talking with Mr. Y.

*Note: A defendant **can** be convicted based on circumstantial evidence alone. Direct evidence is not necessary to sustain a conviction. Rule 402 states that all relevant evidence is admissible and does not differentiate between direct or circumstantial evidence.*

2. The Form By Which The Evidence Is Offered

a) Testimonial Evidence:

Testimonial evidence is information, which the jury learns about from someone else; a personal observation or opinion made by a witness who describes that observation or opinion to the jury.

EXAMPLE: Eyewitness A says, "I saw defendant X sell Mr. Y two baggies of coke on the corner of 14th and I streets yesterday afternoon."

b) Tangible Evidence:

Tangible evidence is information that speaks for itself; one of two kinds:

(1) Real Evidence:

The thing at issue in the case; i.e.: murder weapon

(2) Fact finder:

EXAMPLE: Two baggies of a white powdery substance. How the evidence is classified will effect the second two questions stated above. These were: First, -- Is it admissible? Second, -- If so, how will it be admitted?

3. Is It Admissible Evidence?

To be admissible, all evidence must stand certain tests. If these criteria are met, then the jury will determine what weight the evidence is given.

To be admissible, evidence must pass the following tests: Competency, Relevancy, The Constitution and The “Other”.

c) Competency

Definition: Eligible to be considered. To be admissible, a piece of information must first be competent. That is, it must first be eligible to be received into evidence. Competency is the threshold question and the first test, which evidence must pass to be considered at trial. For example, polygraph results are considered incompetent, and therefore not admissible.

To establish the competency or eligibility of any piece of evidence, it must have the proper foundation for admission. The foundation requirements differ according to the type of evidence involved.

(1) Foundation for Testimonial Evidence

(a) In general

Long ago specific classes of people were deemed to be incompetent to give testimonial evidence. At one time, the accused could not take the stand on their behalf. Convicted peers were likewise ineligible to give testimony.

The Federal Rule of Evidence 601 states the general rule today: “Every person is competent to be a witness except as otherwise provided in these rules.” A witness must be qualified in two ways: first, to take the stand in general; and second, to give testimony on the specific facts at issue.

In general, there are four basic foundation requirements necessary to establish the competency of a witness:

- ◆ Oath
- ◆ Perception
- ◆ Recollection
- ◆ Communication

In order to be competent to testify, a person must be sworn in and be able to remember and communicate his perception of some past event. [Rules 602 and 603.]

(b) Special factors

Mentally disabled/children. A judge will determine competency after a number of preliminary questions; Not automatically incompetent.

Convicted perjurers. Someone convicted of a voluntary violation of an oath to swear to tell the truth. Incompetent, in the state of Mississippi; Not in Federal Court however, the jury is allowed to weigh credibility. FRE-601/MRE 601 preserves perjury incompetence of a husband or a wife.

Opinion evidence.

Lay persons. Generally, a layperson is not competent to testify on matters beyond the facts perceived

by his senses [Rule 701.] This rule is based upon the principle that the witnesses are to furnish the facts and the jury will draw conclusions from those facts. A layperson may give an opinion in very specific circumstances such as to describe, intoxication, speed and value of land.

Experts. A witness may be qualified as an expert and thus be competent to give an opinion or a conclusion on a particular matter by having the witness answer preliminary questions concerning their education, knowledge, training or experience.

(2) Foundation Required for Real (Tangible) Evidence.

For real evidence to be competent a foundation must be laid. It must prove that the evidence is the real thing in any way that makes sense. The most common way is for the witness to identify it.

I.e. The prosecutor questions a witness about a gun in a murder case. The witness testifies to custody, control and the unchanged condition. If upon consideration of these factors the trial judge is satisfied that in all reasonable probability the article has not been changed in any important respect, the they will then permit its introduction.

Examples of tangible evidence where a foundation must be laid before admission, must prove competency for:

- ◆ photographs
- ◆ tape recordings
- ◆ voice prints
- ◆ other documents

Each document must adhere to the original document rule. This rule requires the use of the original document unless accepted by one of the rules. Rule 1003-1005.

d) Relevancy

Relevancy is defined as “Helpful in proving or disproving a fact; of some probative value”.

The old concept of “materiality” required that the evidence relate to the issues of the case. Relevancy under the federal rules of evidence incorporates that requirement. Rule 401 defines relevant evidence as “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.”

(1) The Concept of Relevancy

Once a proposed piece of evidence has met the competency requirement, in order for it to go before the jury, it must be found to be relevant.

The rules of evidence define the term relevant as: FRE: 401 “Evidence having any tendency to make the existence for any fact that is of consequence to the determination of the action more probable or less that it would be without the evidence. Relevant means a tendency to prove a proposition properly probable in a case. Evidence therefore may be excluded as not relevant (1) because it is not probative of the proposal at which it is directed or (2) because that particular proposition is not probable in the case. (i.e.: Not a necessary element to be proven--to remote in time or place)

(1) Several questions must always be asked in determining relevance:

- ◆ What is the evidence being used to probe?
- ◆ Toward what proposition is it directed?
- ◆ Does it help in proving that proposition?

- ♦ Is the evidence material to proving the proposition?

Relevancy is not an essential characteristic of an item of evidence. Rather, it is a relation between an item of evidence and a proposition one is seeking to prove.

The mere fact that evidence is relevant does not mean that it is admissible. The rules of evidence are constructed to protect the trier of fact from misleading or otherwise prejudicing relevant evidence.

It is recognized that some piece of evidence may have little influence on the conclusion of the legal issues but may have a great impact and influence on the emotion of the trier of fact.

As a result, the typical relevancy case does not involve an issue where the only complaint is that the probative value of the evidence is minimal. Rather, the complaint is that, for some reason, the evidence is unduly prejudicial. The rule also covers objections on grounds of relevancy as they relate to confusion of the issues, misleading of the jury, or for considerations of undue delay, wastes of time or needless presentation of cumulative evidence.

The rule that controls, in the instances described above, is FRE 403. This rule allows the trial judge great latitude in the balancing of the probativeness of the particular evidence versus the prejudicial effect on the jury.

The evidence is usually admitted if it tends to shed light rather than heat but, if it only adds heat towards the defendant in the eyes of the jury, then it is not admitted.

The judge is also allowed to conditionally admit evidence as relevant contingent upon the

proponent of the evidence supporting the relevancy with other after admitted evidence.

e) The Constitution

If government officials, in a manner that violates the defendant's constitutional rights, obtain the evidence, then it will not pass this test for admissibility. The evidence is excluded at trial by what is known as *the exclusionary rule*.

f) The Rules of Evidence

Rule 402 states that "all relevant evidence is admissible except as otherwise provided by...these rules". The final test, then, is to run the evidence through the rules themselves. Once a piece of evidence is deemed to be competent, relevant and not obtained in any manner which violates the defendant's constitutional rights, it will be admissible unless specifically excluded by one of the other rules.

The rules of evidence encompass a broad range of procedures and guidelines, many of which are specifically related to the trial phase of the criminal process. Therefore, it would be unnecessary, for these purposes, to address every rule covered under the Rules of Evidence. The limited purpose of this introduction to the law of evidence would be accomplished by a brief review of only those rules most pertinent to the law enforcement officer's function.

(1) Pertinent Rules of Evidence

Rule 403

Rule 403 excludes relevant evidence on grounds of prejudice, confusion or waste of time. This rule requires the judge to balance the probative value of, and the need for, the evidence against the harm likely to result from its admission.

EXAMPLE: A gory photograph may be relevant and competent evidence if the proper foundation is laid. However, if the judge feels that its prejudicial effect outweighs its probative value, it may then be excluded under this rule.

Rule 501 - Privileges

A basic underpinning of our judicial system is that everyone has an obligation to testify when subpoenaed or commanded to appear before a court of law. However, the law of evidence recognizes the concept that some privileged information is protected. There is a long-standing right to every man's evidence, except for those persons protected by a constitutional common law, or statutory privileges.

Fifth amendment privilege

A witness need not testify about facts, which could subject him to a criminal action. This is the only privilege that has constitutional origins. These are privileges based on relationships such as: Husband/Wife, Client/Lawyer, Priest/Penitent or Doctor/Patient.

Rules 801-804 - Hearsay

Hearsay is defined by the Federal Rules of Evidence as 'a statement other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth or the matter

asserted.” Rule 801 (c)

A statement, as defined by Rule 801 (a) may be either oral or written, or it may be a non-verbal conduct by a person who intends it to be an assertion.

Rule 802 excludes hearsay evidence except as otherwise provided by other rules. The basis for excluding hearsay evidence is the defendant's amendment right to confront witnesses against them.

There is no opportunity to place the witness under oath, he cannot be cross-examined and since the assertor is not present in court, the jury cannot evaluate his demeanor to ascertain his credibility - no eyeball-to-eyeball contact.

The law of evidence does, however, permit the use of hearsay at trial when there are other indications of reliability.

Hybrid Evidence Concept

Judicial Notice - Rule 201: The doctrine of judicial notice permits the judge and jury to recognize a fact as true without formally presenting evidence of that fact. In other words, there are some facts which can bypass the above four tests required for admissibility. In determining a defendant's guilt, the jury may consider a fact without any formal proof of that fact if the judge takes judicial notice of it. A judge may take judicial notice of a fact at trial if the fact is one not subject to reasonable dispute.

Rule 201 States that a fact may be judicially noticed if it is either: generally known within the territorial jurisdiction of the trial court. I.e.: The fact must be a matter of common knowledge in the area where the court sits, or it is capable of accurate determination from a reliable source. I.e.: you can look it up in a generally accepted reference book. I.e.: June 10, 1986 was on a Tuesday, a particular substance is a controlled substance.

The fear of a strong centralized government and the potential for abuse of an individuals' civil liberties led the founding fathers to draft a series of amendments to the Constitution. These amendments were specifically designed to prevent the abuses of the past and insure the individual rights of the citizen. The amendments were drafted in such a way as to guarantee the fundamental rights of the individual to life, liberty and the pursuit of happiness. Known collectively as the Bill of Rights, the first ten amendments were originally designed to protect the rights of the individual from the federal government and its agents.

However, the officers of the state government were not always considered to be bound by the provisions of the Bill of Rights. Therefore, unless a state constitution contained similar amendments, the citizens' opportunities for remedy against the state for violation of federal constitutional rights were limited. In the late forties, and more consistently in the early sixties, the Supreme Court of the United States began a move toward the incorporation of the "Bill of Rights" through the due process clause of the Fourteenth amendment. The Fourteenth amendment had long guaranteed the right of fundamental fairness to the citizen of the state by the state, but its extent had never before been seen to incorporate the first eight amendments which were the core of the Bill of Rights. In fact, the U.S. Supreme Court had expressly stated that the Fourteenth amendment had not intended the first eight amendments be restated within the Fourteenth. Meaning, that if the amendments were to be considered applicable to the state through the Fourteenth amendment, they would have to be incorporated on an amendment by amendment basis. Adamson v. California, 332 U.S. 46.

The process of selective incorporation of the Bill of Rights through the Fourteenth amendment began in 1949, in the case of Wolf v. Colorado, 338 U.S. 25 (1949). In Wolf, the U.S.

Supreme Court ruled that the prohibition against unreasonable search and seizure guaranteed by the Fourth Amendment was applicable to the state through the "Due Process clause" of the Fourteenth Amendment. The Court stated: "The security of one's privacy against arbitrary intrusion by the police is basic to a free society. It is therefore implied in the concept of ordered liberty, and as such, enforceable against the States" thereby clearly incorporating the Fourth Amendment through the Fourteenth and making it applicable to the States. The Court did not, however, make the sanctions of the exclusionary rule applicable to the States. This was accomplished some twelve years later in the landmark case of Mapp v. Ohio, 367 U.S. 643 (1961). The process of selective incorporation continued through the decade of the sixties and is still a viable concept today.

The Law Against Unreasonable Search And Seizure

The most significant impact of this selective incorporation into law was that the state governments and their agents were now required to adhere to the federal constitution through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Due Process being a course of legal proceedings carried out regularly and in accordance with established rules. The State governments and their agents are required to follow those constitutional amendments incorporated by case law.

In order to understand the significant impact the Fourth Amendment had on the concept of ordered liberty, we should first examine the historical development and foundation of the law that prohibits arbitrary government intrusions. Best articulated in 1886 by the U.S. Supreme Court in the case Boyd v. United States, the motivation for the amendment was based on abuses perpetrated by the English monarchy.

In order to discover the nature of the proceedings intended by the Fourth Amendment, under

the terms unreasonable searches and seizures, it is only necessary to recall the contemporary or then-recent history of the controversies on the subject, both in this country and in England. The practice was established in the Colonies; of issuing writs of assistance to the revenue officers, empowering them, at their discretion, to search suspected places for smuggled goods. James Otis pronounced this "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book since they placed the liberty of every man in the hands of every petty officer". This was in February of 1761, in Boston, and the famous debate in which it occurred was perhaps, the most prominent event that inaugurated the resistance of the colonies to the oppression of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." *Boyd* at 624.

1. The Controlling Constitutional Amendments

a) Fourth Amendment To The United States Constitution

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.

b) State Constitutional Provisions, i.e. Article 3, Section 23, Mississippi Constitution

The people shall be secure in their persons, houses and possessions, from unreasonable seizures or search; and no warrant shall be issued without probable cause, supported by oath or

affirmation, specially designating the place to be searched and the person or thing to be seized.

2) The Sanctions For Abuse:

a) Judge Made Law (Exclusionary Rule)

A Judge made rule of law established by the United States Supreme Court in Weeks v. U.S. and made applicable to the State law enforcement officials in Mapp v. Ohio. The exclusionary rule states that evidence seized as a result of a violation of the Fourth Amendment or of Article 3, Section 23, of the state constitution cannot be used against the individual whose rights were violated. Any evidence seized or tainted by an unlawful search or seizure is considered inadmissible at trial.

b) Federal Law

(1) 42 U.S.C. 1983 (civil penalties)

A federal statute that provides for severe civil sanctions against individuals acting under color of law who, while so acting, commit an act in violation of another persons clearly established constitutional right. (This statute has been extensively used against state and local law enforcement officers who have violated another individual's constitutional rights.)

(2) 18 U.S.C. 242 (criminal penalties)

A federal statute that makes gross violations of an individual's constitutional rights punishable by imprisonment.

The concept of law:

Any organized society that wishes to maintain order must create a code of conduct. The code can either be written in the form of laws or understood as in the form of custom. Regardless of the laws form, the more structured the society, the greater the need for a universal code of conduct. The

perception that each individual is free to pursue their own individual goals within societal guidelines is commonplace in democratic society. This perception embodies the concept of a duty to fellow man. The duty concept is expressly described, and inherently woven throughout our civil and criminal law.

Our democratic society distinguishes this concept of duty to fellow man and differentiates between the type of wrong committed and the gravity of the offense. Once a wrong is committed against an individual by another, the impact of the wrong is considered and for reasons of order and societies greater good, sanctions will then be determined. The act by the offending party will be characterized as either civil or criminal.

A criminal wrong is one committed against an individual that negatively affects the common good. Society places these actions into a group requiring public sanctions. Simply stated, society, as a group, recognizes the negative impact, and for public policy reasons, punishes the wrong doer for breaching a duty to an individual. This concept is embodied in the criminal law and is created through state statutes. Statutes are created by our representatives in the legislature and enforced by the executive branch of our local, state and/or federal governments.

A civil wrong is generally one committed against another which society recognizes as a breach of duty to fellow man but a private wrong which is not sanctioned by society as a whole. In essence, a civil wrong impacts the individual more than society and this private wrong does not rise to a level requiring greater sanctions.

The punishment for committing a criminal wrong can range from monetary fines for lesser offenses and, for more serious offenses, the relinquishment of freedom. The punishment for committing a civil wrong is primarily designed to redress the offended party for the wrong committed against them. This is done by placing them in as good a position as they would have

been, had the wrong not been committed against them. This is accomplished by the use of monetary damages. The concept of “an eye for an eye” does not work well in our society, therefore, the most just and equitable manner to handle the redress of grievances in a civil suit, is to place a value on the wrong committed and to make the perpetrator or tort-feasor pay the offended party.

The civil law is broken down into primary areas or classifications. These areas have evolved from common law rights and privileges. They are classified as Contract law, Property law, and Tort law. The area of law most commonly used against the law enforcement officer when a breach has been alleged is the tort law.

The Tort Law

The tort law can best be described as a private wrong committed against an individual or their property wherein the aggrieved party is entitled to recover damages against the perpetrator. The tort law is generally broken down into three areas classified by the type of tort and the elements necessary to constitute the action. The three areas are *Negligence*, *Intentional tort* and *Strict Liabilities*. There is a fourth area of the law, which is statutorily created and administered by the Federal Executive and Judicial Branch. Acts coming under this category are known as *Constitutional Torts*. When committed by state or local officers, acting under color of law, the breach of a citizen’s civil rights is considered a Constitutional Tort. These lawsuits are carried out under the authority of a federal statute cited as 42 U.S.C. 1983.

Under the general tort laws, including the constitutional torts, the officer and his department can be sued. Usually it is the officer who is sued in his individual capacity and the department is sued because the officer was an agent of said department working on departmental business when the breach occurred. Whereas, attorney fees are not usually awarded in a state tort action, the federal

statute creating the constitutional tort, allows attorneys fees to be collected against the officer and/or their department. The purpose in awarding attorneys fees when a breach has been proven is to insure access to the courts for all citizens; even those whom cannot afford a lawyer.

In order to prevail in a constitutional tort case the offended party would have to prove facts, in addition to those required by general tort law. The offended party must prove that the officer was acting under the color of law (which essentially is any act carried out under the authority of your police responsibilities) and while so acting, violated a clearly established constitutional right of the offended party. Mere negligence is not compensatory under 42 U.S.C. 1983 because public officers are granted a qualified immunity under the statute. The offended party would have to prove an intentional violation of a here-before clearly established constitutional right. When proven, the offended party would receive actual and compensatory damages and, in some instances, punitive damages. In addition to the damages, the federal statute allows for the collection of attorney fees from the losing party. Attorney fees in a 1983 action can be in the hundreds of thousands of dollars, and if found personally liable, the officer, not his department, are responsible for the payment of those fees.

The burden placed on public police

In order to illustrate the higher standard of behavior held to public officers, consider a public officers behavior and sanction, with that of an unsworn citizen in an identical situation. In the following example, the public officer is not only held to a higher standard, but their breach of duty results in more severe sanctions. **Citizen A** in an unprovoked attack assaults **citizen B**. What can be

done to **citizen A** for his breach of duty? First, **citizen B** can swear by affidavit that **A** assaulted **B** and a criminal warrant can be issued to bring **A** in for a hearing. If found guilty, **citizen A** can be criminally fined. Seldom will **citizen A** be incarcerated for a misdemeanor assault. **Citizen B** may also redress his grievance by suing **citizen A** and they may receive money damages, if applicable. Consider this same scenario, but instead, **officer A** commits the assault on **citizen B**. In addition to the criminal and civil sanctions applied to **citizen B**, **officer A** can be sanctioned by their department starting with the loss of rank, pay and seniority and up to, and including, losing their job. **Officer A** can be sued in federal court under 42 U.S.C. 1983. **Officer A** can be held liable for violating **citizen B's** clearly established Constitutional rights and may be forced to pay actual and compensatory damages AND all attorney fees. In addition, **officer A** can be found to have violated a federal criminal statute 18 U.S.C. 241. This statute holds any person who intentionally violates another person's civil rights, while acting under color of law, liable for criminal sanctions of up to ten years in prison and a \$250,000 dollar fine. It should be abundantly clear that the public officer is held to a higher standard and is sanctioned accordingly. An officer cannot only lose their job and his money, but also their freedom.

Analysis of The Fourth Amendment's Constitutional Concepts: A Law Enforcement Officers Friend or Foe?

As clearly indicated by the previous analysis, the underlying concept that the constitutional mandate or authoritative command against unreasonable searches and seizures is premised upon is the right of the individual to be secure from arbitrary governmental intrusion. The significance of the amendment to the law enforcement officer is that the words within the amendment dictate the actions that an officer must follow or they will suffer the sanctions provided by law.

Many law enforcement officers view the provisions of the Fourth amendment as contrary to the aims of law enforcement. One in which the ends of justice are thwarted by technical legal practicalities thrust upon them by an insensitive judiciary. The facts do not support this perception. The Fourth amendment does not bar the government from searching and seizing, it merely requires that the search and seizure be in a reasonable manner.

The determination of whether the actions of the police are reasonable, has been established by the courts and is based upon clearly established case precedent. The law enforcement officer is given direction by the case law and is expected to adhere to the fundamental bright line rules established by the Supreme Court. The United States Supreme Court in Katz v. U.S., 389 U.S. 347, (1968), stated the most basic Fourth amendment rule and procedure:

Searches and seizures not conducted pursuant to a valid warrant are per se unreasonable under the Fourth amendment ---subject only to a few specifically established and well-delineated exceptions. Katz, at 389.

Therefore, any search or seizure absent a valid search or arrest warrant is per se "unreasonable" and unless the law enforcement officer can articulate an "established well delineated exception" the search or seizure is thereby unconstitutional and the sanctions against arbitrary governmental intrusion then apply.

The Fourth amendment proscription against unreasonable searches and seizures limits the actions of public law enforcement officers on three distinct occasions while performing their duties:

- ◆ Before and during an arrest
- ◆ Before and during the seizure of property
- ◆ Before and during a search

c) Arrest Defined:

An arrest is an unlimited restraint on a suspect's freedom of movement that contemplates formal booking and future interference with the suspect's liberty. Put another way, an arrest is "the apprehending or restraining of one's person in order to be forthcoming to answer all alleged or suspected crime". 4 Blackstone's commentaries, 289, p. 1679 (1897 ed.). The key to arrest, then, is restraint of freedom in order that the restrained person can answer for alleged or suspected crime. Arrest is not a trivial interference with a person's freedom. It is the beginning of the judicial process. See, Draper v. U.S., 358 U.S. 307 (1959) page 145. Dunaway v. New York, 442 U.S. 200 (1979) Hayes v. Florida, 470 U.S. 811 (1985) page 149.

d) Elements of Arrest

The majority of states hold that an arrest occurs when the following elements are present:

- ◆ A purpose of intention to effect an arrest;
- ◆ Real or presumed authority;
- ◆ Actual or constructive seizure or detention of the arrestee, by a person having present power to control the arrestee, to then and there arrest and detain them.
- ◆ An understanding by the arrestee of the arrestor's intention to then and there arrest and detain them.

(Ref: Gless, Arrest & Citation: Definition & Analysis, 59 Neb.L.R. 279, 283-84 (1980)).

NOTE: The traditional elements of arrest looked at whether the officer intended to arrest the suspect or seize the person with the purpose of arresting him. Since the Supreme Court decision in Dunaway v. New York, 99 S.Ct. 2248 (1979), the focus is on the circumstances surrounding the seizure to determine if the arrest has occurred. Courts will look at the facts surrounding the incident, and not the intent of the agents, to determine whether an arrest took place. The test for

whether a person is in custody is whether a reasonable person would feel that he or she was going to jail. Compton v. State, 460 So.2d 847, 849 (1984). Also see, Berkemer v. McCarty, 468 U.S. 420 (1984). The officer's subjective intent is irrelevant. Stansbury v. Califorma, 511 U.S. 318 (1994).

e) Authority to make arrests:

The authority to make an arrest in the State of Mississippi is granted by statute. An arrest may be affected by the Sheriff or a deputy, any constable or conservator of the peace within his county, or any marshall or policemen within the confines of his city, town or village. MCA 99-3-1 (1972); private persons may also make an arrest. MCA 99-3-3 and 99-3-13 (1972).

Arrest without a Warrant may occur in Mississippi (a) for an indictable offense or breach of peace committed in the officer's presence, (b) where a warrant exists for the arrest of a misdemeanor, (c) where the officer possesses probable cause to believe a felony has been committed by the person he proposes to arrest and (d) when the officer has probable cause to believe that an act of domestic violence has occurred within the last twenty-four hours. MCA 99-3-7 (1972). See: Williams v. State, 434 So.2d 1340 (Miss, 1983) "a misdemeanor may be committed in the officers presence even though the commission of the offense was committed outside the actual physical presence of the arresting officer"; Banks v. State, 523 So.2d 68 (Miss, 1988) "officer may arrest for felony not committed in presence but only were probable cause exists to warrant an arrest". (e) An officer can make an arrest without a warrant when a report of a crime on a school campus has occurred.

Arrest with a warrant may be made by an officer, and only by an officer, as defined in the state statutes. The officer may arrest a person, with a warrant, as determined and controlled by the general Fourth Amendment guidelines.

The use of force during an arrest must be limited to only that force necessary and reasonable to affect the arrest and to insure the safety of bystanders, suspect and the officer making the arrest. See, Tennessee v. Garner, 85 L.ED 2D 1 (1985).

f) Contacts and Stops are not Arrests

Not every restriction on a suspect's movement is an arrest. The law recognizes other restrictions on a subject's freedom of movement, these are: the **CONTACT** and the **STOP**.

A **contact** is not an arrest. By definition, a contact is a polite request for cooperation made under circumstances where the suspect is free to leave. The Mississippi Supreme Court has termed the contact as a voluntary conversation (see, Nathan v. State, 552 So.2d 99,102 1989)

A contact is not a seizure of the person since the suspect is free to leave. Therefore, the Fourth Amendment does not apply. An investigator may initiate a contact in any place where their has a right to be. Since it does not amount to a seizure, the investigator or officer may initiate a contact without reasonably articulating suspicion.

A **stop**, by definition, is a limited restraint on a suspect's freedom of movement made for purposes of investigation, such as building probable cause, or reducing the officer's suspicions.

These are "seizures of the person" that do not rise to the level of an arrest requiring probable cause, but they are "seizures" under the Fourth Amendment.

Reference: Terry v. Ohio

The authority for law enforcement personnel to make these stops is Terry v. Ohio, 88 S.Ct. 1868 (1968); Floyd v. State, 500 So.2d 989 (Miss, 1986); Nathan V. State, 552 So.2d 99, (Miss, 1989). Also see: Singletary v. State, 318 So.2d 873 (Miss, 1975) (authority for state law

enforcement officers to conduct a limited weapons search when making a stop under the Terry rule).

Scenario

Two police officers are patrolling in a rural area at night. They observe a car traveling erratically and at excessive speed. The car ran off the road and into a ditch. The officers got out of their car to investigate further. The defendant met them as he was walking out of the ditch. He did not respond when the officers asked for a license and registration, instead the defendant walked back toward the open car door. The officers followed him to the door and observed a hunting knife on the front seat floorboard nearest the driver's side of the car. The officers then retrieved the knife and patted the defendant down. One of the officers shined his flashlight into the car and saw something protruding from the armrest. He investigated further and found it to be marijuana. The defendant was then arrested for possession of marijuana. The officers then transported the defendant and his vehicle to the station where the trunk was searched and more marijuana was found. Can they do that? Yes. Michigan v. Long, 463 U.S. 1032 (1983)

You are an experienced Cleveland plain clothes officer on duty in a busy downtown area. You notice T and C pacing up and down the sidewalk in front of the Happy Times liquor store. They proceed back to the corner, where they converse nervously with K, and look in the store window repeatedly. From your experience, you believe they are casing the liquor store. You approach them, identify yourself as an officer, spin T around and pat down T's outer clothing. You find a pistol. Is the stop and search reasonable under the Fourth Amendment Terry, 88 S.Ct. 1868 (1968). Is this an **arrest**?

NO! This is a **stop**. In Terry, the Supreme Court created an exception to the probable cause

requirement of the Fourth Amendment. The Court found that the officer's actions constituted a "seizure" of T's person, and therefore the Fourth Amendment applies. However, the probable cause standard required to make an arrest does NOT apply in a stop since the intrusion on T's freedom was far less than the intrusion caused by an arrest.

(1) The degree of intrusion defines a Stop.

How long can an officer hold an individual during your stop? This question is crucial, because often the length of a stop determines the degree of intrusion that makes the difference between a stop based on reasonable suspicion and an arrest that must be based on probable cause.

The courts use a balancing test: Is the scope of the intrusion justified in light of the facts of the case? In Terry, the scope of the intrusion was justified, since T was detained for only a short period of time. The pat down was justified in light of the facts surrounding the case: his suspicious movements, his location, etc.

The courts have not articulated a set standard as to the amount of time a suspect can be held before the stop evolves into an arrest. In one United States Supreme Court case, the court allowed a stop of more than thirty minutes, their basic premise was that each case varies and must be decided on its facts. U.S. v. Sharp, 105 S.Ct. 1565 (1985); Also see; Penick v. State, 440 So.2d 547 (Miss, 1983). The Miss Supreme Court held that an investigatory stop rose to the level of an arrest after the suspect was moved to a separate location and facts and circumstances known to the defendant lead the defendant to believe he was under arrest. Also see; Reed v. State, 199 So.2d 803, 808 (Miss 1967) "It is not necessary for formal or particular words to be used. An arrest can be shown by surrounding circumstances." Also see; U.S. v. Raborn, 872 F.2d 589 (5th Cir. 1989) "An arrest

occurs when under the whole scope of circumstances, a reasonable person would have thought their was not free to leave." Also see; Compton at 460.

(2) Officers must articulate facts to show reasonable suspicion.

The court said in Terry that an officer must have "reasonable suspicion" of criminal activity before he can detain an individual for the purposes of investigation.

The investigating officer must be able to point to specific and irrefutable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. Terry, at 1880.

(3) Terry stands for two primary propositions

The first proposition is that an officer may stop an individual to reduce his/her suspicion if their can articulate facts that lead to a reasonable suspicion. The second proposition is that the officer may pat down a suspect's outer clothing if their can articulate facts to show that their believes that the suspect might be armed. Also see; Alabama v. White, 110 S.Ct. 2413 (1990); Maryland v. Buie, 494 U.S. 325, 324 (1990) (court refusing to allow a protective sweep or pat down without particularized suspicion.); Brown v. Texas, 443 U.S. 47, 49 (1979) (even though high crime area, the court found pat-down improper without individualized belief that suspect was armed).

The Fourth Amendment does not require an investigator or officer to simply shrug his/her shoulders and allow a crime to occur or a criminal to escape, because the officer lacks probable cause to arrest. The officer or investigator may briefly stop a suspicious individual in order to determine his/her identity, to maintain the status quo momentarily or to obtain more information. Adams v. Williams, 92 S.Ct. 1921 (1972); Also see, Griffin v. State, 339 So.2d 550, 553 (Miss, 1976) "given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation

without having sufficient knowledge to justify an arrest".

Scenario

A police officer executes warrant to search a house for drugs. The officer encounters the defendant coming down the front steps of the house that was to be searched. The officer detains the defendant and requests that he assist them in gaining entry into the house. The officers find large amounts of drugs in the house. When the officer confirms the defendant was the owner of the house, he is placed under arrest and searched incident to the arrest. During the search incident to the arrest, the officer finds heroin on the defendant. The defendant now claims the search of his person was unreasonable. Can they do that? Yes. The court allows the arrest and subsequent search to stand based upon the exigency of the circumstances and the warrant to search residence. The law allows the officer serving the search warrant to detain anyone on the premises until the officer can either build probable cause or reduce their suspicions. See Michigan V Summers, 452 U.S. 692 (1981)

4. Probable Cause, Search and Seizure

a) PROBABLE CAUSE REQUIREMENT

The Fourth Amendment applies to arrests since an arrest is a seizure of a person. Gerstein v. Pugh, 420 U.S. 140 (1975). Therefore, the strict standard of probable cause must be met whenever an officer makes an arrest. If the arrest is not based on probable cause, it is invalid; and the indictment or formal charge is to be dismissed. Probable cause must be based on:

- ◆ Facts and circumstances within officer's knowledge;
- ◆ Or facts of which they had reasonable trustworthy information;
- ◆ Sufficient in themselves;
- ◆ To warrant a man of reasonable caution;
- ◆ To believe that . . . either sizable property would be found in a particular place or on a particular person or that an offense has been committed and "X" has committed it.

Probable cause to arrest exists when: "The facts and circumstances within the officers knowledge and of which they had reasonable trustworthy information sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed and that a particular individual committed it." Draper v. United States, 358 U. S. 307, 313 (1959). Also see: Riddle v. State, 471 So.2d 1234 (Miss, 1985); Mccray v. State, 486 So.2d 1247 (Miss, 1986); Alexander v. State, 503 So.2d 235 (1987). Haddox v. State, MS Supreme Ct. No.91-ka-00652 4/7/94. Also see, Illinois v. Gates, 426 U.S. 318 (1982).

Probable cause has been described as: "The sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observe as trained officers. We (the courts) weigh not individual layers but the laminated total" Smith v. United States, 358 F.2d 833 (D.C. Cir. 1966).

b) THE LAW OF ARREST AND THE MIRANDA DECISION

Background: The decision in Miranda v. Arizona, 86 S.Ct. 1602 (1966) introduced a new element into the law of arrest. The Miranda decision extended the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel to the arrest situation. Failure to follow the Miranda rules can result in a dismissal of a confession, even if the arrest is based on probable cause and is otherwise proper.

The Court summarized its holdings as follows: "The prosecution may not use statements, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

Four areas of concern relating to MIRANDA where a police officer must adhere to the strict guidelines established by the case law are custody, interrogation, warning, and waiver.

(1) Custody

The Miranda warnings are required only if a suspect is undergoing custodial interrogation. The court will determine whether a suspect is in custody by using the OBJECTIVE STANDARD of review. The OBJECTIVE STANDARD is "The reasonable man standard, asks whether a reasonable man innocent of any crime would believe himself to be in custody under the facts in the case". The OBJECTIVE STANDARD has been pronounced as the standard by the courts of the State of Mississippi, Fifth Circuit and the U.S. Supreme Court. *Floyd v. State*, 500 So.2d 989 (Miss, 1986); *Riddles v. State*, 471 So.2d 1234 (Miss, 1985); *Haddox, supra*; *United States v. Carrol-Franco*, (Fifth Circuit, June 22, 1988, # 87-1483); *Berkmer v. McCarty*, 468 U.S. 420 (1984); *Standbury v. California*, No. 93-5770, 4/26/94

(2) Interrogations

Some statements are interrogation, but not all questions are: The Supreme Court has defined what "interrogation" means for Miranda purposes.

"The term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." Can they do that? No. *Rhode Island v. Innis*, 100 S.Ct. 1682, 1689, 1690 (1980) page 57.

The Courts have generally agreed that the following forms of questioning are not

"interrogations" requiring the Miranda warning:

- ◆ Threshold and Clarifying questions
- ◆ Routine questions and procedures
- ◆ Spontaneous questions
- ◆ Emergency questions asked to human life
- ◆ An interrogation that is investigatory non-custodial, on the scene questioning does not require Miranda warnings. Tolbert v. State, 511 So.2d 1368, 1375 (Miss, 1987)

Volunteered statements are not interrogation. A volunteered statement is one that is not made in response to questioning by an officer. Therefore, it is not "interrogation" requiring the Miranda warning.

(3) Warnings

Warnings must be given before any interrogation is begun and they are best given immediately upon arrest and repeated before any formal interrogation begins. The suspect must be advised that:

(Note: Below gender can also be referred to "she")

- ◆ He has a right to remain silent.
- ◆ That anything he says may be used against him.
- ◆ That he has the right to an attorney before he submits to any questions.
- ◆ If he cannot afford an attorney the court will appoint one for him.
- ◆ He may request that the questioning cease at anytime; and
- ◆ He may waive any of these rights.

(4) Waiver

The final area of concern where the law enforcement officer must understand Miranda is in the "waiver." After determining that a suspect is in "custody," and that questioning would be "interrogation", and adequate warning must be given to protect the suspect's right against self-incrimination. The question of waiver is raised only after the warnings are given, but it is

probably the most important question in a Miranda situation. The question is: Did the suspect knowingly and intelligently waive his/her rights when making the statement?

Waiver is defined as intentionally relinquishing or abandoning a known right. (Webster's Third International Dictionary). In any waiver situation, a person freely gives up a right they knew they had. The purpose of the Miranda warnings is to inform a suspect of his right against self-incrimination and right to counsel. The investigating officer must show, and the government must ultimately prove, that the suspect intentionally gave up those rights, which they knew when making the statement.

It is clear from the Miranda decision that a waiver may not be inferred from silence. Miranda v. Arizona, 86 S.Ct. 1602, 1628. No one factor determines whether there is a waiver. The condition of the suspect can affect his Waiver in the following ways:

- ◆ Under influence of drugs
- ◆ Youthful offender – who lacks capacity to understand, and
- ◆ Illiterate (one who cannot read.)

What constitutes waiver? Waiver cannot be inferred from silence. However, a defendant need not explicitly waive his/her right to remain silent or right to counsel in order that a statement they make be admissible. There are several ways in which a defendant can show that they have waived their rights.

A defendant indicates understanding of his/her rights and gives a statement. The Supreme Court has held that a knowing intelligent waiver could be inferred from a defendant's conduct. North Carolina v. Butler, 99 S.Ct. 1755 (1979); Johnson v. State, 512 So.2d 1246 (Miss, 1987). But see, State v. Abram, MS Supreme Ct. No.030-DP-55, 7/29/92 ("Do right by God" admonition by sheriff was considered coercion.)

The defendant signs a waiver form. While signing of a written waiver form is not the sole indication of voluntary waiver, in the absence of any evidence showing coercion, the form is sufficient to show a voluntary waiver. Menendez v. United States, 393 F.2d 312 (5th Cir. 1968). Written waivers are not legally required. U.S. v. Crisp, 435 F.2d 354 (7th Cir. 1970). Also see: Johnson v. State, (cited above).

Note: In the state of Mississippi, if a defendant's statement is voluntary, the state must prove the voluntariness" beyond a reasonable doubt". Neal v. State, 451 So.2d 743 (Miss. 1984); the burden is met and a prima facie case (a case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded, Black's Law Dictionary) made out by testimony of officers, or other persons having knowledge of the facts, that the confession was voluntarily made without threats, coercion or reward. Chase v. State, 645 So.2d 829, 838 (Miss 1994). Also see: Hunter v. State, No. 93-dp-01025-sct 6/26/96.

Oregon v. Elsted, 105 S.Ct. 1285 (1985). "We hold today that a suspect who has once responded to unwarned, yet un-coercive, questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warning." Miranda is not a violation of the constitution per se, it is a procedural guideline to insure the protections of the Fifth Amendment for citizens in custody.

Scenario

A defendant is arrested on an arrest warrant for capital murder. While being interrogated by a Federal Agent, he requests a lawyer and that all questioning be stopped. On several occasions the defendant meets and discusses his case with his appointed lawyer. A Deputy sheriff then meets with the defendant and advises him that he could not refuse to answer questions. The defendant confesses

to the Deputy. Can they do that? No. Minnick v. Mississippi, 498 U.S. 146 (1990).

The defendant requested appointed counsel, but before he was able to speak with an attorney he was questioned by a police officer. The police officer gave the defendant the Miranda rights before he questioned him about the crime. The defendant appealed the case to the United States Supreme Court. State the probable outcome and the constitutional amendment that applies to these facts. Can they do that? No. Michigan v. Jackson, 475 U.S. 625 (1986), page 43.

c) SEARCH AND SEIZURE

(1) Logic concept:

The law of search and seizure, both on the federal and state level, has grown into a complex system of rules and procedures that tend to confuse, rather than clarify, the jurisprudence or philosophy of law upon which they are based. The well-informed jurist is hard pressed to illustrate the present state of the law without first devoting many hours to legal research. Public law enforcement officers do not have the time or resources to devote to lengthy research each time they are confronted with a Fourth Amendment concern.

Given the importance of the Fourth Amendment and the role it plays in the protection of individual liberties; the law enforcement officer must be trained to adhere to the rules and follow the procedures as dictated by the courts.

In order to accomplish this task, a logic system has been developed which aids the officer in conceptualizing the Fourth Amendment rules and procedures. This system is named after the man who developed it and is called the "BERNER'S SERIES". The Berner's series is designed to enable the officer to identify a Fourth Amendment situation and then apply a systematic process to

determine the appropriate governmental response.

(2) Is there a search?

The Katz equation stated below is used to determine whether or not a search is being conducted: (See U.S. v. Katz, page 17)

GOVERNMENT+ REASONABLE EXPECTATION OF PRIVACY = SEARCH

(a) The right to privacy:

A search occurs only when the government invades a reasonable expectation of privacy. (In other words, the government invades a constitutionally protected area)

(b) Governmental conduct

The Fourth Amendment generally protects only against governmental conduct and not against searches by private persons. Government agents include only the publicly paid police and those citizens acting at their direction or behest, and public school officials. Private security guards are not government agents unless deputized as officers of the public police. U.S. v. Jacobsen, 104 S.Ct. 1652 (1984); Skinner v. R.R. Labor Executives, 109 S.Ct. 1402 (1989); New Jersey v. T.L.O., 105 S.Ct. 733 (1985).

(c) Reasonable expectation

Reasonable expectation of privacy exists if the suspect expects privacy or the expectation is reasonable. An evaluation of the totality of the circumstances will be made to determine whether an individual had a reasonable expectation of privacy, considering such factors as ownership of the

property seized and the location of the property at the time of the search. Katz, at 347. Also see: Rawlings v. Kentucky, 448 U.S. 98 (1980).

d) COMMON FACTUAL PATTERNS THAT MAY NOT CONSTITUTE A SEARCH

A person does not have a reasonable expectation of privacy in objects held out to the public, such as the sound of one's voice [United States v. Dionisio, (1973)]; one's handwriting, [United States v. Mara, (1973)]; paint on the outside of a car, [Caldwell v. Lewis, (1974)]; account records held by the bank [United States v. Miller, (1976)]; an automobile's movement on public roads and arrival at a private residence, even if detection of such movement requires the use of an electronic beeper placed on the automobile by the police [United States v. Knotts, (1983)]; or magazines offered for sale [Maryland v. Macon, (1985)].

Police do not need a warrant to attach an electronic beeper to a car or to drug-making equipment, but must obtain a warrant to place a beeper in a private residence. [United States v. Karo, (1984)]

Entering a curtilage or the area behind a fence is generally a search; entering open fields generally is not. [Oliver v. United States, (1984). But also see: Arnette v. State, #57-920 (Miss, 1988) (the Mississippi Supreme court has ruled that entering open fields may be a search.)

The use of a trained narcotics detection dog is not a search if a dog is lawfully present but the length of detention of suspect luggage waiting for a narcotics dog may constitute an unreasonable seizure. Thereby, making the subsequent seizure of drugs a violation of the constitution. U.S. v.

Place, 103 S.Ct. 2637 (1983); U.S. v. Lowell, 849 F.2d 910 (1988).

Sensing things in OPEN VIEW is not a search unless done with rare equipment from an unusual vantage point.

The police may, within the Fourth Amendment, fly over a field to observe with the naked eye things therein. [California v. Ciraolo, (1986)]. The police may also take aerial photographs of a particular site. [Dow Chemical Co. v. United States, (1986)]. A helicopter hovering lawfully at 400 feet over a residential backyard does not violate a reasonable expectation of privacy. [Florida v. Riley, 109 S.Ct. 693 (1989)].

A police officer may constitutionally reach into an automobile to move papers to observe the auto's vehicle identification number. [New York v. Class, (1986)]

Abandoned property is not protected; but abandonment must not be caused by unlawful government conduct.

Trash searches are not protected if they have been put out for collection. [California v. Greenwood, 108 S.Ct 1625, (1988)]

When the Government uses a device that is not in general public use, to explore the details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment "search," and is presumptively unreasonable without a warrant. [Kyllo v. United States 121 S. Ct. 2038 (2001)]

Eavesdropping is not a search if done with naked ear from lawful location.

Scenario

Federal narcotics agents arrest defendants as they approached their parked vehicle. A

previously alerted agent has information the defendants are drug dealers and that they would be in possession of drugs. The agents have probable cause to believe that drugs would be stored in a footlocker. The agents find a double-locked footlocker in the trunk of the defendant's car. The agents take the defendants into custody and transport the defendants and their footlocker to the Federal Building. About an hour and half passes before the agents open the footlocker and find large amounts of marijuana. The agents did not have a warrant. Can they do that? No. United States v. Chadwick, 433 U.S. 1 (1977)

e) PROBABLE CAUSE / WARRANT REQUIREMENTS

The warrant requirement is central to the Fourth Amendment protection against unreasonable searches and seizures; therefore all searches without warrants are unconstitutional unless they fit into one of the clearly delineated exceptions to the warrant requirement.

A warrant must be based upon a showing of probable cause. Officers must submit to a neutral magistrate a request for a warrant. Along with this request for a warrant, the officer must submit an affidavit setting forth sufficient underlying circumstances to enable the magistrate to make a determination of probable cause independent of the officers' conclusions. [United States v. Ventresca, (1965)]; Hearsay may also be used to establish the probable cause necessary for issuance of a warrant this is usually in the form of an informants statement. All that is required of an affidavit based on information from an informant is that it permits the magistrate to make a "common sense evaluation of probable cause" [Illinois v. Gates, 462 U.S. 213 (1983)]; [Garvis v. State, 483 So.2d 312 (Miss, 1986)]; [Rooks and Montee v. State, 529 So.2d 546 (Miss, 1988)]. Also see, [McCommon v. State, 476 So.2d 940; Carney v. State, 525 So.2d 776 (Miss, 1988)].

An affidavit for a search warrant can become a point of attack by the defendant. A search warrant issued on the basis of an affidavit that, on its face, is sufficient to establish probable cause will be invalid if the defendant establishes all three of the following:

- ◆ A FALSE STATEMENT was included in the affidavit by the affiant, (the person giving the affidavit);
- ◆ The affiant INTENTIONALLY or RECKLESSLY included that false statement and;
- ◆ The false statement was material to the finding of probable cause i.e.: without the false statement, the remainder of the affidavit cannot support a finding of probable cause. [*Franks v. Delaware*, (1978)].

Evidence may be admissible even though the warrant was not supported by probable cause. This is known as the Good Faith exception to the warrant requirement. A finding that the warrant was invalid because it was not supported by probable cause will not entitle a defendant to exclude the evidence obtained under the warrant. Evidence obtained by the police in reasonable reliance on a factually valid warrant may be used by the prosecution, despite an ultimate finding that the warrant was not supported by probable cause. [*United States v. Leon*, 468 U.S. 897 (1984)]

- (1) There are several other specific requirements which must be met before a warrant is factually valid:

These are: a) it must be issued by a neutral magistrate or judge; b) it must particularly describe the place to be searched and the things to be seized and c) must be supported by a sworn testimony or affidavit.

- (2) Other requirements for serving warrants

Who must be there: One of the officers named in the warrant. Unauthorized persons can assist if they are asked by the authorized officer and the officer supervises them. The Byars doctrine

requires that unauthorized officers may not assist if their help extends the scope of the warrant. The Byars officer should be aware of the doctrines rationale because it may be applied to State warrants.

Life of the warrant is determined by the circumstances surrounding the necessity for the search. A Police officer cannot serve a warrant where the probable cause vanishes or where there is an unreasonable delay in serving the warrant.

MANNER OF ENTRY: An officer or investigator need not exhibit a warrant before entry or search and the site of the search need not be occupied. Before using force to enter the site the officer or investigator must a) announce their identity; b) announce the purpose, and; c) be refused entry.

REFUSAL OCCURS: When occupant a) expressly refuses, or, b) conduct shows refusal; or c) reasonable time to get to door has passed. The officer must use only that force that is **REASONABLE.**

The investigator or officer need not announce their presence if it is virtually certain that: a) the premises are unoccupied, or b) the occupants know why the officers are there, or c) it is reasonably believed that bodily harm, escape, loss of evidence will occur.

RECEIPT for property must be left after seizure and the warrant must be returned to the issuing magistrate listing all property that was seized.

Scope of the search cannot exceed the scope of the warrant. The areas searched are the premises which include the curtilage or grounds. Vehicles on the premises may or may not be subject to the search. Persons on the premises may not be searched unless they are named in the warrant. However, anyone on the premises may be detained while a proper search is being

conducted. Ybarra V. Illinois, 444 U.S. 85 (1979); Michigan V. Summers, 452 U.S. 692 (1981).

f) EXCEPTIONS TO THE WARRANT REQUIREMENT

(1) IMMEDIATE CIRCUMSTANCES:

All situations involving probable cause to search and, when urgency is involved, justify not getting a warrant. Some common fact patterns that have been classified as immediate or exigent circumstances are:

(a) Hot pursuit of a fleeing felon.

(b) Mobile vehicle searches:

If there is probable cause to search, and a vehicle is moving or is capable of being moved, no warrant is needed (Carroll doctrine). Also see, [Wolf v. State, 260 So.2d 425 (1972)]; [Fleming v. State, 502 So.2d, 327 (1987)]; [California V. Acevedo, 111 S.Ct. 1990 (1992)]; [Welch v. Wisconsin, 466 U.S. 573 (1980) no exigency (immediate circumstances) if a misdemeanor or non-violent crime.]

(c) If there is probable cause to search and probable cause to believe evidence is threatened with immediate removal or destruction, no warrant is needed

(d) Emergency searches are also authorized during any other emergency, which justifies entry without a warrant; but entry must be limited to responding to the emergency.

(2) SEARCH INCIDENT TO ARREST

Incident to arrest an officer can search the arrestee (person to be arrested) and areas within immediate reach. The officer can make a full search of the person. Strip searches are permitted, but body cavity searches can only be made upon probable cause and medical personnel must be available.

The officer may search any property carried by the arrestee unless a lock secures it, and the person arrested offers no threat to the arresting officer. The officer may search any area within the arrestee's control. This is often referred to as the lunging distance, or the area within the arrestee's arm span. Once the arrestee is moved to another location, search of area is unlawful.

Arrest must be lawful and custodial. Pretext and timed arrests are prohibited.

For example, search of a vehicle incident to the lawful arrest of the vehicle occupant/driver is authorized as incident to the arrest but must be limited to the passenger compartment of the vehicle and any unlocked containers including the glove box. New York v. Belton, 453 U.S. 454 (1981).

What is incident to arrest? It covers the periods immediately before or after the arrest; during the booking process; and after the booking process, but only if it is reasonable. See, United States v. Edwards, 415 U.S. 800 (1974). Here the defendant was incarcerated for ten hours before his clothing was taken from him and used as evidence against him at trial. The court ruled that this was reasonable search under the incident to arrest exception.

Purposes of the search incident to arrest are to protect officers, protect evidence and prevent escape.

Protective sweeps are allowed if a cause exists to believe that others are there, and the sweep

is limited to a quick look for other people. It is not a pretext to find evidence.

Scenario

A defendant is arrested for drunk driving and his car impounded. The defendant gives the officers permission to open the trunk. The officers continue their search under the authority of inventory search policy. During this inventory search, the officers find small amounts of marijuana in the ashtray and a locked suitcase in the trunk of the car. The officers open the locked suitcase and find a large quantity of marijuana. The police department has an inventory policy but it does not cover locked suitcases. Can they do that? No. *Florida v. Wells*, 495 U.S. 1 (1990).

The defendant's car was impounded for multiple parking violations. The police, following their established inventory procedure, inventoried the contents of the car. During the inventory, the police found marijuana in the glove box of the car. The defendant was arrested and charged with possession. Can they do that? Yes. *South Dakota v. Opperman*, 428 U.S. 364 (1976)

Consent: A consent search is lawful if there is a) voluntary permission, b) by a party with a right to equal access and c) the search is within the scope of consent.

Voluntary permission: No one factor determines voluntary permission or consent. I.e.: Coercion or a bad faith threat to obtain a warrant and written consent. The factors are balanced and the burden is on the officer to show voluntary permission or consent.

*Note: In Mississippi the state constitution requires that the police must advise a suspect of the right to refuse to consent to a search without a warrant. This is a departure from federal law. *Penick v. State*, 440 So 547 (Miss. 1983). Other states may have the argument and you should review your own state's laws to determine the requirement.*

Third party consent is premised on the rationale of equal access. Some common examples are the husband-wife or parent-child. They must have some apparent right to access but are limited in areas that are reserved for private use by the individual claiming the violation. The consent is invalid if the suspect is present and refuses or the third party abandons right to access. Once consent has been given the suspect or the third party can revoke consent at any time.

Scenario

A police officer stops a defendant's car for a traffic violation. The officer had earlier heard the driver discuss a drug transaction. He feels he has probable cause to search the car. The police officer tells this to the individuals in the car and asks their permission to search the car. The police officer finds cocaine in a folded paper bag. The police arrest the occupants for possession of cocaine. Can they do that? Yes. Florida v. Jimeno, 500 U.S. 248 (1991)

g) STOP AND FRISK

To stop and frisk there must be a reasonable suspicion of criminal behavior. The stop must be a limited detention. The frisk must be based on a reasonable fear of danger, and must be limited to a weapons search. If probable cause to arrest does not develop you must let the suspect go.

h) PLAIN VIEW

An object is in plain view if: It is immediately apparent evidence, and inadvertently found during a lawful search. It is immediately apparent evidence if there is probable cause to seize and the probable cause is immediately apparent this will prevent officers from merely rummaging through personal belongings. The officer must have been lawfully present because plain view always

involves a search. The search must have been lawful. The courts also recognize the doctrines of plain smell, touch, sound and taste.

The Supreme Court recognizes other exceptions to the warrant requirement. Those exceptions are mainly administrative in nature, such as forfeiture, border searches, FAA searches and regulatory inspections.

APPENDIX

BERNERS SERIES

To construct the Berner's logic chart you must first answer five questions about your search or seizure problem.

- ☐ 1. Is there a search? If not, then no 4th amendment violation. If you have a search, go to 2.
- ☐ 2. Is there probable cause to search? If so, go to 3. If not, go to 5.
- ☐ 3. Is the Search to be conducted with a warrant? If so, search is reasonable and lawful. If not, go to 4.
- ☐ 4. Are there Exigent circumstances? If so, the search is reasonable and lawful. If not, go to 5.
- ☐ 5. Is there an exception to the probable cause and warrant requirement? If so, the search is reasonable and lawful. If not, the search is unlawful.

Florida v. Wells
495 U.S. 1 (1990)

Facts: Respondent Wells was arrested by the Florida Highway Patrol for Driving Under the Influence (DUI). Respondent gave permission to the officer to open his trunk (auto). An inventory search of the car turned up two marijuana cigarette butts in an ashtray and a locked suitcase in the car's trunk; that was subsequently searched.

Issue: Was the search of the respondent's car and his locked suitcase a violation of his Fourth Amendment Rights?

Finding: Yes, noting the absence of any Florida Highway Patrol policy on the opening of closed container found during an inventory search of an automobile; a specific policy needs to be in place for these examinations to be performed and justified.

Reasoning: Requiring a standardized criteria or an established routine for such searches prevents individual police officers from having so much latitude that inventory searches are turned into a ruse for general rummaging in order to discover incriminating evidence.

U.S. v. Edwards
415 U.S. 800 (1974)

Facts: Respondent Edwards was arrested and then taken to jail but it was not until the next morning that a warrantless seizure was made of his clothing; over his objection.

Issue: Did the time lapse between the arrest and the search of the respondents clothing violate his Fourth Amendment Rights?

Finding: No, since at the late hour of arrest there was no substitute clothing available; the delay in the search and seizure of respondents clothing was not unreasonable.

Reasoning: Once the accused has been lawfully arrested and in custody, the effects in his possession, at the place of detention may be lawfully searched and seized without a warrant even after a substantial time lapse.

New York v. Belton
453 U.S. 454 (1981)

Facts: Respondent and occupants were stopped by New York State Police for speeding. In the process of discovering none of the occupants owned the car or were related to the owner, the officer smelled burnt marijuana and discovered an envelope full of marijuana. He directed the occupants to get out of the car—and arrested them for unlawful possession of marijuana.

On a subsequent search of the car, the officer found a jacket of one of the occupants that contained cocaine. The respondent filed a motion to suppress the officer's search of the jacket containing the contraband.

Issue: Was the search of the respondent's jacket and the seized cocaine a violation of his Fourth and Fourteenth Amendment rights?

Finding: No. The search of the respondent's jacket was a search incident to arrest and hence did not violate the respondents Fourth and Fourteenth Amendment rights.

Reasoning: The respondent's jacket which was located on the passenger side of the car was "within arrestee's immediate control". A custodial arrest creates a situation justifying the warrantless search of the arrestee and of the immediate surrounding area. Police may examine the passenger compartment of the car, contents of any containers whether the container is opened or closed. This justifies the infringement of any privacy interest the arrestee may have.

South Dakota v. Opperman
428 U.S. 364 (1976)

Facts: Respondent's car had been impounded for multiple parking violations by the police. Following standard procedures the police inventoried the contents of the car. In doing so they discovered marijuana in the glove compartment, the respondent was subsequently arrested for possession of a controlled substance.

Issue: Was the respondents Fourth and Fourteenth Amendment rights violated?

Finding: No. Police procedures followed in this case did not involve an "unreasonable search" expectation of privacy in one's auto is significantly less than that relating to one's home or office.

Reasoning: When vehicle are impounded, police routinely follow care-taking procedures by securing and inventorying the cars contents. These procedures have been widely accepted as reasonable under the Fourth Amendment.

Michigan v. Long
463 U.S. 1032 (1983)

Facts: Two police officers observed a car traveling erratically and at an excessive speed. The officers stopped the car and were met by the respondent. The officers observed a hunting knife on the floorboard on the driver's side of the car. The respondent was then subjected to a pat down search, which revealed no weapons. Upon further inspection of the vehicle, officers found a bag of marijuana protruding from the arm rest of the front seat and found other contraband in the respondent's trunk. Respondent was arrested for possession of marijuana.

Issue: Was the search of the respondent's vehicle and specifically the passenger compartment and trunk a valid protective search?

Finding: Yes. But because the Michigan Supreme Court suppressed the marijuana taken from the trunk as a fruit of what is erroneously held was an illegal search of the cars interior, the case is remanded to enable it to determine whether the trunks search was permissible, (*Opperman v.S.D.*)

Reasoning: Protection of the police and others justify protective searches when police have reasonable belief that the suspect poses a danger, though the contents of the trunk did not pose an imminent danger to the officers.

Terry v. Ohio
392 U.S. 1 (1968)

Facts: A Cleveland detective observed three strangers on a street corner. Suspecting the three men of "casing a job, a stick-up", the officer approached the suspects and identified himself as a police officer. The detective frisked the suspects and discovered a pistol. The suspects were subsequently taken to the police station and charged with carrying concealed weapons. The defense moved to suppress the weapons into evidence.

Issue: Did the "Stop and Frisk" violate the respondent's Fourth Amendment Rights?

Finding: No. When a reasonably prudent officer is warranted in the circumstance of a given case in believing that his safety or that of others are endangered, he may make a reasonable search for weapons of the person believed by him to be armed and dangerous.

Reasoning: The officers protective seizure of the petitioner and his companions and the limited search which he made was reasonable, both at their inception and as conducted.

Florida v. Jimeno
500 U.S. 248 (1991)

Facts: Respondent Jimeno's car was stopped for a traffic violation. The officer had reason to believe and declared to the respondent Jimeno that he might be carrying narcotics in his car. (after overhearing respondent arrange a drug transaction, prior to the stop.) The officer requested and received permission to search the car, upon consent the officer found cocaine in a folded paper bag on the car's floorboard. Jimeno was charged with possession with intent to distribute cocaine.

Issue: Was the respondent's Fourth Amendment Rights violated by the officer by not gaining specific consent to open the bag-containing cocaine?

Finding: No. The criminal suspect's Fourth Amendment right to be free from unreasonable searches is not violated when, after he gave police permission to search his car, they opened a closed container found within the car that might reasonably hold the object of the search.

Reasoning: The authorization to search extended beyond the car's interior surfaces to the bag. Since Jimeno did not place any explicit limitation on the scope of the search and was aware the officer would be looking for narcotics in the car.

U.S. v. Sharpe
470 U.S. 675 (1985)

Facts: A DEA agent on patrol in an area known for drug trafficking observed a pick-up truck with an attached camper traveling in tandem with a Pontiac. After observing and following both vehicles for twenty miles the agent decided to make an investigative stop. After confirming his suspicion that the drug contained marijuana (smell) the agent opened the rear of the camper without permission of the occupants. The agent discovered bales of marijuana and both the driver of the pick-up and his accomplice in the Pontiac were arrested on Federal drug charges.

Issue: Did the DEA agents "Investigative stop" of both vehicles meet the Fourth Amendment requirements of brevity governing detentions on less than Probable Cause?

Finding: Yes. The agent had an articulable and reasonable suspicion that the respondent's were engaged in marijuana trafficking and the agent's record of the case supports his assumption.

Reasoning: Assessing whether a detention is too long in duration to be justified an "investigative stop", the DEA agent diligently pursued his investigation, and clearly no unnecessary delay to the investigation was involved.

U.S. v. Katz
389 U.S.347 (1967)

Facts: Petitioner was convicted of transmitting wager information from a public telephone booth.

Issue: Were the listening devices posted by the Federal agents violate the petitioner's Fourth Amendment right?

Finding: Yes. The government agents eavesdropping devices violated the privacy of the petitioner. His privacy rights can justifiably be relied upon while using a public telephone/booth.

Reasoning: Although surveillance in this case was justified, a specific warrant was not originally issued. This procedure is a constitutional and a pre-conditional precursor of such surveillance.

Berkemer v. McCarty
468 U.S. 420 (1984)

Facts: After observing the respondent's car weaving in and out of a highway lane, an Ohio State Highway Patrol officer forced the respondent to stop his car. The Respondent was unable to perform a field sobriety test. The officer then asked the respondent if he had been using any intoxicants. The respondent replied he had been drinking and had smoked marijuana. The officer then arrested respondent but at no point, before or after the arrest, was the respondent given his Miranda warning.

Issue: Were the respondents incriminating statements a violation of the respondent's Fifth Amendment right to remain silent?

Finding: Yes. The Miranda warning must be given to all individuals prior to custodial interrogation, whether the offense is a felony or misdemeanor traffic offense. Also, the respondent's post-arrest statements, at least, were inadmissible,

Reasoning: A person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in Miranda, regardless of the nature or severity of the offense of which he is suspected of or for which he was arrested.

U.S. v. Chadwick
433 U.S. 1 (1977)

Facts: Police received information from an informant that the respondents were possible drug traffickers. After returning from a trip from San Diego to Boston, the respondents were arrested by Federal Narcotics Agents. Police seized a foot-locker which was transported from San Diego as well as the automobile waiting for them at the train station. Agents cited Probable Cause that the foot-locker contained contraband materials. Without consent or warrant to search the foot-locker and the automobile were inspected and was found to contain marijuana.

Issue: Was the warrantless search of the footlocker unreasonable under the Fourth Amendment?

Finding: Yes. Respondents were entitled to protection of the Warrant Clause of the Fourth Amendment. The evaluation of a neutral magistrate is needed before the privacy interests in the contents of the foot-locker 18 invaded.

Reasoning: The fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests and not simply those interest inside the four walls of the home. Also in view that no exigent circumstances existed, since the foot-locker was in the possession of the agents and hour and a half before it was opened.

Illinois v. Gates
462 U.S. 213 (1983)

Facts: After receiving an anonymous letter that the respondents were engaged in selling drugs and that arrangements were being made to transport those drugs (via Car from Florida). The Bloomingdale Illinois Police requested and received a Search Warrant. Once the respondents arrived from Florida, the police were waiting and discovered marijuana and other contraband in respondents' car trunk and home.

Issue: Were the respondents' Fourth Amendments Rights violated?

Finding: No. 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 before him, that there is a fair probability that contraband or evidence of a crime will be found in a particular place. The duty of the reviewing court is to simply ensure that the magistrate had a substantial basis for concluding that probable cause existed.

Reasoning: The judge issuing the warrant had a substantial basis for concluding that Probable Cause existed and to search respondent's home and car. Under "totality of the circumstances" analysis and corroboration of the informant tip by independent Police work was of significant value.

Franks v. Delaware
48 U.S. 154 (1978)

Facts: At the Petitioners' Delaware State trial on rape and related charges, and with his motion to suppress evidence on Fourth Amendment grounds (items of clothing and a knife) found in search of his apartment, petitioners challenged the truthfulness of the alleged factual statements made in the police affidavit supporting the warrant to search the apartment.

Issue: Can the defendant challenge the veracity of a sworn statement (affidavit) used by the police to procure a search warrant?

Finding: Yes. When the defendant makes a substantial preliminary showing that a false statement was knowingly or intentionally, or with reckless disregard for the truth was included by the affidavit in the warrant affidavit, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request. The search warrant must be voided and the fruits of the search (knife and clothing) must be excluded from the trial.

Reasoning: If the content of the search warrant is insufficient, based on the sworn affidavit, the defendant is entitled under the Fourth and the Fourteenth Amendment to a new hearing.

U.S. v. Leon
486 U.S. 897 (1984)

Facts: Acting on information from a confidential informant, the Burbank Police Department initiated a drug- trafficking investigation of the respondents' activities. An application for a warrant to search three residences and the respondents' automobiles was issued. Although recognizing the officers acted on good faith, the court rejected the government's suggestion that the Fourth Amendments Exclusionary rule should not apply where is evidence is in a reasonable, good faith reliance of the search warrant.

Issue: Does the Fourth Amendments Exclusionary rule apply? Were the officers acting unreasonably on the specific search warrant that was issued by a detached and neutral magistrate?

Finding: No. An officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient.

Reasoning: Only the respondent (Leon) contended that no reasonably well-trained police officer could have believed that there existed probable cause to search the house. However, the record established that the police officers' reliance on the state-court judge's determination of probable cause was objectively reasonable.

California v. Carney
471 U.S. 386 (1985)

Facts: DEA agents received information that respondent's motor home was being used for exchanging marihuana for sex. Without warrant or consent, DEA agents entered the home (motor) and observed marihuana on the premises. Respondent was charged with possession and distribution of marijuana.

Issue: Does the warrantless search of the respondent's motor home violate the respondent's Fourth Amendment rights?

Finding: No. When a vehicle is used on the highways or is capable of such use and is found stationary in a place not regularly used for residential purposes, two justifications for the vehicle exception come into place: 1) The vehicle is readily mobile, or 2) There is a reduced expectation of privacy stemming from the regulation of vehicles capable of traveling on the highways.

Reasoning: To fail to apply the exception to vehicles such as a motor home would ignore the fact that a motor home lends itself easily to use as an instrument of eliciting drug traffic or illegal activity.

California v. Acevedo
500 U.S. 565 (1991)

Facts: Police observed respondent (Acevedo) place a brown bag known to have contained marijuana, in his trunk. As the respondent drove away, the police stopped the car and opened the trunk and the bag and found marijuana. Respondent was charged with possession of a controlled substance.

Issue: Did the search of the respondent's trunk and paper bag and contents contained therein; contravene the Fourth Amendments Warrant Clause?

Finding: No. The police in a search extending only to a container within the automobile, may search the container (bag) without a warrant where they have probable cause to believe that it holds contraband evidence.

Reasoning: In this probable cause case, the police had to believe that the bag in the trunk of the car contained marijuana now allows a warrantless search of the bag, but no probable cause to search the entire vehicle.

Ybarra v. Illinois
444 U.S. 85 (1979)

Facts: Upon an informant's complaint that a bartender was selling tin foil packets of heroin, police requested and were issued a search warrant for the tavern and the person of the bartender only. Upon execution of the warrant, officers searched other customers in the tavern. The officers found a packet of heroin on one of the customers who was subsequently indicted for unlawful possession of a controlled substance.

Issue: Did the search and seizure of contraband from the customers other than the bartender contravene the respondent's Fourth and Fourteenth Amendment rights?

Finding: Yes. When the search warrant was issued, the authorities had no probable cause to believe that any other person found in the tavern, aside from the bartender, would be violating the law.

Reasoning: The Fourth and Fourteenth Amendments are not to be construed to permit evidence searches of a person who, at the start of the search, are on the premises subject to a search warrant, even if the Police have reasonable belief that such persons are connected with drug trafficking.

Michigan v. Summers
452 U.S. 692 (1981)

Facts: Police officers executed a warrant to search a house for narcotics. They encountered the respondent descending the front steps of his house and detained him while they searched the inside premises. Police arrested him after discovering narcotics on his person. Respondent was charged with possession of heroin even though the warrant specified a search of the house only.

Issue: Was the respondent's Fourth Amendment Rights violated by the search of his person during execution of the warrant to search the house?

Finding: No. A warrant to search the house for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants on the premises, while a proper search is conducted.

Reasoning: Because it was lawful to require the respondent to re-enter and to remain in the house until the evidence establishing probable cause to arrest him was found, his arrest and search of his person was constitutionally permissible.

Adams v. Williams
407 U.S. 143 (1972)

Facts: Acting on an informant's tip police officers stopped the respondent and asked him to open his car door. The officer reached in the car and found a loaded gun around the waist of the respondent. The respondent was arrested for unlawful possession of a handgun and a search incident to the arrest disclosed heroin in the respondent's clothing.

Issue: Was the evidence seized by the officers from the respondent and resulting in the respondent's conviction obtained by an unlawful search?

Finding: No. In the easier *Terry v. Ohio*, it recognizes a policeman making a reasonable investigative stop may conduct a limited protective search for concealed weapons when he has reason to believe the suspect is armed and dangerous.

Reasoning: The information received from the informant that respondent was armed justified the officer's forcible stop of the petitioner and protective seizure of the weapon, which afforded reasonable grounds for the search incident to the arrest. (discovery of heroin on the respondent).

Brown v. Texas
443 U.S. 47 (1979)

Facts: Two police officers observed the appellant and another man in an alley, which had a high incidence of drug traffic. The police officers stopped and asked the appellant to identify himself. Later, the officers said they stopped the appellant because "he looked suspicious", but when the appellant refused to identify himself he was arrested. The arrest was considered a violation of a Texas Statute that makes it a criminal offense to refuse to give your name and address to an officer.

Issue: Were the appellant's First, Fourth, Fifth and Fourteenth Amendment rights violated by the arrest?

Finding: Yes. The application of the Texas statute to detain the appellant and require him to identify himself violated the Fourth Amendment, because the officer lacked reasonable suspicion that the appellant was engaged or had engaged in a criminal activity.

Reasoning: The Fourth Amendment requires that such a seizure, as in this case, be based on specific, objective facts indicating the society's legitimate interests require such action, or that the seizure be carried out pursuant to a plan embodying explicit neutral limitation on the conduct of the individual officers. In this case, the officer's actions were not justified.

California v. Ciralolo
476 U.S. 207 (1986)

Facts: Police received an anonymous tip that the respondent was growing marijuana in his backyard, which was enclosed by two fences and shielded from view at ground level. The officers trained in marijuana identification, secured a private plane and identified the marijuana plants growing in the backyard. On the basis of naked-eye observations and aerial photographs from 400 feet, a search warrant was obtained to seize the plants.

Issue: Was the aerial observation of the respondent's house and the subsequent search warrant that was obtained violate the respondent's Fourth Amendment rights?

Findings: No. The Fourth Amendment does not require police traveling in public airways at 1,000 feet, to obtain a warrant in order to observe what is visible to the naked eye.

Reasoning: In this case, the respondent's expectation of privacy from all observations of his backyard was unreasonable. The mere fact that an individual has taken measures to restrict some view of his taken measures to restrict some views of his activities does not preclude an officer's observation from a public vantage point where he has a right to be and which renders the activities clearly visible.

Draper v. U.S.
358 U.S. 307 (1959)

Facts: A Federal narcotics agent was told by a reliable informer, that the petitioner was peddling narcotics had gone to Chicago to obtain a resupply of drugs and would return at a certain time on a certain train. The agent arrested the petitioner without a warrant and seized narcotics and a syringe which were in found on his possession.

Issue: Was the arrest of the respondent without a warrant violate his Fourth Amendment rights?

Finding: No. The information in the possession of the narcotics agent was sufficient to show probable cause and a reasonable ground to believe the petitioner violated Federal Narcotics laws.

Reasoning: Even if the information received was “hearsay” the agent was legally entitled to consider it in determining whether he had “probable cause”, within the meaning of the Fourth Amendment.

Florida v. Riley
488 U.S. 445 (1989)

Facts: After receiving an anonymous tip that marijuana was being grown on the respondent's property, an investigating officer discovered he could not observe the greenhouse at ground level. Officers took a helicopter and from 400 feet made naked-eye observations confirming marijuana plants were being cultivated. Upon this information and evidence, a search warrant was secured and the respondent's arrested.

Issue: Did the observation, via helicopter, at 400 feet, constitute a violation of the respondent's Fourth Amendment rights?

Finding: No. The Supreme Court decided without comment.

Reasoning: See: California v. Ciraolo - (476 U.S. 207, 1986)

Tennessee v. Garner
471 U.S. 1, 105 S.Ct. 1694, 85L.Ed2d 1. (1985)

Facts: Memphis police officers answered a “prowler inside call”. Officers chased subject, Edward Garner, who was stopped at a 6ft. chain link fence. Garner was told to halt but tried to vault the fence and was shot by the officers. Police officers used “deadly force” acting under the authority of a Tennessee State statute which allows for the use of necessary deadly force in cases of fleeing felons.

Issue: Was the use of “deadly force” to prevent the escape of a felony subject, whatever the circumstances, constitutionally unreasonable?

Finding: Yes. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar it authorizes the use of deadly force against such fleeing suspects.

Reasoning: The use of deadly force under common law has an altogether different meaning and harsher consequences now as in the past. Common law cannot be translated to present day because Common Law was developed when weapons were rudimentary. Deadly force could be inflicted almost solely in hand-to-hand struggles during which the officers safety was at risk. The handgun was not carried by officers until the latter half of the last century. Only then it was possible to use deadly force from a distance.

Dunaway v. New York
442 U.S. 200 (1977)

Facts: Upon receiving a statement from a jailed inmate the petitioner was implicated in an attempted robbery and homicide. Police detectives gave the order upon such information to pick-up the petitioner. Further interrogation of the petitioner yielded incriminating statements, implicating him in the crime.

Issue: Did the jailed inmate/ informant statements constitute probable cause for the petitioner to be picked-up and questioned without a specific warrant?

Finding: No. Although the petitioner's Miranda rights were given and waived right to counsel; the petitioner's Fourth and Fourteenth rights were violated. The arrest must be supported by probable cause.

Reasoning: Under analysis of the Fourth Amendment focusing on a casual connection between illegality and the confession factors had to be considered in determining whether the confession was obtained by an illegal arrest. In this case, the petitioner was admittedly seized without probable cause in the hope something might turn up and confessed without any intervening event of significance.

Maryland v. Buie
494 U.S. 325 (1990)

Facts: Following an armed robbery by two men, one of whom was wearing a red running suit, police obtained arrest warrant for the respondent Buie and his accomplice. Buie was arrested at his home upon emerging from the basement. Upon this the officers entered the basement to conduct a protective sweep for their own safety. In the basement was red running suit described in the armed robbery.

Issue: Did the police have probable cause to conduct a “protective sweep” of the basement? Could the running suit discovered in the basement be used in evidence?

Findings: Yes. The Fourth Amendment permits a properly applied and limited protective sweep in an in-home arrest. When the searching officer possesses reasonable belief that the areas to be swept harbor an individual posing a danger to those at the arrest scene. Subsequently, the red running suit can be used in evidence against the respondent.

Reasoning: The protective search was not a full search of the premises, but may extend to a cursory inspection of those places where a person may be found. The sweep lasted no longer than was necessary to dispel the reasonable suspicion of danger.

Minnick v. Mississippi
498 U.S. 146 (1990)

Facts: Petitioner Minnick was arrested on a warrant for capitol murder. An interrogation by Federal Law Enforcement officials ended when the respondent requested his right to counsel. After meeting with counsel, the interrogation of the respondent was re-initiated by a county deputy sheriff, after Minnick was told that he could not refuse to talk to him. Minnick confessed and was convicted and sentenced to death.

Issue: Was the respondent's Fifth Amendment rights violated?

Finding: Yes. When counsel is requested, interrogation must cease. Officials may not re-initiate an interrogation without the presence of counsel, whether or not the accused has consulted is attorney.

Reasoning: Since Minnick's interrogation was initiated by the police in a formal interview, which he was compelled to attend, it was impermissible to re-interrogate after he made a specific request for counsel.

Rhode Island v. Innis
446 U.S. 291 (1980)

Facts: A taxi cab driver identified a picture of the respondent who had just robbed him with a shotgun. A police officer spotted the suspect, who was unarmed, and arrested him. The respondent was advised of his Miranda rights and against making any incriminating statements. On route to the police station, the respondent interrupted a conversation between the two police officers who had been talking about where the shotgun might be. The respondent notified the officers where he left the shotgun. Before the trial of kidnapping, robbery and murder charges, the trial court denied respondent's motion to suppress the statement made to the officers about the location of the shotgun. Respondent's motion was denied and subsequently convicted.

Issue: Was the respondent entitled to a new trial based on fact he invoked his Miranda rights to counsel (and /or in the absence of) counsel in custodial interrogation?

Finding: Yes. The Miranda safeguards are exercised whenever a person in custody is subjected to either express questioning or it's functional equivalent. (Defined as any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response.

Reasoning: Even though there was no expressed questioning of the respondent, the conversation between the officers was nothing more than a dialogue between them to which no response from respondent was invited. While it might be said that the respondent was subjected to "subtle compulsion", it must be established that the suspect's incriminating response was the product of words or actions by the police.

U.S. v. Place
462 U.S. 696 (1983)

Facts: While waiting in the Miami Airport, the respondent's behavior aroused suspicion of two law officers. The officers approached the respondent and asked for consent to search through two of his suitcases that had been checked previously. Seeing that it might delay the flight, the officers decided to contact the DEA officials in New York, the plane's destination. Upon arrival in New York the agents approached the respondent and requested a search of his luggage, which the subject denied. The agents then seized the luggage and subjected it to a "sniff test" by trained police dog located at another airport (JFK). The dog reacted positively and after ninety minutes, a search warrant was received for the suitcases. The agents discovered cocaine and the respondent was indicted for possession of cocaine.

Issue: Did the detention of the respondent and the seizure of the respondent's luggage constitute a violation of the Fourth Amendment?

Finding: Yes. The length of detention of the respondent and his luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause.

Reasoning: The Fourth Amendment violation was exacerbated by the DEA agent's failure to inform the respondent accurately of the place to which they were transporting the luggage; length of time and arrangements for the return of the luggage.

New Jersey v. T.L.O
469 U.S. 325 (1985)

Facts: A teacher in a New Jersey high school discovered the respondent smoking in the lavatory in school. Respondent then met with the Assistant Vice Principal and denied that she had been smoking and claimed she did not smoke at all. Upon opening of the respondent's purse, he found a pack of cigarettes, rolling papers, pipe, plastic bags, a large amount of money and marijuana. The state brought delinquency charges against the respondent.

Issue: Was the respondent's Fourth Amendment rights violated by the opening of the purse by the Assistant Vice Principal?

Finding: No. School officials need not obtain a warrant before searching a student who is under their authority.

Reasoning: The search in this case was not unreasonable for the purposes of the Fourth Amendment. First, the initial search for cigarettes was reasonable. Second, the discovery of rolling papers gave rise to the reasonable suspicion that the respondent was carrying marijuana, as well as cigarettes in her purse, and the suspicion justified the further exploration that turned up more evidence of drug-related activities.

U.S. v. Jacobson
503 U.S. 540 (1992)

Facts: Petitioner Jacobson ordered and received magazines containing explicit photographs of nude pictures of pre-teens and teenage boys. The Child Protection Act of 1984 made illegal the receipt through the mails of sexually explicit depictions of children. Government agents found the petitioners name on a mailing list and sent mail to him through fictitious organizations, to explore his willingness to break the law. After two and half years on this mailing list (fictitious) the petitioner was solicited to order child photography. Petitioner ordered magazines depicting young boys engaged in sexual activities. Petitioner was arrested after he received a controlled delivery of the magazine.

Issue: Was the petitioner entrapped by the Government into purchasing explicit sexual material?

Finding: Yes. The petitioner's responses, during the investigation prior to the criminal act, at most, were indicative of certain personal inclinations but would not support the inference that the petitioner was predisposed to violate the Child Protection Act.

Reasoning: In their zeal to enforce to the law, the government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act then induce commission of the crime so that the government may prosecute.

Michigan v. Jackson
475 U.S. 625 (1986)

Facts: At the respondent's arraignment in a Michigan Trial Court, he requested an appointment with counsel. But before the respondent had the opportunity to consult with counsel, police officers, after advising him the respondent of his Miranda rights, questioned him and obtained a confession.

Issue: Was the admission of the confession into evidence a violation of the respondent's Sixth Amendment rights?

Finding: Yes. Once a suspect has involved his right to counsel, the police may not initiate interrogation until counsel has been made available to the suspect.

Reasoning: If police initiate an interrogation after a defendant's assertion of his right to counsel at an arraignment or similar proceeding, any waiver of that right for that police-initiated interrogation is invalid.

U.S. v. Karo
468 U.S. 705 (1984)

Facts: DEA agents learned that the respondents Karo, Horton and Harley ordered 50 gallons of ether, from a government informant. The ether was to be used to extract cocaine from clothing that had been imported into the U.S. The Government obtained a court order authorizing the installation and monitoring of one of the cans of ether. After continuous surveillance and storage of the ether can, agents determined the beeper can was inside a house rented by the respondents. The agents subsequently obtained a warrant to search the house, based on the information received from the beeper. The warrant was executed and the respondents were arrested for various offenses related to cocaine.

Issue: Should the evidence seized (cocaine) be suppressed because the initial warrant to install the beeper was a violation of the Fourth Amendment?

Finding: No. The Fourth Amendment interest of Karo, or any other respondent, was not infringed upon by the installation of the beeper. The informant's consent was sufficient to validate the installation.

Reasoning: Because the location of the ether can was in storage house prior to monitoring, attachment of the beeper in the facility was not an illegal search and because the ether was seen being loaded into Horton's truck, which traveled the highways, it is evident that there was no violation of the Fourth Amendment.

Miranda v. Arizona
384 U.S. 436 (1966)

Facts: The defendant, while in police custody, was questioned by police, detectives, and a prosecuting attorney in a room that was cut off from the outside world. The defendant was not given a full and effective warning of his rights at the outset of his interrogation process. The respondent elicited oral admission and signed statements of guilt as well. The defendant was convicted.

Issue: Can the prosecution use statements, whether exculpatory or inculpatory stemming from the questioning initiated by law enforcement officers or others depriving of his freedom of action in any significant way?

Finding: No. The person in custody must, prior to interrogation, be clearly informed that he has a right to counsel, a right to remain silent, and that anything he says will be used against him in a court of law, also their has a right to consult with an attorney present during interrogation, and that, if indigent (poor). A lawyer will be appointed to represent him.

Reasoning: When an interrogation is conducted without the presence of an attorney, and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his right to counsel.

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Alabama v. White
496 U.S. 325 (1990)

Facts: After receiving an anonymous tip that the respondent, White, would be in possession of cocaine at a certain time and place, police proceeded to observe White as she left her apartment and entered her vehicle. Following her for sometime, the police stopped the vehicle and made a consensual search; which revealed marijuana. After the respondent was arrested, cocaine was later found in her purse.

Issue: Was there enough “reasonable suspicion” necessary (Terry v. Ohio) to justify the investigative stop of the vehicle?

Finding: Yes. The anonymous tip, corroborated by independent police work, exhibited sufficient indications of reliability to provide reasonable suspicion to make the investigative stop.

Reasoning: The fact that the anonymous tipster was able to predict in detail respondents actions, prior to the stop demonstrated a special familiarity with her affairs. Thus, a reason to believe the tipster was honest and well informed.

Kyllo v. United States
121 S. Ct. 2038 (2001)

Facts: Suspicious that marijuana was being grown in petitioner Kyllo's home in a triplex, agents used a thermal imaging device to scan the triplex to determine if the amount of heat emanating from it was consistent with the high-intensity lamps typically used for indoor marijuana growth. The scan showed that Kyllo's garage roof and a side wall were relatively hot compared to the rest of his home and substantially warmer than the neighboring units. Based in part on the thermal imaging, a Federal Magistrate Judge issued a warrant to search Kyllo's home, where the agents found marijuana growing.

Issue: Was the search reasonable based on the facts presented to the Magistrate for his consideration of issuing a warrant?

Finding: No. The expectation of privacy was not considered prior to the setting up of thermal imaging devices.

Reasoning: When the Government uses a device that is not in general public use, to explore the details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment "search," and is presumptively unreasonable without a warrant.

Table Of Cases

Florida v. Wells	56
U.S. v. Edwards	57
New York v. Belton	58
South Dakota v. Opperman	59
Michigan v. Long	60
Terry v. Ohio	61
Florida v. Jimeno	62
U.S. v. Sharpe	63
U.S. v. Katz	64
Bekemer v. McCarty	65
U.S. v. Chadwick	66
Illinois v. Chadwick	67
Franks v. Delaware	68
U.S. v. Leon	69
California v. Carney	70
California v. Acevedo	71
Ybarra v. Illinois	72
Michigan v. Summers	73
Adams v. Williams	74
Brown v. Texas	75
Californai v. Ciralolo	76

Table of Cases (continued)

Draper v. U.S.	77
Florida v. Riley	78
Tennessee v. Garner	79
Dunaway v. New York	80
Maryland v. Buie	81
Minnick v. Mississippi	82
Rhode Island v. Innis	83
U.S. v. Place	84
New Jersey v. T.L.O.	85
U.S. v. Jacobson	86
Michigan v. Jackson	87
U.S. v. Karo	88
Miranda v. Arizona	89
Alabama v. White	90
Kyllo v. U.S.	91