NAILING  THE BAR™

Simple CRIMINAL PROCEDURE Outline

Tim Tyler, Ph.D., Attorney at Law

NINETY PERCENT of the LAW in NINETY PAGES®

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Simple
Criminal Procedure
Outline

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NINETY PERCENT of the LAW in NINETY PAGES.®

It would take thousands of pages to completely explain **CRIMINAL PROCEDURE**. But, such extensive knowledge is unnecessary to succeed in law school or on Bar examinations.

This eBook gives a simple explanation of the law of **CRIMINAL PROCEDURE** for law students. The purpose of this eBook is to provide law students with an **understanding** of the **basic law of criminal procedure** without a lot of unnecessary blather.

This eBook simply tells beginning law students the **BLACK LETTER LAW** and **BRIGHT LINE RULES** they need to know to succeed in law school. The explanation is given in **plain English** with the aid of **examples**. Other than that, this book has --

- **NO EXTENSIVE HISTORICAL DISCUSSION OF THE LAW**
- **NO FLOW CHARTS**
- **NO EXTENSIVE CASE CITATIONS**
- **NO CHECK LISTS**
- **NO PRACTICE QUESTIONS**
- **NO EXAM APPROACHES**
- **NO EXTENSIVE DISCUSSION OF DETAILS**

The reason for these omissions is that they are **UNNECESSARY** and **more CONFUSING than helpful** to beginning law students trying to gain a basic understanding of the law.

YOUR PROFESSOR will probably focus on the details of the law in one or more narrow areas of personal interest. Those details are not covered here. **As you realize a need for more detailed knowledge** in a particular and narrow area of law, consult an appropriate **hornbook from your library** or some other authoritative reference source.

OTHERWISE, THIS eBOOK HAS ALL THAT YOU NEED to understand basic **Constitutional Law**.

UNDERSTANDING THE LAW IS NECESSARY BUT NOT ENOUGH to succeed in law school! You must also be able to **explain** how the law applies to fact patterns presented on examinations.

THEREFORE, after you have developed an understanding of the law using this eBook, you MUST make additional efforts to prepare for your law school exams. To do that, use Nailing the Bar's **How to Write Essays for Criminal Procedure Law School and Bar Exams (De)**.

To test your knowledge and prepare for multiple-choice exams, use Nailing the Bar's **333 Multiple-Choice Questions for First-Year Law Students (MQ1e)**.

. Details on that publication and how to obtain it are given at the back of this book.

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Chapter 1: Criminal Procedure Overview

Criminal Procedure is primarily the study of the rules in the U.S. Constitution that prevent the **government** from pursing criminal prosecutions against the people in an **unreasonable manner** and **without probable cause**. **Probable cause** is a REASONABLE SUSPICION that 1) a **crime was committed** and 2) either the **defendant committed it** (for an arrest) or **evidence of the crime will be found** in a place to be searched. Most of these protections are **fundamental rights**. That means these are rights that are important enough that government cannot violate them without proving there was a necessary and compelling reason.

The entire focus of the study of criminal procedure is:

"Did the government (police, prosecution, etc.) violate the defendant's rights?"

1. Criminal Procedure Rules have no English Common Law Basis

For purposes of law school study there is no "English common law" of **criminal procedure**. Law school studies of criminal procedure issues are entirely based on the U.S. Constitution and how the federal courts have interpreted it. Although State constitutions also establish important rules of criminal procedure, those rules are not generally studied in law school.

"Criminal procedure" classes focus on those portions of the U.S. Constitution that deal with criminal matters while the classes in "constitutional law" focus on the remaining portions of the Constitution.

2. The Constitutional Basis of Criminal Procedure Rules

Criminal procedure is based entirely upon the **case law** concerning the judicial interpretation and application of only eight provisions of the U.S. Constitution:

1. The guarantee of **Writ of Habeas Corpus** in Article I, Section 9[2];
2. The prohibition against **Bills of Attainder and Ex Post Facto** laws by State and federal governments in Article I;
3. The right of an accused to a **Jury Trial** in federal court in Article III;
4. The requirements of States to **Extradite Criminal Defendants** in Article IV;
5. The 4th Amendment prohibition of **Unreasonable Searches and Seizures** by government and its requirements for **Search and Arrest Warrants**;
6. The 5th Amendment guarantees that criminal charges will be based on **Grand Jury Indictment** except during war, that accused criminals will be not be denied life, liberty or property without **Due Process**, and that defendants will not be compelled to give **Self-Incriminating Evidence**;
7. The 6th Amendment guarantee of a **Speedy Public Trial** with **Legal Counsel** before an **Impartial Jury**, the defendant's right to be **Informed of Charges** and to be able to both **Confront Witnesses** for the prosecution and to **Compel Witnesses** for the defense;
8. The 8th Amendment prohibition of **Excessive Bail, Excessive Fines** and **Cruel and Unusual Punishment.**

The case law in Criminal Procedure is very extensive. But **do not** memorize and cite all of the cases. Just cite the cases **your professor stresses**.

3. The Areas of Major Exam Interest

The primary focus of law school and Bar exams with respect to criminal procedure only concerns three Constitutional provisions:

- The 4th Amendment guarantee against **Unreasonable Search and Seizure**
- The 5th Amendment guarantee of **Due Process** and prohibition against **Compelled Self-Incrimination**
- The 6th Amendment guarantee of **Legal Counsel** and the **Right to Confront Adverse Witnesses**.

This narrow scope of interest often causes the study of Criminal Procedure to be abbreviated when compared to other areas of the law. That usually makes a Criminal Procedure class shorter than other law school subjects.

Other areas may be tested so those will be covered briefly in the next Chapters. But these three areas listed are the most tested, and they will be covered in much more detail in the later Chapters.

4. Criminal Procedure Concerns only Governmental Acts

The rules of criminal procedure only protect "natural people" from **improper governmental acts**. They do not protect corporations or organizations like unions. And they do not protect people from improper acts by **private citizens**. Frequently private citizens take the law into their own hands and provide illegally obtained evidence to the police. The rules of criminal procedure do not prevent the police from using that evidence UNLESS the police improperly caused the evidence to be obtained.

> **For Example:** Seeking revenge, Betty breaks into Bob's apartment and gives his secret income records to the IRS. Bob is accused of income tax evasion. Bob cannot exclude the evidence unless Betty acted under direction of the IRS.

If a person is convicted of a crime because a private citizen improperly obtained evidence against them they can only sue that person in tort.

> **For Example:** Linda Tripp illegally records Monica Lewinski's statements concerning her sexual activities with Bill Clinton and gives the tapes to investigators. The investigators can use this evidence because they did not cause Tripp to obtain it. Lewinski can only sue Tripp for **public disclosure of private facts** in a civil action.

5. The Extension of Criminal Procedure Rules to States

The U.S. Constitution originally established few criminal procedure rules or limitations for the States. The main concern of the framers of the Constitution was to limit the power of the federal government, NOT to limit the powers of the States.

The original Constitution and the Bill of Rights (Amendments 1-10) only limited State criminal procedures in two places. It expressly prohibited States from issuing **Bills of Attainder** and **Ex Post Facto** laws at Article I, Section 10[1], and it required that States **Extradite** criminal defendants at Article III, Section 2[2]. Other than that, the Constitution originally expressed no other limits on the criminal procedure rules in the States. This changed with the adoption of the 14th Amendment after the Civil War.

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A. Application to the States by Selective Incorporation

The 14th Amendment prohibited States from denying any person "life, liberty, or property, without **due process** of law." The term "due process" effectively means "fair treatment". The requirement that States give "due process" to criminal defendants gave the federal courts power over State criminal procedures.

After the enactment of the 14th Amendment federal courts extended the federal protections for criminal defendants to the States in a halting and piece-meal manner called **selective incorporation**. The U.S. Supreme Court has refused to adopt a "total incorporation" approach that would have extended all of the criminal protections guaranteed in the Bill of Rights to the States.

The eventual result of judicial interpretation through a long series of cases has been that most of federal criminal procedure protections for defendants, whether included in the Bill of Rights or elsewhere in the Constitution, have been extended to the States under the argument that they entail the "due process" guaranteed by the 14th Amendment. The criminal procedure rules that have been extended to the States are considered to be **fundamental rights**. However two federal criminal procedure rules have NOT been deemed to be fundamental, and they have NOT been extended to restrict the States.

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B. Federal Criminal Rules that Still do NOT Bind the States

At the current time the only criminal procedure rules established by the U.S. Constitution that have NOT clearly been extended to limit actions by the States are:

1. The 5th Amendment guarantees that criminal charges will be based on **Grand Jury Indictment**;
2. The 8th Amendment prohibition of **Excessive Bail.**

These rules have not been extended to limit the States because the Supreme Court has not deemed them to be fundamental rights.

All other criminal procedure rules that originally were intended to apply only to the federal government have now been judged to be fundamental rights and they have all been extended to apply to the States through interpretation of what the term "due process" means.

6. The Typical Steps in a Criminal Prosecution

The steps in the criminal procedure process are seldom given much discussion in law school and are almost never tested, but to understand the discussion in the case law it is often helpful to understand the chronological process. The "typical" steps are as follows:

1) A crime is **reported** to the police.
2) Police conduct an **investigation.**
3) The police often but not always obtain an **arrest warrant** from a magistrate.
4) The police **arrest** the suspect.
5) The police **search** and **book** the suspect (e.g. fingerprinting and photographing).
6) The police may conduct a **lineup** for eyewitnesses to identify the suspect as the perpetrator.
7) The **decision to charge** the suspect may be reviewed, affirmed or disaffirmed by police and/or the District Attorney (the prosecution). The charges may be "dropped" if the prosecution believes evidence is insufficient to prosecute.
8) The **complaint is filed** with the magistrate court.
9) If the defendant was arrested without a warrant (i.e. If step 3 above was skipped) the magistrate court must conduct a **Gerstein review hearing** to determine if the arrest was based on probable cause. This may occur at the start of the arraignment.
10) The defendant is brought before a magistrate for a **first appearance**. This typically is within 24 hours of the arrest. The magistrate would make certain that the person arrested is the same person named in the complaint, inform the defendant of the charges against him/her and inform the defendant of his/her rights (e.g. right to counsel, etc.)
    a) If the defendant is charged with a misdemeanor the magistrate may ask the defendant to **enter a plea**.
    b) If the defendant is charged with a felony the magistrate would inform the defendant that they will be provided later with a **preliminary hearing**.
    c) The magistrate may also set a bail amount or release the accused without bail.
11) If the defendant is charged with a felony and has not been indicted by a Grand Jury he/she must be given a **preliminary hearing** before a magistrate court. However, the prosecutor may seek an immediate **Grand Jury indictment** and if that is obtained from the Grand Jury the preliminary hearing can be eliminated.
12) Even if the preliminary hearing finds probable cause, a **Grand Jury review** of the charge is required in some jurisdictions.
13) The **complaint** filed in the magistrate court is then replaced in the trial court with the filing of a new accusation that will either be a **Grand Jury indictment** or an **information** combined with a **preliminary hearing bind-over**.
14) The defendant is then **arraigned** before the trial court on the accusation composed of the Grand Jury indictment or information. The trial court will ask the defendant to enter a plea. If the defendant pleads "not guilty" a tentative trial date will be set.
15) The defense may file a number of **pre-trial motions** attacking the sufficiency of the charges.
16) The **trial** would eventually be held.
17) Following the trial there would be a **sentencing hearing** before the trial judge.
18) Following sentencing there can be an **appeal**.

19) Following all appeals the convicted defendant may file a habeas corpus petition in federal court as a "**post-conviction remedy**" citing violation of due process.

7. Criminal Procedure Remedies

If a defendant's fundamental criminal procedure rights are violated the trial court can either **exclude illegally obtained evidence** from being admitted at the trial of the individual or, if the defendant is convicted of a crime by the trial court, the Appeals Court can **reverse** the conviction and return the case to the trial court to be retried.

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A. Exclusion of Illegally Obtained Evidence

When government agents illegally obtain evidence by violating a defendant's fundamental rights the trial Court (i.e. the judge) has **discretion to exclude** the evidence from being presented at trial.

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B. Reversal of Conviction Based on Illegally Obtained Evidence

If a defendant is convicted of a crime based on evidence that was illegally obtained by the government in violation of the defendant's fundamental rights the conviction may be **reversed** by an Appeals Court. If the evidence in dispute was admitted by the trial court judge over the defendant's objection the Appeals Court must find **abuse of discretion** by the trial court judge.

"Reversal" means the prior trial findings are "set aside" as if the first trial never took place. An Appeals Court will not reverse a conviction in many situations if it is convinced the violation of fundamental rights was a "harmless error" because the defendant would clearly have been convicted anyway.

If a trial Court is reversed on appeal the defendant can remain under arrest and be tried again. And people who are originally arrested in violation of fundamental rights can still be kept in custody as long as probable cause exists that they committed a crime.

Consequently, **an illegal arrest is not a defense to a crime.** It only establishes an **argument to exclude evidence** at trial.

> **For Example:** John is arrested illegally, without probable cause. But after he is in custody Victor reports that John robbed him. No Court will order John released because **probable cause exists for keeping him** in custody. If he were released he could just be arrested again as soon as he left the jail. [1]

[1] People arrested without probable cause can sue for abuse of process. But if probable cause is discovered or proven after they are arrested they are unlikely to be able to prove damages

8. Effect of Supreme Court Decisions on Criminal Cases

Before the Supreme Court rules on the Constitutionality of a criminal procedure issue, numerous lower courts will have ruled on the same issue, and those rulings will almost always conflict.

What happens to convicted criminals when the U.S. Supreme Court changes the rules? If the Supreme Court declares a criminal procedure unconstitutional, is everyone convicted under a contrary application of that law automatically set free (pending new trial)?

If the Supreme Court declares a criminal procedure Constitutional, is everyone freed on appeal as a result of conflicting opinions automatically reinstate the conviction and put the defendant back in prison?

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A. Retroactive Effect of a Finding of Unconstitutionality

Prior to 1965 it was generally held that when the Supreme Court decided a particular criminal procedure was unconstitutional it was merely setting forth a statement of the law as it had always existed. If a criminal procedure was ruled unconstitutional any prisoner convicted from the use of that procedure could seek a reversal by petitioning for habeas review.

In 1965 (in *Linkletter v. Walker*) the Court refused to allow retroactive application of its holding concerning "new standards" for exclusion of evidence obtained by **unreasonable search and seizure.** The Court held that the decision could only be applied to cases that were not "final" because appellate review had not been completed.

The Court later reasoned (in *Stovall v. Denno*) that new Constitutional standards should not be applied to "final" cases in habeas review if 1) the **purpose** of the new standards is to modify future police practices, 2) police have **relied extensively** in the past on the "old standards" and 3) retroactive application of the new standards would have a **significant negative impact** on the administration of justice. These three factors came to be called the ***Linkletter-Stovall* standard.**

The purpose and effect of the *Linkletter-Stovall* standard was to prevent the establishment of new "prophylactic standards" intended to improve police practices from causing numerous reversals upon habeas review.

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B. Retroactive Effect on State Appellate Court Reversals.

When the Supreme Court holds that a challenged police practice IS Constitutional, that finding frequently conflicts with the holdings of state appellate court decisions that the police practice was NOT Constitutional.

> **For Example:** In 2005 the federal 9th Circuit court of appeals held that government use of video cameras with software to recognize people by the shape of their noses on public streets is a violation of the 4th Amendment prohibition of unusual search and seizure. Based on that holding and other argument Tom succeeded in getting his 2000 state court conviction for robbery reversed in the state appeals court and he is released in 2007. But in

the 10th Circuit the appeals court held on the same exact issue that there was no 4th Amendment violation. To resolve this conflict the U.S. Supreme Court reversed the 9th Circuit holding in 2009 finding the 10th Circuit was correct in finding that there was no "reasonable expectation of privacy" on public streets. Does Tom have to go back to prison? It depends on what the "other argument" is.

1) State Decisions Based on Independent and Adequate State Grounds

The answer is that a Supreme Court decision will NOT cause reinstatement of a conviction reversed in a State appeals court IF the State appeals court reversed the conviction on the basis of State law that gave it **independent and adequate grounds** for the reversal. Often State constitutions give defendants greater protections than the U.S. Constitution, and State law cannot reduce the protections promised by federal law. Even where State constitutions use the same exact wording as the U.S. Constitution, State case law interpretation of the State constitution may differ to give the defendant greater State protections that are available under the U.S. Constitution.

2) State Decisions Based on Federal Law or Ambiguous Grounds

But the conviction WILL be reinstated if the State appeals court did NOT have **independent and adequate grounds** and relied **primarily on federal law** or an **ambiguous combination** of federal and State law. Therefore, if it is not clear whether the State appeals court had independent and adequate grounds for the reversal or not, the Supreme Court will presume that it did NOT and reinstate the conviction.

For Example: In the above example Tom would not have to go back to jail following the Supreme Court decision if his "other argument" gave the state appeals court independent and adequate grounds for reversal.

Chapter 2: Habeas Corpus, Bills of Attainder and Ex Post Facto Laws

This Chapter briefly explains Habeas Corpus, Bills of Attainder, and Ex Post Facto laws, criminal procedure issues that are generally of little interest in law school and on Bar exams. Your particular professor may go into one of these issues in depth, but that is not usually the case.

1. Habeas Corpus

The Constitution guarantees the "privilege of the Writ of Habeas Corpus shall not be suspended" except in time of national emergency at Article I, Section 9[2]. This simply means criminal defendants (in State or federal courts) have the right to petition for federal judicial review after all of their other remedies (e.g. appeals) have been exhausted. This process of reviewing the merit of the prisoner's petition is called "habeas review".

Habeas petitions raise arguments that Constitutional rights have been violated. For example, the petitioner may argue that he is being denied a "speedy public trial" or was denied a trial before an impartial jury as guaranteed by the 6th Amendment.

A criminal defendant may claim Constitutional violations in a petition for habeas review even if the same claims were raised and denied at trial and on appeal. If the federal district judge decides upon habeas review that the defendant is being held or has been convicted in violation of Constitutional rights the defendant may be ordered released subject to a new trial.

There is one important limitation on habeas review. In 1976 the U.S. Supreme Court held that a petitioner may NOT raise an argument in habeas corpus that evidence was improperly admitted at his/her trial because it was the result of an **unreasonable search and seizure** if the petitioner had an opportunity to fully and fairly litigate the same claim at the State level. It was held that in these cases only the petitioners are barred from raising their claims even if the federal court believes the State court acted improperly.

2. Bills of Attainder

Bill of Attainder is a finding of criminal guilt, usually of treason, without a trial by legislative fiat.

The Constitution prohibits Bills of Attainder at Article I, Section 9[3] and States are prohibited from passing them at Article I, Section 10[1].

3. Ex Post Facto Laws

An Ex Post Facto law is a law declaring some prior act to be illegal or increasing the penalties for prior crimes. The Constitution prohibits Ex Post Facto laws at Article I, Section 9[3] and States are prohibited from passing them at Article I, Section 10[1].

The most common scenario that raises the ex post facto issue is when a criminal law changes. The Court should apply the law to the crime that existed at the time the crime was committed, not the law that exists at the time the defendant is convicted. But some situations are arguable.

For Example: A woman is raped in 1980 when the law provides a 10-year statute of limitations on rape prosecutions and a maximum sentence of 10 years. In 1985 the law is changed to eliminate the statute of limitations and increase the maximum sentence to 20 years. Butthead is not identified as the rapist until DNA testing is used in 2000.

Butthead clearly cannot be sentenced to more than 10 years because application of the new sentencing rules to Butthead would cause him to face a "risk" that did not exist at the time he committed the crime. This would make the new sentencing rule an "ex post facto" law.

But can Butthead be prosecuted at all? If the statute of limitations had not been removed the case would have become "time-barred" in 1990, and he could not have been prosecuted after that. But, the elimination of the statute of limitations did not make a past innocent act a crime. And it did not increase the penalty for a past crime. It seems a good argument that Butthead was "at risk" of prosecution in 1985 when the law changed, so elimination of the statute merely caused him to remain "at risk" of prosecution into the future. Since Butthead faces the same exact risk of prosecution in 2000 that he faced in 1985 when the law was changed, it does not appear elimination of the statute is an ex post facto law.

But what if the statute of limitations had not been removed until 1995 when the case against Butthead was already "time-barred"? Then it would seem the better argument would be that it is an "ex post facto" application of law since he was no longer at risk of prosecution. It would seem improper to initiate a prosecution under a new law that could not have been pursued at the time of the law was changed.

Chapter 3: Grand Juries and Trial Juries

This Chapter briefly explains Grand Jury procedures and the rights of an accused to a jury trial. The 5th Amendment guarantees that serious criminal charges will be based on **grand jury indictment**, and the 6th Amendment guarantees a **speedy public trial** before an **impartial jury**. These criminal procedure issues are generally of minor interest in law school and on Bar exams.

1. Grand Jury Indictment

The 5th Amendment requirement that "capital or otherwise infamous crimes" can only be charged after a Grand Jury indictment applies in **federal cases**. Every federal court district periodically establishes a federal Grand Jury.

And most if not all States also provide for the establishment of county Grand Juries. But the requirement of a grand jury indictment for those charged with serious crimes is NOT a **fundamental right** and it has NOT been extended to the States. States do not have to base serious criminal charges on a grand jury indictment as long as State rules provide the accused with **due process**, which **is a fundamental right**. Typically State laws have been found to be adequate if arrests are based on a **complaint** promptly followed by a **preliminary hearing** at which a **neutral magistrate** makes a finding of **probable cause**.

A Grand Jury itself consists of approximately 20 members. County **Grand Juries** are supposed to be selected in a manner such that its composition (age, sex, ethnicity, etc.) is representative of the county population.

Grand Jury proceedings are **investigative** in nature and are conducted in **secret.** The targets of Grand Jury investigations have **no right to be present.** And **illegally obtained evidence**, such as contraband seized in violation of the 4th Amendment and confessions obtained in violation of the 5th Amendment **will be admitted** for Grand Jury review. Therefore, the **Exclusionary Rule** that often allows a Court (i.e. judge) to exclude illegally obtained evidence at <u>trial</u> **does NOT apply** to Grand Jury proceedings. Generally Grand Jury testimony must be kept sealed.

Any person may be subpoenaed and compelled to appear and testify before a Grand Jury. Witnesses have no rights to a *Miranda* warning or *Miranda* rights to appointed counsel but they do have the 5th Amendment right to refuse to testify against themselves. *Miranda* and the 5th Amendment will be explained in detail later.

Witnesses that refuse to testify before a Grand Jury on 5th Amendment grounds may be granted **immunity**, and then they can be **compelled** to testify under a threat of contempt because their testimony cannot be used against them. **Immunity** will be explained in more detail below.

The purpose of the Grand Jury is to determine whether probable cause exists for an arrest and prosecution of a defendant. In the sealed Grand Jury proceedings the prosecutor is responsible for presenting any **exculpatory** evidence that would exonerate the accused. The prosecutor has no duty to present **mitigating** evidence that would justify a reduced charge against the defendant.

In many States a Grand Jury must review and issue an indictment after a preliminary hearing has found probable cause. Other States (including California) allow prosecution to proceed based on the filing of an "information" that recites the charges and is filed with the trial court.

2. The Right to a Speedy and Impartial Jury Trial

The 6th Amendment guarantees a **speedy public trial** before an **impartial jury**, and this is a **fundamental right** extended to the States under the due process requirement of the 14th Amendment. But, it is a **limited right,** and defendants can **waive** their right to a jury trial, and the waiver can be **express or implied**. Defendants have the right to be **physically present** at their trial, but they can be **ordered removed** from the trial if they are disruptive.

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A. Right to a Jury Trial

The U.S. Constitution guarantees the right to a jury trial of "all crimes, except cases of impeachment" in Article III and the 6th Amendment guarantees a "speedy and public trial by an impartial jury". However, **no right to a jury trial** is recognized in trials for **"petty" offenses**. A **petty offense** is one that cannot result in **imprisonment for more than six months**, regardless of the sentence actually imposed.

The established rule today is that defendants have a right to demand a jury trial if a sentence to more than six months in jail is possible in any way. This is the federal rule and it has been extended to the States as a **fundamental right** by the 14th Amendment. Some State laws give a right to jury trial for specified classes of misdemeanors.

> **For Example:** Bevis is charged with three misdemeanors that each impose a maximum jail sentence of 90 days. Does he have a right to a jury trial if **consecutive sentences** are possible? Yes, **unless the judge states** before trial that the sentences will not be imposed consecutively, because consecutive sentencing would result in 9 months of jail time. In that case these charges are **not petty** even though the crimes are "misdemeanors." But, if the judge states before trial that he will not impose a sentence of more than 6 months in jail, Bevis would not have a right to a jury trial.

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B. Right to an Impartial Jury

The 6th Amendment guarantees a defendant trial before an **impartial** jury. This is a **fundamental right** so the rule is extended to the States.

> **For Example:** Ali is charged with an act termed "terrorist" by the local prosecutor. Prior to his trial the World Trade Center is destroyed by terrorists. Can Ali escape or delay prosecution because the jury cannot possibly be impartial? Not if the Court is able to seat a jury and there is no credible evidence that any member is biased.

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C. Right to a Speedy Trial

The 6th Amendment guarantees a defendant a "speedy" trial. The federal **Speedy Trial Act** regulates federal trial setting. There is no clear definition of "speedy" for State prosecutions but the Court will consider four factors:

- Was the defendant's **request for an earlier trial** denied?
- What was the **length of the trial delay**?
- What was the **reason for the trial delay**?
- What **prejudice** has the defendant suffered as a result?

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D. Jury Size and Unanimous Verdict are NOT Fundamental

Federal rules require a criminal jury to be composed of 12 jurors and they must reach a unanimous verdict. However, this has NOT been found to be a fundamental right, and the States are not bound by this rule.

State laws may provide for juries of less than 12 jurors and may allow a finding of guilt by less than a unanimous jury. Federal courts have upheld State court convictions based on unanimous verdicts by panels of only six jurors (in non-capital cases.) And federal courts have upheld State court convictions by the verdict of only 10 out of 12 jurors.

However, **due process becomes questionable** if few jurors are convinced of the defendant's guilt, and this is especially so if the charges are more serious. A State court conviction for a serious crime by a only 5 members of a jury has been found to violate due process. And a State provision that allowed conviction by "five out of six" jurors has been held invalid on similar grounds.

Chapter 4: Cruel and Unusual Punishment and Excessive Bail

The 8th Amendment prohibits cruel and unusual punishment and excessive bail requirements. Certain aspects of this are frequently tested on law school and Bar exams, but the information you need to know is very limited.

1. Cruel and Unusual Punishment Violates Due Process

Cruel and unusual punishment has been found to violate the **fundamental right** of due process so that 8th Amendment prohibition **has been extended to bind the States**. Obvious examples of "cruel and unusual punishment" would be "flogging", mutilating, branding or otherwise physically maiming criminals. However numerous Courts have concluded that the **death penalty** is NOT a "cruel and unusual punishment" per se, and that fact is often tested.

Certainly a death penalty carried out in a cruel and unusual manner would violate the 8th Amendment, but the penalty itself is not considered to be cruel or unusual.

2. Excessive Bail Prohibition Not Extended to States

The 8th Amendment prohibition of excessive bail has **NOT been held to be a fundamental right** or that bail requirements may violate due process so this **has NOT been extended to the States**. Consequently, a State Court can order a defendant to be held without bail without clearly raising a Constitutional issue. However, this always depends on the circumstances.

> **For Example:** Rube is arrested for jaywalking (a very minor offense) and the judge orders him to be held without bail pending trial. This fact alone does not alone suggest a denial of due process. But if he is not a flight risk and would not receive a speedy trial the combination of circumstances may suggest a denial of due process anyway.

Chapter 5: Double Jeopardy

The 5th Amendment guarantees that criminal defendants cannot be "subject for the same offense to be twice put in jeopardy of life and limb". This is called **double jeopardy,** and it is often the misrepresented in the movies. By judicial interpretation this means that a defendant cannot be **tried** a second time for the **same crime** by the **same government power** after being **acquitted, convicted or pleading guilty** in the first prosecution. This is a **fundamental right** applied to the States through the 14th Amendment.

> **For Example:** O.J. is tried by California for murdering his wife. O.J. is acquitted. O.J. **cannot be tried** for this **same murder** again by **California** because he was already acquitted for the same crime.
>
> **For Example:** Bevis is tried by California for murdering Butthead. The jury splits 11 to 1 in favor of acquittal. Bevis **can be tried** for this **same murder** again by **California** because he was neither acquitted nor convicted.

Certain aspects of this are frequently tested on law school and Bar exams, but here again the information you actually need to know is fairly limited.

1. When Double Jeopardy Attaches

Double jeopardy requires that the first government action **proceed far enough** that it prohibits a second action. At that point it is said that "double jeopardy has **attached**" to the proceedings. And, even if the first trial is completed a second trial may be possible when the first conviction is reversed on appeal.

As a general rule **double jeopardy does NOT prevent a second trial IF:**

- The first trial was terminated because of **necessity**;
- The first trial was a **jury trial** that terminated **before the jury was sworn;**
- The first trial was a **bench trial** that terminated **before the first witness was sworn;**
- The first trial ended with a **mistrial on the defendant's request or consent;**
- The first trial resulted in a **hung jury**;
- The first trial jury voted for a conviction but the **judge overturned** on a finding evidence was insufficient for conviction, but that was later **reversed on appeal;**
- The first trial resulted in a conviction that was **reversed on appeal** but not because the **evidence was insufficient;**

But double jeopardy **DOES prohibit** a second trial IF:

- The defendant **pled guilty** and the plea was accepted by the Court;
- The first trial ended because **prosecutorial misconduct caused a mistrial;**
- The first trial resulted in an acquittal that **necessarily implies acquittal** of the charges brought in the second trial (because they are a **lesser included offense)**;
- The defendant is **acquitted by a jury** (even if it was the result of perjury);
- The defendant was **acquitted by a judge** (and not by reversing a jury finding of guilt);
- The defendant was **convicted or pled guilty** to a lesser or greater offense;

> **For Example:** Bernie is tried for a crime and just as the trial is about to end the judge dies. A mistrial is declared. Bernie can be tried a second time because the trial terminated out of **necessity** upon the death of the judge.

2. Prosecution for Lesser Included Offenses

Generally prosecution for any crime (the first crime) bars later prosecution for another crime (the second crime) arising out of the same criminal act if the first crime is a "lesser included offense" of the second crime. In other words, the second crime charged requires proof of the first crime charged as one of its elements.

> **For Example:** Dan is charged with larceny (the first crime) for stealing from a liquor store. He is acquitted. After the jury finds in his favor the District Attorney charges him with robbery (the second crime) for taking the same whiskey by use of force. Generally, Dan **cannot** be prosecuted for this second crime (robbery) because it requires proof of the first crime (larceny) as a lesser included offense, and he has already been prosecuted for that crime.

Further any prosecution for a crime (the first crime) bars later prosecution for any other crimes arising out of the same criminal act if the other crimes are lesser included offenses of the first crime. In other words, proof of the other crimes was required to prove the first crime prosecuted.

> **For Example:** Dan is charged with robbery (the first crime) after holding up a liquor store. He is acquitted. After the jury finds in his favor the District Attorney charges him with larceny, assault and battery (the other crimes) for taking the same whiskey from the store clerk by force. Generally, Dan **cannot** be prosecuted for these other crimes because the first crime (robbery) required proof of these other crimes as lesser included offenses, and he has already been prosecuted for that.

A little common sense shows why this is so. Would it be fair for any defendant to plead guilty to any crime if the prosecution could use that plea against him to try him again and again for other crimes arising out of the same criminal act? And if the prosecution could do that, would any defense lawyer ever recommend pleading guilty to any crime at all?

3. Prosecution for Crimes with Different Elements

Generally any plea, conviction or acquittal for a crime (the first crime) does NOT bar later prosecution for another crime arising out of the same criminal act (the second crime) if EACH of the two crimes require proof of elements that are different from the other.

> **For Example:** Dan is charged with murder (the first crime) for shooting Victor. He is acquitted. Then Dan is charged with robbery (the second crime) for stealing Victor's watch when he shot him. Generally, Dan **can** be prosecuted for the second crime (robbery) because it required proof of a larceny (not required to prove murder) and the first crime required proof of a homicide (not required to prove robbery). Therefore EACH of the crimes required proof of something different from the other.

4. Prosecution for Crimes Not Previously Chargeable

Double jeopardy does not prevent prosecution for a second crime if it was **impossible to prosecute** at the time a first crime was prosecuted.

> **For Example:** O.J. is tried for battery for stabbing his wife. O.J. pleads guilty. Then his wife dies, so the prosecutor files a murder charge. O.J. **can be tried** for murder because the murder could not have been prosecuted previously when the battery was prosecuted.

5. Prosecution for Different Criminal Acts

Double jeopardy does not prevent prosecution for the **same crime** twice if the second prosecution is for a **different criminal act** from the criminal act alleged for the first prosecution.

> **For Example:** Gomez is convicted of murdering his wife Maria and burying her body in the desert. After Gomez has been in prison for 10 years Maria suddenly reappears. Gomez is so mad when he gets out of prison he shoots and kills Maria. Gomez **can be tried** for **murder** a second time because it is based on a **different criminal act** from that alleged in the first murder prosecution. The fact it is the same "victim" is irrelevant.

6. Prosecution by a Separate Sovereign

Double jeopardy does not prohibit a **second independent government entity** from trying the defendant for the same exact crime if the Courts of the second entity have jurisdiction. This is called the "**Separate Sovereign**" theory. The federal government is a separate sovereign from the States, and each State is separate from each other State. Counties are not separate sovereigns because each is a subdivision of a State.

> **For Example:** Gallego kidnaps Mary in California, murders her and buries her body in the Nevada desert. Unable to find the body, the Sacramento County prosecutor tries Gallego for murder based on circumstantial evidence. Gallego is acquitted. Thinking he cannot be tried twice for the same crime, Gallego writes a book, "How I Got Away With Murder." After the book is published Mary's body is found exactly where Gallego claimed to have buried it. Based on this new evidence Nevada tries Gallego for murder. This is legal because Nevada is a **separate sovereign** from California.

7. Forfeitures and Punitive Civil Actions

A defendant is tried for a **crime** twice if the government entity brings a second action that is intended to **punish** the defendant for the same crime twice. It does not matter if the two crimes are classified as felonies, misdemeanors or civil. What matters is whether the legal action seeks to punish the defendant twice for the same act.

> **For Example:** Dan steals a county police car and wrecks it. He pleads guilty to larceny and receives a suspended sentence. The county then sues him for destruction of its property and wins an award of $10,000 for the car and $100,000 as punitive damages. The award

for the car is intended to compensate the County for its loss, not punish Dan. So it does NOT constitute double jeopardy.

But the award of punitive damages is intended to punish Dan so it would be **illegal double jeopardy** intended to punish Dan for the same wrongful act.

An action seeking only a **fine** is a criminal action if the fine is **disproportionately high**. But a **forfeiture proceeding** arising out of an act is NOT a criminal action if the purpose is to confiscate ill-gotten gains (unjust enrichment) rather than to punish.

For Example: Dick is caught with narcotics and a large quantity of cash. The police take the cash in a forfeiture proceeding, and he is then tried for possession of narcotics. Dick claims **double jeopardy** on the grounds that the forfeiture proceeding was intended to punish him for drug dealing and since that already punished him for his actions prosecution for possession would subject him to double punishment for the same crime. Dick would lose because forfeitures are normally "civil actions" to prevent unjust enrichment rather than to "punish".

Chapter 6: Confronting and Compelling Witnesses

The 6th Amendment guarantees criminal defendants the right to **confront** adverse witnesses and to **compel** witnesses to testify on their behalf, but the 5th Amendment **prohibits forced self-incrimination**. If witnesses are questioned about their own criminal acts they can refuse to answer. This can create a conflicting situation that is often tested but poorly taught.

In an "Evidence" class the "admissibility" of evidence is always based on evidence rules. But in a "Criminal Procedure" class the "admissibility" of testimonial evidence is determined by criminal procedure rules. If a Bar exam question asks if certain evidence is "admissible" in a criminal case it is critical for you to determine whether the answer depends on evidence rules, criminal procedure rules or both.

1. Compelled Testimony

In both criminal and civil actions witnesses are compelled to testify, both in deposition and at trial, if they are served with a **subpoena** (i.e. a "deposition subpoena" or a "trial subpoena") Under the 6th Amendment a criminal defendant has a right to call witnesses and compel them to testify. This is a **fundamental right** extended to the States by the 14th Amendment. As explained in an earlier Chapter witnesses can also be compelled to testify before a Grand Jury.

> **For Example:** Newman is charged with robbery. He claims he was somewhere else with Kramer at the time of the robbery. Kramer is mad at Newman so he refuses to testify. Newman has a fundamental right to call Kramer as a witness and force him to testify whether he wants to or not.

2. The Right to Confront Adverse Witnesses

Under the 6th Amendment a criminal defendant has the right to confront adverse witnesses at trial. This is also a **fundamental right** extended to the States by the 14th Amendment.

> **For Example:** Newman is charged with robbery. Kramer testifies at trial that he saw Newman rob the store. Newman has a right to confront Kramer, cross-examine him and impeach his testimony.

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A. Confrontation of Physically Separated Witnesses

The right to "confront" witnesses means the defendant has a right to see and hear the witnesses testify and to cross-examine and cast doubt on their testimony. Defendants do not have any right to physically threaten or intimidate the witnesses. A witness may be allowed to **testify from a remote location**, as long as a criminal defendant has an adequate opportunity to cross-examine.

> **For Example:** David is charged with raping child who is so traumatized her that she is emotionally unable to testify against him in his physical presence. At trial David is removed from the courtroom when the girl testifies before the jury. This is **not a violation of due process** if David is 1) **able to see and hear** the girl's testimony and 2) **able to**

communicate with his defense counsel in a reasonable manner so that the witness can be adequately cross-examined.

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B. The Right to Discover and Confront Secret Informers

Criminal defendants have the right to compel the prosecution to **reveal the identity of secret informers** if they have **firsthand knowledge** concerning the crime charged. But informers without firsthand knowledge do not have to be revealed.

> **For Example:** Cathy watches "America's Most Wanted". She discovers her boyfriend Dwayne is a wanted bank robber. She calls the police and Dwayne is arrested. On trial for bank robbery Dwayne **cannot** compel the police to reveal that Cathy was the one who turned him in because she has no firsthand knowledge about the crime he is being tried for.

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C. The Right to Confront Hearsay Declarants

Hearsay is a major subject in **evidence classes** but it also is a subject in **criminal procedure classes**. Hearsay statements that are admissible under the rules of evidence were ruled inadmissible in criminal proceedings if they are **testimonial** in nature and the **declarant is not available** for cross-examination by the criminal defendant. *Crawford v. Washington* (2004) 541 U.S. 36. However, the Court in *Michigan v. Bryant,* USSC Feb.28, 2011, implies that only statements made during custodial interrogation are "testimonial" in nature so that statements made during emergencies and "dying declarations" can still be admitted at trial even if the declarant is unavailable.

> **For Example:** A recorded statement by Crawford's wife was admitted against him at trial after his wife refused to testify citing spousal privilege. The Court admitted the statement as an "inherently trustworthy" statement, but the Supreme Court held it was NOT ADMISSIBLE under criminal procedure rules because Crawford was not afforded **an opportunity to confront and cross-examine** his wife. [2] But a dying declaration by a shooting victim was admissible against Bryant because the Court held it was not "testimonial" in character.

3. No Forced Self-Incrimination

Even though the 6th Amendment gives a criminal defendant the right to compel witnesses to testify the 5th Amendment prohibits compelled self-incrimination. This is also a **fundamental right** extended to the States by the 14th Amendment. [3] So if the "witness" is also a criminal defendant, or if the witness is being compelled to testify in a manner that would constitute self-incrimination, there is a conflict between 5th and 6th Amendment rights.

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[2] *Crawford* did not clearly make dying declarations inadmissible and *Bryant* clearly seems to make them admissible
[3] The U.S. Supreme Court did not hold this to be a fundamental right until 1936 in *Brown v. Mississippi* and until then States were allowed to torture suspects into "confessing".

A. Right of Defendants to Not Testify

Criminal defendants have a right to decline to testify completely at all at their own trials. If a defendant declines to testify the prosecution and other defendants are barred from attempting to call the declining defendant to be a witness and they cannot even comment on the fact the defendant is declining to testify.

> **For Example:** Newman and Kramer are charged with murder. Newman claims he was an innocent bystander and Kramer alone committed the murder. If Kramer declines to testify Newman cannot call Kramer as a witness, compel him to testify or even comment on the fact that Kramer is not testifying. Newman's 6th Amendment right to compel Kramer to testify is in direct conflict with Kramer's 5th Amendment right to decline to testify.

Defendants can waive their right to decline to testify at their trial, and if they waive that right they become witnesses. And that allows all of the adverse parties (prosecution, co-defendants) to confront them in cross-examination.

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B. Right of Witnesses to Refuse to Testify

Witnesses have a right to refuse to answer questions that might lead to self-incrimination (i.e. "pleading the 5th Amendment"). This is true whether the witness is a defendant or not.

> **For Example:** Martha Steward sold her stock in a certain company after her broker told her the president of the corporation was "dumping" his holdings. Later federal investigators questioned her. She was afraid she might have violated SEC insider trading rules (it turned out she had not). She could have legally refused to answer their questions "on the grounds it may tend to incriminate her". She could also have refused to answer any questions "until she has a chance to talk to her attorney". And if she had truthfully answered their questions she would not have been in trouble either. Unfortunately she told them some things that were not true and that is what got her into trouble.

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C. Redacting Accusations from Confessions

When defendants confess to crimes their confessions often also accuse co-defendants of being involved. To the extent a defendant confesses to a crime that constitutes an admission that can always be used against them at trial. But accusations against other defendants are merely hearsay, which cannot be admitted at trial unless the defendant making the accusation is willing to testify, and that is almost never the case. Therefore, accusations by defendants against co-defendants generally have to be **redacted** (removed) to leave only the admissions of the defendant that confessed. This allows use of the confession against the defendant without violating the co-defendant's right to confront an adverse witness.

> **For Example:** Tom and Dick are arrested for robbery. Dick confesses, "Tom and I went to the store to rob it." Later Dick refuses to testify on 5th Amendment grounds. At a joint trial of Tom and Dick the prosecution offers into evidence Dick's statement, **with statements about Tom redacted** so that it says, "… I went to the store to rob it." This is **legal**

evidence because it is an admission by Dick that he acted with criminal intent to rob the store. The part of the statement that accused Tom of being an accomplice has been removed. Since the confession contains no testimony concerning Tom at all, his right to confront Dick as an adverse witness (i.e. a hearsay declarant) is not violated.

4. Granting Immunity to Compel Testimony

Witnesses may be compelled to testify if they have been granted immunity from prosecution for the statements they make. There are two types of immunity, **use immunity** and **transaction immunity**. If a witness has been granted immunity, nothing they say can "tend to incriminate them" and they no longer have a right to refuse to testify on those grounds.

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A. Use Immunity

A grant of use immunity means the testimony of a witness while acting under the grant cannot be used against them later in any manner, whatsoever. This is a rather common situation.

> **For Example:** Tom is subpoenaed to testify before the Grand Jury about a robbery he witnessed. He refuses to testify on the grounds his statements may incriminate him. So the District Attorney grants Tom **use immunity**. That means that nothing that Tom says to the Grand Jury can be admitted into evidence against him later as an admission. Tom confesses that at the time of the robbery he was so high on narcotics he could not remember what happened. His statement cannot be used against him later in any way.

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B. Transaction Immunity

A grant of **transaction** immunity is a much broader agreement than a grant of **use** immunity. **Transaction immunity** means a witness cannot be prosecuted, at all, for the transactions (crimes) they are asked to testify about. This is a far less common situation.

> **For Example:** Tom is subpoenaed to testify before the Grand Jury about the activities of a gang he belonged to. He refuses to testify on the grounds his statements may incriminate him. So the District Attorney grants Tom **transaction immunity**. That means that Tom can never be prosecuted for any crimes he reveals to the Grand Jury. Tom confesses that as a member of the gang he was required to kill certain people. Not only can his statements not be used against him later, he cannot even be prosecuted for the murders he reveals to the Grand Jury.

5. The Use of Separate Trials or Juries to Compel Testimony

Co-defendants that accuse each other of criminal acts can be tried in separate trials or in a joint trial with separate juries to allow each to testify against the other without waiving their own right to avoid self-incrimination. Statements made by each defendant before the other defendants' juries (or at the other defendants' trials) are granted use immunity.

> **For Example:** Mariya was mad at Dmitry because he had been saying things that questioned her chastity. So she lured Dmitry to a city park in the night. There Mariya's two associates Maksim and Gennadiy confronted Dmitry to "teach him a lesson". The lesson ended up being Maksim shooting Dmitry in the neck with a 12-guage shotgun. Everyone agreed on that. But Gennadiy claimed to just be an innocent bystander. Statements by Mariya and Maksim contradicted that. Mariya and Gennadiy blamed Maksim. Maksim claimed they were equally to blame and in on the plot all along. There were no other witnesses so at their joint trial for murder Mariya, Maksim and Gennadiy were each provided with a separate jury. That made it possible for the prosecution to call each defendant as a witness against the others under a grant of use immunity without compelling anyone to self-incriminate themselves because their own jury was removed from the courtroom. They all testified against each other and all were convicted of murder.

Chapter 7: Unreasonable Search and Seizure

Unreasonable search and seizure in violation of the 4th Amendment is one of the three most tested criminal law issue areas. The other two highly tested issue areas are the right to counsel and the *Miranda* warning which are explained in the following Chapters.

Amendment IV [adopted 1791]

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

The rights established by the 4th Amendment are **fundamental rights**, extended by the 14th Amendment to limit the States. The elements of the 4th Amendment that have been the main focus of judicial interpretation and application are:

- What are the requirements of a **valid warrant**?
- Was there a **search**?
- Was there a **reasonable expectation of privacy**?
- Did **exigent circumstances justify** a search or arrest without a warrant?
- Was a warrant required for **electronic surveillance**?
- Was the conduct of the search **unreasonable**?
- When and how should the Court fashion an **appropriate remedy**?

1. The Warrant Requirement

Although the text of the 4th Amendment does not expressly state that arrests and searches by police without "warrants" are always "unreasonable," the judicial interpretation is that searches without a warrant are generally unreasonable per se **absent exigent circumstances.** In contrast, arrests without a warrant are NOT generally unreasonable **unless the arrest is on private premises.** Where police enter **private premises** to make an arrest, and particularly when police enter a **private home** to make an arrest, a warrant is required **absent exigent circumstances**.

Conversely, arrests or searches with a warrant are deemed reasonable unless the **warrant was invalid** or the police **improperly execute** the warrant. Even where the warrant is invalid, the search may still be reasonable where the police properly execute the invalid warrant with a **good faith** belief the warrant is valid.

Therefore, the issue in every case where the police arrest or search without a warrant is whether their actions were **reasonable** because the **circumstances** justified their action.

And, in every case where police arrest or search with a warrant the issues are: 1) Was the warrant **invalid**? 2) Did the police **exceed the authority** the warrant gave them? And, 3) did the police **properly execute** an invalid warrant with a **good faith** belief the warrant was valid?

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A. The Limited Application of the Warrant Requirement to Arrests

Although the 4th Amendment applies to both **arrests** and **searches** as written, an arrest is far more likely to present the types of **exigent circumstances** that justify police action without stopping to wait for a warrant. If a police officer sees a crime in progress in a **public place**, he/she obviously does not have to wait around for a warrant before arresting the criminals.

In addition the practical implications of an improper arrest are far less important to defendants that the implications of an improper search because an **illegal arrest does not shield a defendant from prosecution**. It can have a serious effect on the admissibility of evidence against the defendant, and that will be explained later. But the implications otherwise can be unimportant.

An illegal arrest may give the defendant a cause of action for a **civil suit** against the police claiming "police brutality" or a similar allegation. And the Court may **exclude evidence** that results from an illegal arrest. But evidence that was not the result of police misconduct will not be excluded. If there was adequate evidence to arrest and convict the defendant anyway, the Court will find on appeal that the illegality of the arrest was "harmless error."

Although it is wrong to say police don't ever have to use arrest warrants, violation of this requirement often carries few consequences of importance.

> **For Example:** Craig the cop finds Victor in the street in front of Dan's house with Dan's knife in his chest. Victor says, "Dan stabbed me." Based on this evidence Craig kicks down Dan's door without a warrant and arrests Dan. Although it was illegal for Craig to kick in the door (absent exigent circumstances) the arrest itself will still be effective.

Where police **enter a private home** to arrest **without a warrant**, the Court will generally exclude evidence discovered there. But if the police had **probable cause** for the arrest any subsequent **confessions** will probably NOT be excluded even though the arrest itself was improper.

> **For Example:** Craig has probable cause showing that Dan killed Victor. He goes into Dan's house and arrests him without a warrant. Craig finds a bloody knife, and Dan spontaneously confesses. The Court will probably exclude the knife because the search was illegal. But the confession will be admitted because there was probable cause for the arrest.

An arrest warrant only allows police to enter the **home of the person to be arrested** unless there are **exigent circumstances.** A **search warrant** is required to enter the **home of a third party** to arrest a different person named in an arrest warrant.

> **For Example:** Craig the cop had a warrant for Dan' arrest. He learns Dan is staying at Bob's house. Without Bob's consent, Craig enters Bob's house to look for Dan. He sees some dope that belongs to Bob. This would be an **illegal search** because Craig did not have a search warrant to look for Dan in Bob's house.

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B. Application of the Warrant Requirement to Searches

The main importance of the 4th Amendment is that it requires a warrant before the police or other government agents can conduct a search and seize evidence. Unlike arrest warrants, the requirement for search warrants has a powerful and far-reaching impact on criminal procedure.

If police conduct any search or seize any evidence, with or without a warrant, the defendant may challenge the admission of the evidence produced by the search at trial by filing a **Motion to Suppress**. The merits of the motion will be considered at a **suppression hearing.**

If the police acted without a warrant, the prosecution will have the burden of proving at the **suppression hearing** that the search was conducted under **exigent circumstances** that made the search reasonable, despite the lack of a warrant.

If police conduct a search with a warrant, the defendant will have the burden of proving either that the **warrant was invalid** or that the police search **exceeded the scope** of the warrant. Where the defendant proves the warrant was invalid the prosecution may be able to salvage the situation by showing the warrant was **facially valid** and **properly executed** by the police acting in a **good faith** belief the warrant was valid.

Where a search and seizure of evidence is proven to have been **unreasonable** in violation of the 4th Amendment the Court has **discretion** to suppress the evidence under application of the **Exclusionary Rule** explained briefly earlier. This is a powerful tool for the defendant because the suppression of evidence frequently destroys the prosecution's ability to prove guilt beyond a reasonable doubt.

> **For Example:** With only a suspicion that Darren killed Victor, Craig goes into Darren's house without a warrant and finds him covered with blood. After being arrested Darren blurts out, "I killed Victor." The Court will exclude Craig's eyewitness testimony about seeing the blood because the evidence was the result of an **illegal search**. And the Court will also exclude Darren's confession because it was the direct result of Craig's entry of Darren's house 1) without a warrant, 2) without probable cause and 3) without exigent circumstances.

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C. Required Elements of a Valid Warrant

Warrants require these characteristics to be valid:

1) **Authorized, Neutral Magistrate.** The warrant must be issued by a **magistrate**;
   a) The magistrate must be **authorized by statute** to issue the warrant;
   b) The magistrate must be **competent**;
   c) The magistrate must be **neutral**;
2) **Sufficient Affidavit.** The magistrate must issue the warrant based on a **written, signed, truthful affidavit** submitted by the police;
3) **Showing of Probable Cause.** The affidavit must establish **probable cause**;
   a) That the person to be arrested **probably committed a crime**;
   b) That **evidence of a crime probably will be found** in the place to be searched;

4) **Particularity of Search.** Warrants must state the item or person sought with **particularity** and identify the Court issuing the warrant;
   a) Arrest warrants must state the **person or description** of the person to be arrested and the **crime** they are believed to have committed;
   b) Search warrants must state the **place** to be searched and the **evidence** to be seized.

1) The Magistrate

Authority. A warrant is not valid unless it is issued by a **magistrate** or "judicial officer" authorized by a **statute** to represent the authority of a Court or other judicial authority. The magistrate may be a judge, a court clerk, a justice of the peace or an attorney that reports to a court or similar official within the limits of the authorizing statute.

> **For Example:** Shaky was arrested for felony drug possession after his house was searched under a warrant issued by Norton, a notary public. Shaky can challenge the warrant on the grounds a "notary public" is not a judicial officer of any court.

Competence. The magistrate as an individual must be sufficiently educated and **competent** to understand the requirements of the law.

Neutrality. The purpose of the magistrate is to provide a **neutral determination** that probable cause has been shown. A magistrate is NOT neutral if 1) the magistrate reports to or represents the **law enforcement agency** (police department, prosecutor's office, attorney general, etc.) that is seeking the warrant or 2) the magistrate is compensated

> **For Example:** Alan's house was searched under a warrant issued by Bubba, a justice of the peace. Bubba gets paid $5 for every warrant he issues and nothing if he does not issue a warrant. Alan can challenge that Bubba is not a **neutral** magistrate because he has a financial incentive to find probable cause even if it does not exist.

> **For Example:** Purvis was arrested for possession of pornography after his video store was searched under a warrant issued by Bubba, the magistrate. But Bubba accompanied the executing officer to Purvis' store, participated in the search and told the police officers which materials to seize as "obscene". Purvis could challenge that the warrant is **invalid** because Bubba participated in the search and was not a **neutral** magistrate.

2) The Affidavit

The warrant is issued on the basis of an affidavit, a written, signed declaration by the law enforcement agency seeking the warrant that should truthfully recite, without exaggeration or embellishment, all of the **facts** that prove probable cause exists to justify issuance of the warrant.

When a warrant is challenged at a suppression hearing, the issue of whether the warrant was based on a showing of sufficient probable cause is **strictly decided** upon the evidence that was presented to the magistrate at the time. Specifically, the warrant cannot be defended at a suppression hearing by evidence that was **not known to the magistrate.** This might be evidence **discovered later** or evidence **known to police at the time but not conveyed** to the magistrate at the time.

Supplemental Oral Evidence to Establish Probable Cause. Federal jurisdictions are split on the issue of whether a warrant can be justified after-the-fact by **oral statements officers** made to the magistrate at the time the warrant was issued. The 9th Circuit has held that the affidavit supporting the warrant must be self-sufficient to prove probable cause. But, the 8th Circuit has held that **sworn oral statements by officer** made at the time the warrant was issued may be considered later to decide whether the warrant was issued based adequate probable cause.

Effect of Police Perjury. The affidavit supporting a warrant must contain sufficient truthful statements of fact by police to support a reasonable finding of probable cause. If a defendant can prove with a **preponderance of evidence** that portions of the police affidavit are **perjury** or the result of a **reckless disregard for the truth** by police, those portions of the affidavit will be redacted.

> **Reckless disregard for the truth** means the affiant **swore something was true** with **knowledge that they had no factual evidence** to support that belief, even if the belief was honestly held.

If portions of the affidavit are redacted (removed) the warrant will be invalid unless the remaining portions of the affidavit, alone, are sufficient to prove probable cause.

> **For Example:** Karl the cop knew Coker had a previous drug conviction. One day he saw Coker throw something in the bushes. Karl found a syringe and a cigarette butt in the bushes, and the syringe had traces of heroin. Karl got a warrant to search Coker's house by **truthfully** swearing 1) Coker had a previous drug conviction. He also said a reliable informer had told him 2) Coker was selling drugs. That was a **lie**. And he said 3) he saw Coker throw away the syringe. He **honestly believed** that was true, but he **knew he could not be sure** whether he saw Coker toss the syringe or the cigarette butt. Police found drugs in Coker's house. Coker can invalidate the warrant because the only true statement **of fact** by Karl was that Coker had a prior conviction. That alone is not probable cause.

The Franks Hearing. The procedure a defendant uses to challenge a warrant based on **police perjury** or a **reckless disregard for the truth** is to move for a hearing. It is called a "Franks hearing" after the 1978 case, *Franks v. Delaware*. Defendant's motion for a hearing must make a **substantial preliminary showing** that the warrant was the product of false police statements. Mere **inaccuracies** or **negligence in determining facts** are not enough. If the police reasonably and honestly believed the facts falsely stated in the affidavit the warrant will be held to be valid, even if the false statements were the result of negligent police investigation.

After obtaining a hearing with a **substantial showing** that there was police perjury, the defendant must prove perjury by a **preponderance** of the evidence. This means the judge at the hearing must be more than 50 percent convinced that there was police perjury or reckless disregard.

> **For Example:** Karl the cop got a warrant to search Coker's apartment for drugs. But he accidentally misstated the apartment number giving the number for Tweaker's apartment instead of Coker's. When Tweaker's apartment was searched police found child pornography. Tweaker's motion for a Franks hearing would be denied because the incorrect statement by Karl was the result of simple negligence and not an intentional or reckless act.

3) The Establishment of Probable Cause

A warrant must be based on proof of **probable cause**. Probable cause is also necessary for searches or arrests without warrants because of exigent circumstances. Those will be explained further later.

Regulatory Exception – Less Than Probable Cause. There is an unusual exception when a search warrant can be issued on less than probable cause. That is when the warrant is sought to search for regulatory violations such as a municipal or fire inspection. In cases where a suspect refuses to consent to an inspection a warrant is needed to enter the premises, but it can be issued based on a showing that inspection of the place to be searched is **authorized by statute and reasonably required.**

> **For Example:** Fred the fire marshal goes to Jones' apartment building to do a fire inspection. Jones refuses to let him enter. Fred can get a search warrant without evidence that evidence of a crime will probably be found inside the building.

Likelihood. Probable cause for a warrant means that the magistrate must be given evidence sufficient to reasonably show that a proposed arrest or search is **justified, more likely than not**. Probable cause is slightly different between search warrants and arrest warrants.

- Probable cause for a **search warrant** means substantial, reliable evidence that the things sought are **more likely than not** 1) **evidence of a crime** AND 2) **they will be found at the place** to be searched.
- Probable cause for an **arrest or arrest warrant** means substantial, reliable evidence that **more likely than not** 1) **a crime has been committed** AND 2) **the person to be arrested committed it**.

Evidence Supporting Probable Cause. A magistrate can consider almost any evidence in finding probable cause for a warrant, even if it would not be admissible at trial under the statutory rules of evidence.

The affidavit for a warrant may cite **hearsay** statements, repeated statements that may be of questionable reliability. It may also cite the suspect's **reputation in the community**. And it may include statements by other police officers reflecting the **collective knowledge** of the police about the suspect accumulated from various unrelated incidents in the past. **Past convictions** and **arrests** of the suspect that did not result in conviction can be considered. Tips from **anonymous informants** can be considered. And acts by the suspect, such as **sudden flight** from the area after crimes are committed or **suspicious behavior** and **nervousness** can be considered.

Sufficiency of Evidence. Under the **Totality of the Circumstances Test**, the evidence must only be **sufficient in its totality** to show probable cause exists, even if individual items of evidence are of highly questionable reliability.

For a **search warrant** the evidence presented to the magistrate must be reasonably convincing that **more likely than not** the search will **reveal the evidence** of the alleged crime in the place to be searched. For an **arrest warrant** the evidence presented to the magistrate must be reasonably convincing that **more likely than not** a **crime was committed** and the **defendant did it**.

How "likely" is likely enough? While there is no strict mathematical rule, "more likely than not" means the probability must equal or exceed fifty percent.

Dragnets. Searches where the police "round up the usual suspects" and conduct mass arrests or order searches of numerous locations are **illegal** searches and seizures because there is obviously no evidence to show that any one suspect or place searched "probably" is the correct suspect or place to search. Any evidence that is developed from such practices will generally be suppressed.

> **For Example:** Daisy reported she was raped by a guy that walked, quacked and looked a lot like a…well a lot like a duck. Drake the prosecutor knew there were only three suspects matching that description in their little neck of the pond, Huey, Louie and Dewey. So Drake got three arrest warrants, one for each of them. After they were arrested the DNA of each was collected, and Huey was a perfect match. But Huey could challenge the warrant and prevail, because the magistrate could not have believed he was **more likely than not** the rapist at the time the warrant was issued because there were two other **equally likely** suspects. Although Huey could be re-arrested based on <u>other</u> evidence, the DNA evidence would be tainted and permanently suppressed in the general case.

Allegations Must be Specific. The affidavit submitted to get a warrant must state with "particularity" the **facts that support a finding of probable cause** and facts that show the affiant has **personal knowledge**.

The **places to be searched** and the **persons and things that are to be seized** must always be stated with particularity in **both the affidavit and the warrant** that results.

This requirement prohibits police from going on **"fishing trips"** where they rummage through the suspect's home or papers searching for any evidence they can find to "pin a charge" on the suspect.

> **For Example:** Conan the cop requests a warrant to search Coker's house based on an affidavit that only states, "I have knowlege Coker has been selling drugs. If we search his house we will find evidence." Absent any other statement of facts this warrant would be invalid because the affidavit does not state **how** Conan got the "knowledge" he claims to have or **why** it is likely drugs would be found in the house.

The Evidence Must be Fresh. The evidence presented in an affidavit requesting a <u>search</u> warrant must be recent enough for the magistrate to reasonably conclude that it is likely evidence of the purported crime will still be found at the place to be searched. This is NOT an issue with respect to <u>arrest</u> warrants because in that case it does not matter how old the evidence is.

If a warrant is issued based only on "stale" evidence, the magistrate could not have reasonably concluded there was probable cause to search the location at the time the warrant is issued. If probable cause was not proven, the warrant is not valid.

Whether evidence is "fresh" or "stale" depends on the type of crime alleged and the surrounding circumstances.

> **For Example:** Sid the snitch tells Conan the cop, "I bought dope at Tweaker's house last month." Conan seeks a warrant to search Tweaker's house. Absent other evidence, it is

unlikely Tweaker has drugs in his house **now** simply because he had drugs there a month earlier. Therefore, this evidence is **stale** and the warrant should be DENIED.

For Example: Sid the snitch tells Conan the cop, "I saw Gomez bury Victor's body in his back yard three years ago." Conan seeks a warrant to search Gomez's yard. Without any other evidence, it is still likely Gomez has Victor's body in his backyard because he probably did not move it after he first buried it. Therefore, this evidence is **not stale** and the warrant should be ISSUED (assuming Sid is a proven, reliable informer).

For Example: Sid the snitch tells Conan the cop, "I have bought dope at Coker's house seven times in the past two years, and the last time was just last month." Conan seeks a warrant to search Coker's house for drugs. Based on this evidence (assuming Sid is a proven, reliable informer) the warrant should be ISSUED because this evidence indicates there is an **ongoing pattern of criminal behavior** sufficient that one would reasonably conclude a search will find drugs.

Informers must be Knowledgeable, Reliable, Sufficient. The previous examples illustrate that police may seek warrants based on information from **informers**. In these cases there are strict court-fashioned rules that warrants may not be issued unless there is enough evidence to support a finding of probable cause.

For Example: Craig the cop seeks a warrant to search James' house with an affidavit that says, "An anonymous caller told me James has drugs in his house." This warrant should be DENIED because there is no reason to believe this "anonymous" person knows what he/she is talking about or that that Craig even got such a telephone call.

Some "informants" are naturally regarded as being more reliable than others, even if the information is of the same nature.

- If the "informant" is an **undercover police officer** or other police officer the Court affords the information the highest level of reliability.
- Information from a **private citizen or victim** is also afforded high reliability.
- Information from a **criminal source** is given less credibility.
- And an **anonymous** tip is given the least credibility.
- Some Courts have held that a **private citizen** whose **identity is concealed** by police should be afforded somewhat less credibility because the informant cannot be questioned at a suppression hearing and police perjury is a greater risk.

Totality of the Circumstances Rule for Informers. Whether an informer's tip is sufficient to establish probable cause depends on the **totality of the circumstances**. Evidence that is developed by police following a tip from an informant can validate the tip's reliability.

Some situations where an informer's tip is **probably sufficient** to show probable cause are:

- The informer 1) is **known**, 2) has been **reliable before** and 3) gives detailed facts that indicate **first-hand knowledge**.
- The informer gives 1) detailed facts that indicate **first-hand knowledge** and those statements are 2) **corroborated** by one or more independent sources.

- The informer gives 1) detailed facts that indicate **first-hand knowledge**, 2) successfully **predicts** the suspects future actions, and 3) the suspects' actions are **suspicious and consistent** with the crime alleged.
- The informer gives 1) a tip of **questionable reliability**, but 2) subsequent police investigation reveals **highly suspicious activities** by the suspects that are **consistent** with the crime alleged by the informer.

  For Example: An anonymous informant called officer Otto and said, "Allan has drugs in his house." Otto then determined that Allan had a **prior conviction** for drug sales and **lived beyond his means** because he drove a fancy new car, wore expensive jewelry, and carried large amounts of cash even though he was unemployed. Further, Otto watched Allan and saw him make **suspicious trips** that suggested drug activity. Based on this highly **corroborating evidence** the informer's tip may be sufficient for a search warrant.

Situations where an informant's tip is **probably NOT sufficient** to show probable cause:

- The informer is **anonymous** and there is **no corroboration**.
- The informer is **known to be unreliable**.
- The informer correctly predicts the suspect's future actions, but those actions are consistent with **innocent activities** rather than the crime alleged.
- The informer is a **police officer** whose "tip" is not based on probable cause. Otherwise a police officer could "bootstrap" a warrant by giving a second, unsuspecting officer a "tip" that has no factual support.

  For Example: A store is robbed, and officer Oscar has a "gut feeling" Dan did it. Oscar distributes a "wanted" poster bearing Dan's picture. Craig the cop gets a warrant for Dan's arrest on that basis alone. This warrant would be **invalid** because it was totally unsupported by any factual evidence.

  For Example: An anonymous informant calls Craig the cop and says, "Dick is a drug dealer and he is going to Florida next week in a blue car to get drugs." Craig watches Dick. Dick does drive to Florida the next week in his blue car. But his movements are consistent with a vacation trip. Craig seeks a warrant to search Dick's car and house. This warrant should be DENIED because any person that knows Dick was going to Florida for a vacation could give the same information.

Concealing the Identity of the Informer. The identity of a confidential police informer is **privileged information** that the police cannot be forced to reveal. At a suppression hearing the police do not have to produce or identify the informant, and the prosecution only has to 1) **reveal the information given** by the informant, 2) show the police **accurately related** that information to the magistrate, 3) that the information **convinced** the magistrate that probable cause existed, and 4) that the magistrate was **reasonable** in reaching that conclusion.

Standard of Appellate Review. A **suppression hearing** in a warrant situation is a form of appellate review that reviews whether the magistrate had enough evidence to issue the warrant.

On review **findings of fact** will be reversed only if they are **"clearly erroneous"**. But **legal conclusions** are subject to **"review de novo"**. A magistrate's finding that there is probable cause for a warrant is a **mixed decision of both law and fact** because.

Therefore, the judge at a suppression hearing must usually accept the magistrate's determinations of fact as true and then decide "from scratch" whether, given those facts, the magistrate applied the correct legal standards.

4) Sufficient Particularity

The affidavit used to request a warrant, and the warrant that results, must describe with particularity the places to be searched and the persons and things to be seized. The rule is that,

> **A warrant must be specific enough that any police officer executing it would know where to search and what to seize, even if he/she had no other knowledge of the case.**

Particularity of the Place to be Searched. A mistake or ambiguity regarding the **address** to be searched does NOT invalidate the warrant if police can 1) determine the correct place to search with **reasonable effort** and 2) it is **not likely** the wrong place would be searched.

A warrant for rural locations will necessarily be less specific than urban locations.

> **For Example:** A warrant is issued to search the "ABC Store located at 123 Main Street." In fact, the ABC store is on the corner of Main and Broadway, and although the store faces Main Street the mailing address is actually 123 Broadway. Police go to the store and search it. This warrant would be **valid** because the error in the warrant was not sufficient to prevent the police from finding the place intended to be searched.
>
> **For Example:** Police get a warrant to search Bob's apartment on the second floor at 123 Short Street. After searching the second floor apartment and finding drugs the police discover that the second floor is actually divided into two apartments, and they have searched the wrong one. This warrant would be **valid** because it described the location to be searched with as much particularity as the police **possessed** and had a **duty to determine**. Further the search itself was **not unreasonable** because the police could not tell that the warrant was ambiguous.
>
> **For Example:** Police get a warrant to search the apartment described as, "Apartment 2, LOVEPAD written on the door" at a particular street address. When they execute the warrant they find that the apartment with 'LOVEPAD' written on the door is Apartment 3. They search the correct apartment and find drugs. This warrant would be **valid** because the word 'LOVEPAD' uniquely identified the correct apartment to search.

Particularity of the Things to be seized. A warrant must state with particularity the things that are to be searched for and seized. Under the modern view a warrant is sufficient if it **as specific as the police can reasonably make it** given the circumstances. Factors to be considered are:

- Did the police do their **reasonable best to describe** the property sought?
- Is the property sought **difficult to describe with precision**?
- Did the police **fail to reveal** information the executing officer needed to know?
- Was the executing officer **reasonably able to identify** the property to be seized?
- The description of property to be seized does not have to be very exact if it is **contraband** because the executing officer will recognize it when it is found.

- The description should be more precise if the **property to be seized has lawful uses.**
- The description must be more exact if **other similar property** is at the same location.
- The description must be more exact if **there are 1st Amendment threats or serious consequences** would result from seizure of the wrong property.

  For Example: Police get a warrant to search Joe's home for a stolen "pallet containing 90-pound bags of Portland cement". The executing officer finds a pallet with 90-pound cement bags with a blue label in Joe's garage. This warrant would be **valid**, even if the police failed to say the cement bags had a blue label because it was highly unlikely Joe would have any pallets of cement in his home besides the stolen goods sought.

  For Example: Police have a detailed list of stolen jewelry. But they get a warrant to search Joe's home for "jewelry" without listing the exact pieces sought. Police seize all of Joe's jewelry. Some of it turns out to have been stolen elsewhere. The warrant is **invalid** because the police had **"a detailed list"** of stolen items and did not use it.

  For Example: Police get a warrant to search Henry's adult bookstore for pornography. The warrant describes the property sought as "obscene video tapes." The executing officer simply seizes all of the videotapes that are rated "X". The warrant is **invalid** because 1st Amendment rights are at risk, and the description of the property to be seized must be sufficient for the executing officer to identify the tapes that are "obscene".

Particularity of the People to be Arrested. An arrest warrant must reasonably identify the person to be arrested by name, description or other identifying characteristic such that the executing officer can determine the right person to arrest. The requirement of a particular description is not as strict as with a search warrant. But there are unusual situations.

For Example: Police get a warrant to arrest "Mr. Wong who works in a laundry somewhere on Stockton Street." This warrant is **invalid** if there are more than one person named Wong working in laundries on that street. The executing officer would have no way of knowing whether the right Wong was being arrested.

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D. The Exceptions to the Warrant Requirement

Police generally need a search warrant to get evidence and evidence to prove probable cause for the warrant. This is a "Catch 22" situation. The solution is that the initial evidence to prove probable cause must be obtained by means that don't require a warrant. The Courts have held that police may legally discover evidence without a warrant in many situations. These situations are generally called **"exceptions"** to the 4th Amendment warrant requirement.

There are three distinct situations where police can legally discover evidence without a warrant:

1) **Plain View.** In these situations no warrant was needed to discover the evidence in dispute because it was 1) **merely observed** in **plain view** by police that 2) had a **right to be where they were**. This situation is generally considered to be an "exception" to the warrant requirement but actually there is **no search at all** so it is not really an "exception".

2) **No expectation of privacy.** In these situations the police conduct an actual search in a place where the defendant **had no reasonable expectation of privacy.** This would be because either 1) the place searched **belonged to a different person** so the defendant has **no standing to object** or 2) the place searched was **remote** and **subject to observation, trespass or discovery** by strangers.

3) **Exigent circumstances.** In these situations **exigent circumstances justify** the police search without waiting for a warrant. The Courts have particularly recognized and created special rules of analysis for the following situations:
   a) Protection of **victims** and **evidence**.
   b) Search of **automobiles**.
   c) Protection of **police** – the "Terry" stop.
   d) Protection of **police** – the **protective sweep**.
   e) Search **incident to lawful arrest**.
   f) Search **incident to execution of a warrant**.
   g) **Border** searches.
   h) Search in **hot pursuit**.
   i) **School** searches.

These exceptions often overlap and they will be explained below.

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E. The Fruit of the Poisonous Tree

It is critical to determine whether the **initial evidence** police used to get a search warrant was legally obtained because if it is **illegal evidence** it "taints" all of the evidence subsequently discovered under the **Fruit of the Poisonous Tree Doctrine**. In that case the Court has discretion to suppress all of the evidence obtained, and that would destroy the prosecution's case.

Generally, as soon as police invade the sanctity of a home in an illegal manner it will taint any evidence that results thereafter.

> **For Example:** Craig the cop goes into Bob's yard and peeks into the windows. He sees marijuana. Based on this discovery he gets a search warrant and finds Victor's corpse in Bob's basement. Bob can suppress ALL of the evidence because Craig's initial observation of the marijuana resulted from a **trespass** that constituted an illegal search. The subsequent discovery of Victor's corpse was the **tainted with illegality** under the **fruit of the poisonous tree doctrine.**

But if the police legally discover the initial evidence needed to get a search warrant, the evidence discovered when executing the warrant is not tainted.

2. Was The Initial Evidence Found Without a Search?

If the police obtain their initial evidence to prove probable cause without a search, then the evidence is legal. Generally there **is not a search** when police discover evidence in **plain view** by 1) use of **common means** at 2) a place they have a **right to be**.

> **For Example:** Craig the cop is sitting in the Krispy Kreme doughnut shop when he sees Coker sell Dopey a baggie of grass. **No search** was used to discover this evidence because the contraband was observed in **plain view** in a public place the police had a right to be.

A "search" is some police action that involves 1) a **physical trespass** or 2) an **intrusion** or 3) some **intrusive technique** that violates reasonable expectations of privacy. However, your professor may view the "plain view" doctrine as an "exception" to the 4th Amendment. If so humor that view.

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A. Lawful Access to the Place of Discovery

Police have a **right to be** at anyplace they can access without committing a trespass. This may be 1) **public property**, 2) private property with **consent**, 3) private property under a **valid warrant** or 4) private property due to **exigent circumstances** that justify entry. In that event there is nothing "unreasonable" about their being where they are and nothing they observe at the time can be the result of an "unreasonable search".

> **For Example:** Craig the cop sees marijuana in Dopey's yard from the **public sidewalk**. This is **no search** because the contraband was observed from a place of public access.
>
> **For Example:** Craig sees marijuana in Dopey's house after Dopey **consents** to let him enter. This is **no search** because Craig did not commit a trespass to enter the dwelling.
>
> **For Example:** Craig sees marijuana in Dopey's house when he enters with a **valid warrant** to arrest Dopey. This would be **no search** because Craig was in the house legally.

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B. Discovery by Common Means

For evidence to be the result of **no search** the police must find it by **common means.** This means the police can **see, hear** or **smell** the evidence without using **exotic mechanical devices**. The following are **common means** of observation support a **no search** finding:

- Simple **vision**, **smelling** or **listening;**
- **Reports** from private citizens;
- Use of a **flashlight** or **spotlight**;
- Observing with **binoculars** or **telescope**;
- Observing from an **airplane** or **helicopter**;
- Using **radar** to track the movement of airplanes;
- Using **"beeper"** devices to track the movement of automobiles;
- Having a **dog** "sniff" luggage or people;

The following means of discovery would be deemed a **search:**

- **Touching, squeezing** or **patting down** suspects or their baggage without other justification;
- **Hidden microphones** ("bugs");
- **Parabolic** and **"shotgun" microphones**;
- **Hidden cameras**;
- Devices to "see" through walls;
- Devices to sense heat emissions;
- Devices to "see" in the dark;

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C. Specific Situation Rules

Certain "no search" exception concepts are characterized by specific names and rules.

1) Plain View

Police have a not conducted a search if evidence is seen in "plain view" by the police through **mere observation** from a vantage point where they **had a right to be**, even if the police went to great effort to get to the vantage point with an intention of observing the evidence.

Police **may seize** evidence observed in plain view without a warrant if it is **clearly incriminating** and police have **lawful access** to the place where the evidence is.

The plain view doctrine extends to evidence **heard** or **smelled** by the police. But it does NOT extend to evidence police discover by **touching, squeezing, opening** or **manipulating** the property or person of the defendant. And, police **cannot open a container** to determine if criminal evidence is inside it simply because the outside of the container is in "plain view."

There is **no search** and no warrant is needed when police enter a farm or factory (with consent of the owner) and simply ask workers, "Where are you from?"

Police may go to the vantage point **seeking evidence** or they may discover the evidence inadvertently. Police may go to **great lengths** to observe the evidence. And police may **use deceptions** to obtain consent to enter the place where the evidence is observed.

However, evidence is NOT in plain view if **containers are opened** or objects **lifted, turned** or **moved in any manner** in order to **first discover** the evidence.

> **For Example:** Leroy is riding a bus. Craig the cop enters the bus (with bus company consent) and sees marijuana leaking out of Leroy's bag in the bin above the seats. He then squeezes and sniffs the bags to determine which bag leaked the marijuana. He arrests Leroy. Craig's **initial discovery** that a bag had leaked marijuana was NOT a search because the marijuana was in **plain view** since he 1) had a **right to be** in the bus and 2) used **common means** to observe the evidence. His subsequent search was justified by the **exigent circumstance** that the bus would drive away with the evidence if he waited for a

warrant. He could **immediately seize** the evidence because 1) it was **obviously incriminating** and 2) he had **lawful access** to the place where it was.

For Example: George is on the bus and Craig the cop starts touching, squeezing and shaking all the bags in the bin above the seats. This is an **illegal search** because the "touching, squeezing and shaking" **exceeds mere observation** and constitutes a search.

For Example: Craig goes to Jones' door on a **false pretext**. Jones lets Craig into his apartment. Craig smells marijuana, leaves and gets a search warrant. Craig's initial smelling of the marijuana was NOT a search because he entered the dwelling with consent and smelled it in **plain view**. The fact he used a pretext to enter is irrelevant.

For Example: Smith invites Craig in his house. Craig pulls out the drawer of the coffee table and finds marijuana. This is an **illegal search** because he **opened a container** without any **exigent circumstance** to discover contraband without a warrant.

For Example: Craig gets into Bevis' house by posing as a political activist seeking to legalize marijuana. Bevis offers him a joint. Craig seizes the joint as evidence. This would be **plain view** evidence because Craig had consent to enter, and he could seize the evidence because it was **clearly incriminating** and he had **lawful access** to it.

2) Open Fields

The **Open Fields** doctrine is that anything left in the "open fields" where police can see it from a lawful **vantage point** or from an **airplane** or **helicopter** operated in a **lawful and reasonable manner** is in **plain view**.

For Example: Jones is growing marijuana in his back yard inside a tall fence. Craig the cop enters the yard next door with the owner's consent and climbs a tree to see over the fence. This is NOT a search Craig sees the evidence from a place he has a right to be.

For Example: Smith is growing marijuana in his back yard inside a tall fence. Craig hires a helicopter to fly over Smith's house at a low but legal altitude. This is NOT a search because the evidence is seen through **mere observation** in a lawful manner.

3) Sniffing Dogs

Having a dog sniff a person or package for contraband is **not a search** because the animal is merely observing odors in **plain view**.

4) Consensual Entries

If police see evidence after entering private property with **actual consent** of the **occupant** or an **authorized agent** of the occupant, then the **plain view** exception will apply. The consent is limited to the scope agreed to by the occupant or agent, and it is only valid for a reasonable period of time. Consent must be **actual** but it does NOT have to be **fully informed** consent.

> **For Example:** Craig the cop knocks on Bob's door. When Bob opens the door Craig sees contraband behind him in the apartment. This is not a search because the evidence was in **plain view**. There is **implied consent** for Craig to approach and knock at the door.
>
> **For Example:** Craig knocks on Bob's door dressed shabbily and says, "Hey man, I heard I could score some good weed here." Bob asks, "You a cop?" Craig says, "No, I'm not a cop." So Bob lets Craig in and Craig sees some marijuana. This is a **legal search** because Bob **actually consented** to Craig's entry. It is **no defense** for Bob to say, "My consent was invalid because I was not fully informed."

Consent procured by police threat is invalid. There is no actual consent if the consent is coerced by police threats that 1) they have a **warrant that they don't have** or 2) that they can **get warrants they can't get.** But consent is effective if given in response to a police warning they will get a warrant that they really could get.

Authority to consent. If a person that consents to an entry or search by police is NOT authorized to give consent, the police entry will not be unreasonable if the police acted on a **reasonable, good faith belief** that their entry of the property was properly authorized by a person with **joint control** over the property.

But if the police observe evidence from a vantage point where they know or should have known their presence was **non-consensual** because the person giving consent was not authorized to do so then their observation of evidence is the result of an **illegal search.**

> **For Example:** Craig the cop knocks on Bob's door. Jim opens the door. Craig asks to come in, and Jim says "Sure, I'm just the cable guy." This is an **illegal search** because Craig knows Jim is not authorized to consent to a search.

Authority of Spouses and Co-tenants to Consent to Entry. Generally a person is an agent authorized to consent to a search of **only** the portions of a dwelling to which that person has been given **unrestricted access and control**. Some cases have held that a spouse or co-tenant of the defendant cannot consent to a search if **motivated out of anger** against the defendant.

> **For Example:** Craig knocks on Tom's door and Dick, Tom's roommate, opens it. Dick consents to a search of the kitchen, which he shares with Tom, and Tom's private bedroom. The search of the kitchen is a **legal search** because Dick **shares** that part of the dwelling with Tom. But the search of Tom's room is an **illegal search** because Dick has no apparent authority to consent to a search of that room.
>
> **For Example:** Tom dumps his lover Dick and runs off with Harry. Dick angrily tells the police Tom has dope in the apartment and consents to a search. Dick's consent would be invalid **in one view** because he is motivated by anger.

Authority of Landlords, Hotels and Schools to Consent. The 4th Amendment particularly protects the place where a person **resides,** even if only temporarily. Landlords, hotel managers and school administrators are NOT authorized to consent to the search of the rooms of tenants, guests and students. But they can consent to a search of common areas.

> **For Example:** Donald stays at Notell Hotel. Mort the manager reports that his maid saw drugs in Donald's room, and he lets police into the room. This is an **illegal search** because a hotel manager does not have the authority to consent to a search of a guest's room.

Authority of Bailees to Consent. A bailee given possession of property by a defendant may have the authority to consent to a search. The extent of the authority depends on **whether the defendant has a reasonable expectation of privacy** under the circumstances. The bailee may have authority to consent to search of a **storage locker,** but not to containers within the locker.

> **For Example:** Tom rents a storage locker. He lets Dick leave a suitcase there for a long time. Tom has the only key. Tom lets Craig the cop search Dick's suitcase. This is a **legal search** if Dick had no reasonable expectation of privacy.

Authority of Parents and Children to Consent. Parents can consent to the search of children's rooms within their home. Children cannot consent to the search of any part of a parent's home. But teenagers and older children can consent to let police enter the common areas of the home.

> **For Example:** Buddy is a minor living with his mother, Edith. Craig asks Edith if he can search Buddy's room. Edith consents. This is a **legal search** because a parent has authority to consent to the search of a child's room.

> **For Example:** Buddy is a minor living with his mother, Edith. Craig asks Buddy if he can come into the house and search the house. Buddy consents. This is an **illegal search** because a minor child never has authority to consent to a search of the parent's house.

5) Consensual Searches of Businesses and Goods for Sale

If police view evidence with **consent** then the evidence is discovered with **no search.** And there is an **implied consent** that police officers may enter the same areas of a retail business that is open to the general public. But police cannot search beyond the scope of implied consent simply because goods are for sale.

> **For Example:** Craig the cop entered Purvis' adult bookstore to look for illegal pornography. He saw a magazine called "Boy Toys" that he believed to be illegal child pornography because of the suggestive photographs on its cover. Removing the magazine from its sealed, clear plastic cover Craig confirmed that the inner pages of the publication did contain child pornography. This was an **illegal search** because by opening the "sealed, clear plastic cover" Craig opened a "container" to view evidence that was NOT otherwise in plain view for the general public. There was no implied consent for Craig to open sealed merchandise to look for evidence. Craig could have just bought the magazine. Then it would be his own property and he could search it at will.

Authority of Employers and Employees to Consent. Employees and employers are both authorized to give express consent to a search in certain circumstances. An **employer** can consent to a search of **work-related items** in an employee's work area. A **government agency employer** can consent to a search of a government employee's office as long as the search is **work-related.** And an **employee** can consent to a search of areas or items over which the employee has been given **authority and control**.

For Example: Snort is the clerk at Purvis' adult bookstore. Craig the cop, suspecting that the magazine "Boy Toys" is illegal child pornography, asks Snort if he can remove the magazine from its protective cover so he can "see what he's buying." Snort consents. This is **no search** because Snort is authorized to consent to Craig's **opening of the container** and viewing the contents of the magazine.

For Example: Snort is the clerk at Purvis' adult bookstore. Craig the cop, suspecting that Snort has drugs at the store asks Purvis for permission to look in Snort's backpack. This is an **illegal search** because Purvis has no authority to consent to a search of Snort's personal belongings, even if they are on store premises.

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D. Evidence in Plain View can be Seized if there is Legal Access to It

Evidence discovered in **plain view** can be seized immediately without a warrant if it is **clearly incriminating** and police have **legal access** to it. Otherwise a search warrant must be obtained based on **probable cause** in order to seize the evidence. **Exigent circumstances** may justify a seizure without a warrant even if police do not have legal access.

In some circumstances, such as the **automobile exception** explained below, the discovery of evidence in plain view may justify a much more thorough search without a warrant. This is because the mobility posed by autos is an **exigent circumstance**.

For Example: Craig the cop sees marijuana growing in Purvis' house from the sidewalk. When Purvis opens the door he seizes the evidence. This is an **illegal seizure** because Craig has no warrant and no exception applies, so he **lacked lawful access** to the dope.

For Example: Craig stops Purvis for speeding. Smelling marijuana, he searches the entire car and finds dope. Until recently this was considered to be a **legal search** because Craig **properly stopped** the car and smelled an illegal substance. But based on recent decisions it would appear Craig would have to have sufficient **probable cause** for an arrest before he was authorized to search the car for evidence to support the charge.

3. The Lack of Reasonable Expectation of Privacy

It is often said that there is an exception to the 4th Amendment warrant requirement when the defendant had **"no reasonable expectation of privacy."** This catch phrase actually refers to two very different legal concepts. They are both claimed as "exceptions" to the warrant requirement of the 4th Amendment, and often they are muddled together.

The first concept referred to as "lack of reasonable expectation" is that a defendant **lacks standing** to object to an illegal search of some third party's property. This is not an exception as much as a bar to raising the claim of illegal search as a defense tactic.

The second, different concept referred to as "lack of reasonable expectation" is that a defendant has **suffered no injury and cannot object** if police only search places where that defendant never expected privacy anyway. This is a true exception to the warrant requirement.

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A. The Lack of Standing Concept

The rights established by the 4th Amendment are **personal** to the individual. An individual generally has **no standing to object** to the violation of some other person's rights. So, if police acquire evidence by violating some other person's rights, the defendant cannot object that his/her **own** rights were violated at all because there is a **lack of standing** to claim any injury.

> **For Example:** Craig the cop entered Bob's house illegally and seized a gun that turns out to have been stolen. Bob reveals he is just holding the gun for Jim. At Jim's trial for possession of stolen property he has **no standing** to object that the gun was evidence seized illegally at Bob's house because he had **no reasonable expectation of privacy** at someone else's residence. This is an **illegal seizure,** but Jim lacks standing to object to the admission of the gun into evidence.

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B. The Lack of Injury Concept

The second concept called "lack of reasonable privacy" is the idea that a defendant has **suffered no injury** from an "unreasonable" police search if the search is in a place or situation where the defendant didn't have any reasonable expectation of privacy anyway. This argument is based on the view the 4th Amendment is intended to protect individuals from **injury** from unreasonable government intrusion.

Prior to *Katz v. U.S.* in 1967 the 4th Amendment was seen as a protection of certain **specific places** more than people. In *Katz* the government put an eavesdropping device in a public telephone booth without a warrant to record evidence of gambling activity. The Supreme Court held that the 4th Amendment protects individuals wherever they have a **reasonable expectation of privacy** regardless of the place where the injury occurred.

Under this view a search warrant is not necessary when police search in a place or manner that **does not pose any injury to the defendant** because there is **no violation of the defendant's reasonable expectations of privacy**.

1) Extensive Application

This "exception" to the warrant requirement has been so broadly applied that it presents a case where **the exception swallows the rule** and discussion of "Whether there was a reasonable expectation of privacy?" is now *de rigueur* on all law school exam questions that raise the issue of search without a warrant.

Whether there is a **reasonable expectation of privacy** depends on the **totality of the circumstances** and cannot be determined merely by whether or not a **trespass** is involved. A person certainly has a reasonable expectation of privacy in the **home** and the **curtilage**, the yard and structures in close proximity, around the home. But a person also has a reasonable expectation that the government will not eavesdrop on their conversations and activities in other places from great distances by use of extraordinary means unless they get a warrant.

2) Remote or Open Locations

Where the police search in a place **far removed** from the defendant's home, in **open areas** and **rough structures** where the defendant has left **evidence exposed** and **subject to the passing view** of trespassers, the defendant has no reasonable expectation of privacy anyway. In such a case the defendant has suffered **no personal injury** from the search because the police have not deprived the defendant of any privacy. The search is therefore **not unreasonable**.

3) Application to Jail Cells, Probationers and Parolees

Police may conduct searches of jail cells and convicts on probation and parole without a warrant because there is no reasonable expectation of privacy in such places. Further, jail cells and rooms may be "bugged" to overhear prisoner conversations for the same reason.

> **For Example:** Snitch's jail cell is searched without a warrant and dope is found. This would be a **legal search** because Snitch had **no reasonable expectation of privacy** in jail.

4) Application to Private Citizen Discovery

Where **a private citizen trespasses, discovers and reports** evidence to the police, the defendant often has less "expectation of privacy." This would never justify a police intrusion into a private home, but it may justify police responding without a warrant to confirm a citizen's report.

> **For Example:** Hunter is walking across remote desert land owned by Hannibal. He sees a skull sticking out of the ground. He tells the police and police soon unearth a complete skeleton identified as that of Victor. Hannibal is charged with killing Victor. Hannibal objects that the search was illegal without a warrant. But this would be held to be a **legal search** because Hannibal **had no reasonable expectation of privacy** at this location far out in the desert where the skull was there for any passers-by to see.
>
> **For Example:** Hunter reports that he saw dope in Hannibal's house. The police enter Hannibal's house without a warrant to confirm that it is really dope. This would be an **illegal search** because Hannibal has a **reasonable expectation of privacy** within his home.
>
> **For Example:** Coker sent some cocaine by FedEx. The package broke open and FedEx employees saw the white powder. By the time the cops arrived the FedEx employees had resealed the white powder in the package. Without a warrant, the police reopen the package to test it. This was a **legal search** because Coker no longer had a reasonable expectation of privacy after the FedEx employees viewed the evidence and called police.

5) Application to Contraband Testing

The defendant has no reasonable expectation of privacy as to the **identity or chemical nature of evidence** already **legally in police possession**, so no warrant is needed to conduct **chemical tests** on evidence.

6) Cases of Controlled Delivery

The defendant has no reasonable expectation of privacy as to **evidence** already **legally in police possession**, so no warrant is needed to open containers that were first **legally intercepted in transit** and then resealed and forwarded to the possession of the addressee to prove a crime.

> **For Example:** Coker sent Byer some cocaine by FedEx. The package broke open and FedEx employees turned the broken package over to police. This first possession by police was **no search** because the police could seize the contraband in **plain view** where they had **legal access** to it. The police then resealed the package, posed as deliverymen and delivered it to Byer. He was arrested and the package reopened. This second possession was not an **illegal search** because Byer had **no reasonable expectation of privacy** in property that was actually a **controlled delivery** by the police.

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C. Plain View Distinguished from Lack of Expectation

The **plain view** concept has been badly muddled with the **lack of reasonable expectation** concept in court decisions, textbooks and study materials for law students. This muddle is unnecessary and confusing.

Keep the two concepts separate. The **plain view** concept is that **no warrant was needed** to discover the initial evidence because it was **merely observed** by **common means** by the police from a vantage point where they had a **legal right to be without a warrant**. In this case there was **no search** requiring a warrant, even if the police went to great extremes and even concealed their identities to get to the place where the evidence was observed.

In contrast, the **lack of reasonable expectation** concept is that there **was a police trespass** but the search is **not unreasonable** because the defendant had **no reasonable expectation of privacy** at the place searched. This is because it was an 1) **open** place, 2) a place **remote** from his/her home, 3) a place **outside the defendant's control** and/or 4) a place so **subject to view and search** by trespassers and passers-by that the defendant had no privacy there anyway.

> **For Example:** From a public road Craig the cop sees something suspicious growing in a remote and open field. Without a warrant he walks closer to confirm his suspicion that it is marijuana. If he was stayed on **public land** the **plain view** exception applies because he had a right to be at the place where he could observe the evidence. But if he **trespassed** onto the defendant's land to observe the evidence, knowingly or accidentally, the **lack of reasonable expectation** exception applies instead.

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D. Social and Overnight Guests – A Combined Concept

Overnight social guests in private homes of other parties have a reasonable expectation of privacy in the portion of the home they occupy if they are **overnight guests**. But guests have **no reasonable expectation of privacy** if they are **day visitors** or if their visit is for **business purposes.** In those cases the defendant lacks standing and a reasonable expectation.

> **For Example:** Coker goes to Byer's house **to sell him dope**. The police enter Byer's house illegally without a warrant and find the dope in plain view. Coker cannot complain that his reasonable expectation of privacy was violated because he was at Byer's house for a **business purpose.**

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E. Abandoned Property – A Combined Concept

In the case of **abandoned property** the two distinct concepts of **lack of reasonable expectation** often both apply. Often the defendant not only **lacks standing** to object to the search, but the search is also of property where the defendant has **no reasonable expectation of privacy.**

1) Garbage

Garbage may or may not be "abandoned" property. Garbage is abandoned when it is **placed at the curb** for pickup by the garbage collectors. At that point the defendant has abandoned the garbage and **lacks standing** to object to a police search after the garbage is placed at the curb.

If garbage is **picked up on the premises** by refuse collectors, by agreement or custom, the garbage ceases to belong to the defendant when it is picked up. If police search the garbage after it is picked up, the defendant has no standing to object.

If garbage is on the property of the defendant in a place where trespassers look through it for recyclable materials (i.e. bottles and cans) then the defendant has **no reasonable expectation of privacy**.

But if the garbage is still on the property of the defendant, near the home and not in a place where trespassers are likely to look through it, the defendant retains a clear **privacy interest** and a **search warrant is required** to enter the property and search the garbage.

> **For Example:** Craig the cop suspects Tweaker is making amphetamines in his body shop. Craig looks in the dumpster behind the shop and sees empty chemical containers that are associated with drug activity. This is a **legal search** if the dumpster is "at the curb" ready for pickup because it is **abandoned** property and Tweaker has no standing to object. This is a **legal search** if the dumpster is unlocked and placed where strangers **regularly rummage through it** because Tweaker has **no reasonable expectation of privacy**. This is an **illegal search** if the dumpster is on Tweaker's property in a place or situation where he had a reasonable expectation of privacy.

2) Abandoned Buildings

A search warrant is needed to search a building that is **securely boarded up**. But no warrant may be needed for a **limited search** of an "abandoned" building that is **regularly entered** by vagrants and trespassers.

> **For Example:** Dorthea owned an old boarded up house where homeless people often slept. One day a hobo told police he saw a skull sticking out of the ground. Craig the cop dug up the skull with a shovel. He then got a warrant and found Dorthea's long missing

husband. This limited search would be **legal** because Dorthea had **no reasonable expectation of privacy** concerning an old house that was often entered by vagrants.

3) Abandoned Cars

Abandoned cars are similar to garbage. If they are on public streets or have been "dumped" on private property the original owner has relinquished possession. A distinction should be made between cars that are "abandoned" and those that are merely "stranded." The owner of an abandoned car cannot later claim they had a reasonable expectation of privacy concerning it.

4) Denial of Ownership

If the defendant denies ownership of property, even where the object does not appear to be "abandoned," the defendant has no standing to later object to the search of that object by police.

> **For Example:** Craig the cop approaches Coker and asks him if he owns the car parked at the curb. Coker denies ownership and Craig searches it. He finds dope and Coker's name on the registration. Coker cannot object to the search because he **waived** his right to object when he denied ownership of the car. He had **no reasonable expectation of privacy** after denying ownership.

5) Thrown Down Objects or Containers

If a defendant throws down an object when police approach it is not an abandonment and not a denial of ownership.

> **For Example:** Craig the cop approaches Coker at a bus stop and Coker throws down his jacket on the bench. Without saying anything, Craig picks up the jacket and searches it. He finds dope and Coker's name sewn in the collar. This would be an **illegal search** because Coker did not abandon or deny ownership of the jacket.

6) Destroyed property

When property is destroyed in questionable circumstances, it is not "abandoned" and a warrant is still needed to search for the cause of the destruction.

> **For Example:** Fireman Frank sees "splash marks" when he put out the fire at Wong's Restaurant. He reports this to Art the arson investigator. Art goes to the burned building and takes samples. This is an **illegal search.** Frank's original observations were **plain view** evidence because he **merely observed** the evidence at a place he had a **right to be.** But Art needs a warrant to be at the burned building doing a search.

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F. Fruit of the Poisonous Tree Counter-Argument

The 4th Amendment prohibits "unreasonable searches" and the basic foundation for the "lack of reasonable expectation" argument is that there is no "unreasonable search" when the defendant had no reasonable expectation of privacy in the first place. A possible counter-argument arises

when the government action is so clearly illegal that ALL evidence discovered as a result is "fruit of the poisonous tree".

> **For Example:** Police illegally search Bob's house and find a stolen gun. Bob refuses to say where he got the gun so the police beat him until he reveals he bought the stolen gun from Jim. At Jim's trial for stealing the gun he has **no clear standing** to object that the gun was evidence seized illegally from Bob or that Bob was beaten. But the police action was so outrageous a Court may suppress all of the evidence anyway as **fruit of a poisonous tree**.

4. Exigent Circumstances that Justify Search without Warrant

Arrest. It is always Constitutional for police to **arrest** defendants in **public places** without a warrant if **probable cause exists**. But a warrant is needed to **enter private property to arrest** unless **exigent circumstances** justify immediate action without waiting to obtain a warrant.

Search. A search without a warrant is **usually illegal** if police **have time** to get a warrant and **don't**. And **exigent circumstances** are the only **search warrant** exception besides the **plain view** and **lack of reasonable expectation of privacy** arguments explained above. However, the term "exigent circumstances" is applied to a number of **distinct situations** for which the Courts have developed separate specific rules. Most of these situations involve **urgency** such that police must **move fast** to **arrest** suspects, **rescue** victims, protect themselves or **seize evidence** and **cannot wait** for a magistrate to issue a warrant.

Balance test. The **bright line rule** whether exigent circumstances justify a search or arrest without a warrant is based on **reasonableness**, and that in turn depends on a **balance test** between the **privacy rights** of the individual and the **public need** for effective administration of justice and protection.

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A. Protection of Victims, Police and Evidence

Police may usually search and rescue without a warrant if **credible evidence** indicates it is necessary to **arrest** criminals, **protect** victims, **protect themselves** or **prevent destruction of evidence**.

> **For Example:** Craig the cop learns that a little girl has been kidnapped. Aware that Purvis has a prior conviction for child molestation, he goes to Purvis' house. He hears a child crying. Purvis denies that a child is present. Craig pushes his way into the house and rescues the child. This is a **legal search** because Craig had sufficient evidence to establish **probable cause** for a search warrant. But **victim safety** was an **exigent circumstance** that justified immediate search without waiting for a warrant.

Evanescent evidence is evidence that may dissipate before police can get a warrant.

> **For Example:** Weaver is arrested for drunk driving. A blood sample is taken against his will to prove his alcohol level is above the legal limit. This is a **legal search** because blood alcohol is **evanescent evidence** that would be lost if the police wait for a warrant.

A search without a warrant may also be necessary for the police to protect themselves from attack **by criminals.**

A search without a warrant may also be necessary to foil escape **by criminals. This is akin to** hot pursuit**, explained below.**

But in the case of **minor offenses** the **entry of a home to arrest** requires a warrant, and it is NOT justified by the **possibility evidence will be destroyed.**

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B. Automobile Searches

Automobiles, by their inherent mobility, pose a threat to the preservation of evidence that may justify a search of the automobile without a warrant in some cases. Until *Arizona v. Gant* (2009) 556 U.S. 332 it was widely believed that if an occupant of a vehicle was legally arrested for any crime the entire vehicle could be legally searched. But in *Gant* the Court held that even if an auto is stopped for a legitimate reason it cannot be searched without a warrant unless: 1) it is reasonably necessary for **safety purposes** (because occupants may access a weapon in the car) or 2) an occupant or recent occupant of the auto has been legally arrested and a search of the auto is reasonably necessary to **prevent loss of evidence** relevant to <u>that</u> arrest.

1) Legal Car Stop Reasons

Police may **legally stop** an automobile for the following purposes:

1. **Probable cause** to believe a crime has been committed by the occupants;
2. **Traffic violations**;
3. Uniform or systematic traffic **checkpoints** for **traffic safety** purposes or **immigration control**.

If none of the above facts can be shown, **the stop and any subsequent search is illegal.**

2) Searches Must be Reasonable in Scope

Searches must be reasonable in scope given the **purpose for which the auto was stopped** or other **reasonable suspicions** that arise following the stop.

> **For Example:** Craig stops Juan based on a **reasonable suspicion** he may be transporting illegal aliens. When he finds no aliens he searches a suitcase in the trunk and finds cocaine. This is an **illegal search** because the probable cause only justified a stop and search for illegal aliens because that would be evidence of the crime for which Juan was stopped. When no aliens were found, the search should have ended.

3) No Search for a Traffic Violation Only

There is NO warrant exception that allows the search of the interior of an auto merely because it was stopped for a 1) **traffic violation** or a **uniform or systematic vehicle checkpoint** 2) for **traffic safety** or 3) for **immigration control** on a **particularized and objective** basis.

The occupants can be questioned at such a stop, but a stop alone for these reasons does not justify a search of the passenger compartment or any other part of the vehicle.

4) Searches of Auto for Officer Safety

If **reasonable suspicion exists** that it is necessary for **police safety** auto occupants can be required to exit a stopped vehicle and be "frisked" under the **Terry stop** exception explained below. Before they are allowed back into the car the passenger compartment and all interior compartments, boxes and containers can be searched for weapons to protect officers from a reasonably feared attack. This is simply a search for officer safety with respect to an automobile.

> **For Example:** Craig the cop legally stops a car because it has a burned-out taillight. Craig recognizes the occupants as gang members. He reasonably feels "frisking" the occupants for weapons is necessary for safety purposes. He asks them to exit and he "frisks" them. Before they get back into the car he searches the passenger compartment for weapons and finds a kilo of cocaine in a box under the seat. This is a **legal** search.

5) Searches to Prevent Loss of Evidence

If an occupant or recent occupant of a motor vehicle is **legally arrested** for a crime, whether the vehicle was stopped for that reason or for some other reason, the vehicle can be searched for evidence of the crime for which the defendant was arrested to prevent it from being lost or destroyed. This is simply a search for protection of evidence with respect to an automobile.

> **For Example:** Dan gets out of a car, approaches Norm the narc (i.e. undercover narcotics detective), and offers to sell him some methamphetamine. Norm arrests Dan (for soliciting to sell illegal drugs). Norm then tells the other occupants of the car get out. Then he searches the car for drugs and instead finds some stolen property. This is a **legal search** because police can search the vehicle for evidence of the crime for which the occupant was just arrested.

6) Police Can Follow Car Until Reason to Stop Occurs

The **stop** of the automobile must be for one of the proper purposes. But police **can follow** a vehicle until a **minor traffic violation actually occurs** and then stop it.

> **For Example:** Craig the cop decides to stop Bob so he follows behind his car until Bob becomes nervous and starts driving erratically. Craig then stops Bob for driving erratically, "frisks" him (for officer safety) and finds some narcotics. He then arrests Bob for possession of the narcotics, and that justifies a search of the interior of the car for additional evidence of that crime. This is a **legal stop** for a proper purpose, a lawful arrest, and a legal search of the passenger compartment for evidence of the crime for which the arrest was made.

7) Checkpoints and Random Stops

Police may stop cars in a **uniform or systematic manner** at **checkpoints** if it is for the purpose of 1) **traffic safety** or 2) **controlling immigration**. "Uniform" means that all cars are stopped and "systematic" would mean stopping cars according to a fixed sampling method. Cars may also be stopped on a **particularized and objective basis** for immigration control.

Until *Indianapolis v. Edmund* (2000) 531 U.S. 32 it was widely believed that a vehicle could be legally stopped at ANY uniform or systematic checkpoint. The Court clarified that such checkpoints cannot be random efforts to find criminals.

But it is an **illegal search** to stop cars for these purposes:

- **At random** to check registration and licensing;
- Because the drivers "look like druggies";
- Because the cars are in a "bad neighborhood"; or
- Because the drivers are members of a racial or ethnic group.

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C. Police Safety -- Terry Stops

An exception to the warrant requirement is that police may **stop** a person and **"pat them down"** or **"frisk"** them without a warrant in a limited **search for weapons** if the person has been stopped for a **proper purpose** and there is a **articulable reason** to believe the search is necessary for **police protection**. This is referred to as a **"Terry stop"** after the case of *Terry v. Ohio*, and it is simply a search for officer safety with respect to an individual.

A "stop" is not an "arrest" because it is of very limited duration and for the purpose of investigation rather than based on an accusation of criminal activity.

1) Frisk on Articulable Suspicion

The **proper purpose** for a Terry stop is only some **reasonable, articulable suspicion** less than **probable cause** to believe the person searched may have information about a crime, coupled with a reasonable belief a "frisk" is needed for police safety.

> **For Example:** Craig the cop sees Dan talking to Twitchy, a known drug addict. Craig follows, stops and frisks Dan. This would be an **illegal search** because merely talking to Twitchy is not enough to cause Craig to have a **reasonable suspicion** that Dan has committed or knows something about a crime.
>
> **For Example:** Craig the cop sees Twitchy. When Twitchy sees Craig he quickly starts walking away. Craig stops Twitchy and frisks him. This would be a **legal search** because Twitchy's behavior was **reasonably suspicious.**

> **For Example:** While arresting Joe, a bartender, Craig the cop frisks Thirsty, a quiet bar patron. This would be an **illegal search** because there is no **reasonable, articulable suspicion** that Thirsty was committing a crime or a threat to the police.

2) Limited to Weapon Search Only

The "frisking" of a Terry stop must be limited to a **cursory search for weapons** for police protection. It extends to articles in the suspect's possession where weapons might be hidden, such as handbags and jackets.

If the **initial pat down** reveals weapons or contraband, **probable cause** is established and **a complete search** of the suspect **is legal**. Otherwise, any additional searching is **illegal**.

> **For Example:** Craig stops and frisks Devon because he resembles the description of a robber. Craig looks in a pack of cigarettes taken from Devon's pocket. This would be an **illegal search** because there obviously was no weapon inside the pack of cigarettes.

> **For Example:** Craig stops Devon based on reasonable suspicion. During the "frisk" Craig feels a small lump in Devon's pocket but doesn't know what it is. By continued manipulation of the lump through the fabric he determines it is a "rock" of crack cocaine. This is an **illegal search** because the initial "pat down" didn't reveal contraband.

3) Limited to Brief Duration Only

A "stop and frisk" must be of **limited duration** unless there is **probable cause** sufficient for arrest.

> **For Example:** Craig the cop sees Traveler get off a plane and reasonably suspects he is a drug courier. Craig asks Traveler to follow him to a nearby room. After fifteen minutes Traveler's luggage is brought to the room and Craig asks for permission to search it. Traveler **consents** and drugs are found. This is an **illegal search** because Traveler was held too long for it to be a "stop and frisk", and there was no probable cause for an arrest.

> **For Example:** Craig sees Traveler get off a plane with a sports bag and reasonably suspects he is a drug courier. Craig stops and frisks Traveler and finds a kilo of cocaine in **plain view** in the sports bag. This would be a **legal search** because there was reasonable suspicion, no detention beyond the limited period needed to investigate, and looking in the sports bag was justified for **police protection**.

4) Detention of Property for Brief Duration Only

The "stop and frisk" of **suspect's property** must be of limited duration, too.

> **For Example:** Craig sees Traveler get off a plane and suspects he is a drug courier. Craig holds Traveler's suitcase for an hour until a "sniffer dog" can be brought to the airport. This is an **illegal search** because the bags were seized without probable cause or a warrant.

5) Search of Person for Identification

Police with reason to "stop and frisk" may search for identification **if suspects refuse to identify** themselves, but they cannot otherwise search the person to confirm identification.

> **For Example:** Craig stops and frisks Jim and Sam. Sam says his name is "George." Jim refuses to identify himself. Craig looks in both of their wallets for their identification. This is a **legal search** of Jim because he refused to identify himself, but it is an **illegal search** of Sam because he did identify himself, even though he lied.

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D. Police Protection -- Protective Sweeps

Police may conduct a limited, cursory **protective sweep** of the area around them without a search warrant where there is an **articulable, reasonable suspicion** that it is necessary for **police protection**. Often a protective sweep is done in a house where police make an arrest. But a sweep is justified in other circumstances where it is necessary and the search is not overbroad. This is simply another example or situation of a search that is reasonably necessary for officer safety.

> **For Example:** Craig and Karl, cops, serve an arrest warrant on Max at his home. While Craig watches Max, Karl quickly looks in the nearby rooms and closets of the house to make sure someone isn't hiding there who might attack them. This is a **legal search** without a search warrant because it is reasonable for police protection.

> **For Example:** Craig and Karl arrest Max in his front yard. While Craig watches Max, Karl goes into the house and looks through the rooms. This is an **illegal search** because police don't need to go into the house to protect themselves when the arrest is taking place outside in the yard.

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E. Search Incident to Lawful Arrest or Impoundment

People are **under arrest** if they are held in police custody so that they **reasonably believe** they are **not free to leave**. On the other hand, if they reasonably could leave, they are not under arrest.

A lawful arrest requires **probable cause**, a reasonable belief by the police that a **crime has been committed** and the person arrested is the **person who committed the crime**.

> **For Example:** Karl the cop smells marijuana and Max is the only person around. Karl has probable cause to arrest Max because possession of marijuana is generally a crime and he has reason to believe Max is the person who is possessing it.

Police may search a person that has been **lawfully arrested** and their immediate possessions without a warrant. The justification is that it is necessary for 1) **police protection**, 2) **protection of evidence** and 3) to prevent **contraband** from being brought into jails.

An arrest is **illegal if there is no probable cause**, and **evidence produced by an illegal arrest without probable cause** is **illegal** and usually inadmissible.

> **For Example:** Police ask Vick to come to the police station for questioning. Although there is **no probable cause** he is isolated in a locked room when he gets there, read his *Miranda* rights and questioned for a lengthy period of time in a setting where a reasonable person would not feel free to leave. He eventually confesses to a crime. This is an **illegal arrest** because he was **effectively arrested without probable cause** before he confessed.

> **For Example:** Karl the cop boards the bus Traveler is riding on, blocks the exit so none of the passengers can get off, selects Traveler at random and asks to search his luggage. Traveler consents. This is an **illegal search** because Traveler only consented after Karl **effectively arrested** him without probable cause.

1) An Arrest in a Home Generally Requires a Warrant

Absent justifying exigent circumstances a warrant is needed to arrest anyone in a **private home**.

An **arrest warrant** is enough to enter the property of the **person to be arrested** but an **additional search warrant** is generally needed to enter the **home of any other person** to effect the arrest of someone that does not live in that home.

If a **serious crime** is involved police may enter a home without a warrant when necessary to 1) **prevent destruction of evidence** or when 2) they are **in hot pursuit.** A "serious crime" is one that could result in a **jail sentence.**

> **For Example:** Joe the bartender complains that Thirsty is drunk and disorderly. Craig the cop responds and sees Thirsty run into his house. Craig opens the door, arrests Thirsty in his home for public drunkenness and seizes a whiskey bottle as evidence. This would be an **illegal arrest and seizure** because a warrant was needed to enter a home to arrest for a minor offense. The need to protect evidence and "hot pursuit" are not enough in this case.

2) Arrest is Illegal Without Probable Cause – Gerstein Hearing

An arrest is **illegal** if there is **no probable cause at the time.** Probable cause is credible evidence that a crime has been committed and that the person arrested did it. A **search** incident to an arrest is **illegal if the arrest itself is illegal**.

A suspect arrested without a warrant is given a **Gerstein review hearing** promptly afterward to determine whether the arrest was based on probable cause.

3) Illegal Arrest is A Defense to Evidence, Not Prosecution

An illegal arrest is **no defense to prosecution**. But evidence that results from the illegal arrest is illegal evidence that may be suppressed.

> **For Example:** Craig the cop goes to Bruiser's house **with probable cause** to arrest for a battery, but without bothering to get a warrant. Craig goes into Bruiser's home and arrests him. On the table next to Bruiser are some drugs. This is an **illegal arrest** because Craig **entered a home without a warrant** and there are **no exigent circumstances** that prevented him from getting a warrant. Since the arrest is illegal the **drug evidence is**

illegal and inadmissible But Bruiser can still be prosecuted on the battery charge because illegal arrest is no defense to prosecution.

4) Legality of Arrest is Constitutional Issue

Legality of an arrest as discussed here is a Constitutional issue, not a statutory issue. An arrest may violate state laws defining the authority of police to arrest in various circumstances. Such an "illegal" is unrelated to the Constitutional requirements of the 4th Amendment, and the Exclusionary Rule does not apply to such statutory violations.

5) Body Search Incident to Arrest

The search of the suspect's entire **body** is allowed incident to a lawful arrest, including a probe of body cavities, if that is **reasonably necessary** to find and preserve evidence, for officer safety, and to prevent contraband from being brought into jail facilities. This is true of all arrests, even arrests for minor offenses. And the search can be conducted **at any time** after the arrest.

But warrants are required for **more intrusive body searches that are not immediately necessary**. The Court will use a **balancing test**, balancing personal rights to privacy against the public need for efficient administration of justice.

> **For Example:** Coker is lawfully arrested and when searched at the jail a condom full of heroin is found in his rectum. No search warrant was obtained before conducting the search. This would be a **legal search** and the evidence can be used to prosecute him for drug possession because the search was incident to lawful arrest and necessary for effective jail administration.
>
> **For Example:** Larry is lawfully arrested. Without a warrant he is placed under anesthetic and a bullet is removed from his chest. It matches a gun used in a bank robbery. This would be an **illegal search** because the search is 1) **intrusive** into the body, 2) **not for police protection** and 3) **not immediately necessary** for effective jail administration. The bullet was not going anywhere and there was no urgency that prevented getting a search warrant.

6) Lurch Area Search Incident to Arrest

At the time of arrest the area immediately around the suspect, called the **lurch area**, may be searched thoroughly for hastily hidden evidence and possible weapons. This would usually be a probe into the recesses of furniture near the defendant at the time of arrest. This is simply another example of a search that is considered reasonable for officer safety and to prevent loss of evidence.

7) Automobile and Inventory Search Incident to Arrest

If a defendant is arrested in an automobile the vehicle and every compartment within it may be searched without a warrant. The search without a warrant is justified because 1) the interior of the automobile is a **lurch area** where the suspect could hide evidence, 2) the automobile must be **inventoried** when impounded, and 3) the suspect has **no reasonable expectation of privacy** after the vehicle is in police custody.

The **police inventory** exclusion also applies to **abandoned** and **towed automobiles** taken into possession by police. No warrant is needed to search and inventory the items contained in such vehicles. The search can be conducted **at any time** after the arrest.

8) Residence Search Incident to Arrest

A **search warrant** is needed to search the house of an arrested defendant, except for the **lurch area** and **protective sweep** exceptions explained above, even if defendants are legally arrested in their homes. Police can also seize any clearly incriminating evidence seen in the home in **plain view** at the time of a legal arrest. The **plain view**, **lurch area** and **protective sweep** exceptions only apply **at the time of arrest**.

A search warrant is always needed to search a defendant's home if the defendant is **arrested outside**. But if a defendant **asks to enter** his home following arrest (e.g. to get his jacket), **police may accompany** the defendant into the home and seize any evidence seen there in **plain view**.

A possible exception to this is that if there is a reasonable suspicion that **evidence of the crime for which the defendant has been arrested is in his home** AND that friends or family of the defendant may quickly **destroy or hide the evidence**, an immediate entry to the home may be justified to preserve the evidence based on exigent circumstances.

9) Search of Bystanders and Passengers Incident to Arrest

Bystanders and vehicle passengers **cannot be searched without probable cause** incident to the arrest of someone else, but they may be "stopped and frisked" if **reasonable suspicion** exists that they also have evidence of a crime or may be a safety threat to police OR if there is **reasonable suspicion** that they may be holding evidence of the crime for which the defendant was arrested and it will be lost if they are not immediately searched. In this situation the bystanders and vehicle passengers effectively are part of the "lurch area" around the arrested defendant.

10) Detention of Bystanders During House Search

When police **lawfully search** a house, either under a **search warrant** or without a warrant because exigent circumstances indicated the search is necessary to **protect victims or evidence**, they may **detain occupants** while the search continues to **prevent flight**, **obtain their identities** (as witnesses perhaps), and allow **orderly completion** of the search. Such detention is not an **unlawful arrest** that would require the suppression of the evidence found.

> **For Example:** Craig the cop goes to Larry's house to execute a valid search warrant. Craig finds Beau, a visitor, in the house alone. Craig tells him not to leave. The search reveals drugs that Beau brought to sell to Larry. This was a **legal search** under the valid search warrant and the detention of Beau was NOT an illegal arrest.

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F. Search and Seizure Incident to Execution of a Warrant

When police **lawfully enter** a house with a warrant, either under a **search warrant** or an **arrest warrant,** they are legally there and can seize any contraband or evidence of other crimes found in **plain view** or otherwise discovered in the exercise of the warrant. It is an **illegal search** if the scope of the warrant is exceeded.

> **For Example:** Craig the cop arrests Dan at his house under a warrant. After arresting Dan, Craig searches the entire house. This is an **illegal search** because it goes beyond the lurch area, and it is not a protective sweep.

Evidence seen, smelled or heard is found in **plain view** and may be seized immediately without getting an additional warrant when if police are already in the home legally.

> **For Example:** Craig the cop goes to arrest Dan in his home with a warrant. Craig smells the odor of a corpse while arresting Dan in the living room. "Following his nose" he finds Victor's body in the basement. This is a **legal search** because Craig was in the home legally and the odor was **clearly incriminating plain view** evidence that justified immediate seizure, even though the body itself was not in the living room.

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G. Border Searches

Police may search people and property without a warrant at an entry point to the United States. This exception to the warrant requirement is termed a **border search** although the search does not have to be conducted literally at a border crossing. The search may take place at any place where people arrive from other countries, including airports. And a search may take place at a point well inside the United States if the person is reasonably believed to have crossed or gone near a national border crossing to reach that location.

A border search without a warrant is **not an unreasonable** search because national security and sovereignty are legitimate government concerns. The main reasons for border searches are to control **immigration**, prevent **smuggling** and protect **national security** (e.g. prevent terrorism).

The extent of intrusion allowed in a border search depends on the circumstances.

- **Vehicles** can always be stopped and searched completely at a border.
- **Belongings** can always be searched at the border.
- **A person** can only be **strip searched** if there is **reasonable suspicion** that it is justified.
- **A highly intrusive search** or **body probe** requires a **strong showing** of justification.
- **A detention** at a border 24 hours or even longer may be justified if **particularized and objective evidence** suggests they are **smuggling swallowed drugs**.

  > **For Example:** Craig the cop stops Abdul at the airport after he gets off his plane from Jamaica and searches his luggage **without any particular reason**. This is a **legal search** because it is a border search.

> **For Example:** Craig gives Abdul a body probe at the airport without any evidence whatsoever. This is an **illegal search** because a body probe is unreasonable without some strong evidence it is necessary, even at a national border.
>
> **For Example:** Craig the cop detains Valdez for 24 hours after he gets off a plane from Colombia because he fits a drug courier profile. This is a **legal search** because Valdez was identified by **particularized and objective evidence.**

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H. Search in Hot Pursuit

Police may enter and search private premises without a warrant, including **any home**, if they are in **hot pursuit** of a fleeing suspect involved in a **felony** and reasonably believe it is **necessary to foil an escape**. They can seize any contraband and obviously incriminating evidence they see in **plain view** in the process.

Police can ALSO enter a home pursuing a person that committed a **misdemeanor** if police **say the crime committed** AND it is a crime that could result in a **jail sentence.**

> **For Example:** Craig the cop attempts to arrest Tom for robbery. Tom runs into Dick's house. Craig charges into Dick's house in **hot pursuit.** Craig sees Dick's drugs on the counter as he runs through the kitchen. This is **no search** because the evidence was in **plain view** when Craig entered the house, and he entered the house **legally** because he was in **hot pursuit** of a **felony suspect.**

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I. School Searches.

Public school administrators may search the person or property of students in a **reasonable manner** without a warrant if there are **reasonable grounds** to believe the student is **breaking school rules or the law**. This exception to the warrant requirement is based school administrative needs for school discipline and decorum.

Schools may also require students to submit to drug tests to **participate in school athletics.**

> **For Example:** Principal Putz reasonably believes that Bueler is smoking cigarettes on school grounds. Putz orders Bueler to the office and searches his backpack. This is a **legal search** because Putz had **reasonable grounds** to believe school rules were being broken and his search was **reasonable in scope** and means.

5. Police Trickery is Legal

The 4th Amendment prohibits **unreasonable** search and seizure, but it does not prevent police from using trickery and deception to obtain evidence without conducting a search at all.

> **For Example:** Norm the narc (i.e. undercover narcotics detective) suspects Coker is illegally selling narcotics. So he dresses and acts like a drug addict to gain Coker's

confidence. Coker invites him into his house and offers to sell him some drugs. Nothing about this is illegal on the part of Norm and it is not even a "search".

6. Electronic Surveillance

Wiretapping and "bugging" are two particular types of "search" subject to the 4th Amendment warrant requirement that has been subject to extensive judicial interpretation and statutory rules.

States may have more stringent rules, but the law school study of criminal procedure law is based entirely on federal law. The evolution of federal law has been complex, but the rules of law that now exist are very simple.

First, the term **"electronic surveillance"** means **wiretapping** and **bugging**, not surveillance cameras. "Wiretapping" means listening or recording **telephone conversations** of others, and "bugging" means placing **hidden microphones** near people to overhear or record conversations. The entire focus of judicial and legislative concern has been the interception of **wire or oral communications**. There is little or no interest in federal law or in the study of criminal procedure concerning **hidden video cameras**.

Police can put video cameras almost anywhere for legitimate purposes without a search warrant as long as they do not record sound. But to record sound the police must usually have a search warrant.

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A. No Electronic Search Occurs if One Party Consents

Under federal law there is **no search** at all and no warrant is needed when a suspect's **statements are made to a government agent or witness**. Further, this rule applies even if the statements are to an **"informer"** working for the police or to an **undercover police** officer. Those statements can be recorded and used as evidence in every case.

Likewise there is **no search** and no warrant is needed to **record** any conversation between two people when **one of them consents** to the eavesdropping. So if a police officer or a witness secretly working for the police records conversations with the defendant, the recording is not the result of a search, and it is legal and admissible evidence. This is true in every case, whether the defendant knows of the recording or not.

> **For Example:** Tom confides to Craig, an undercover policeman, that he robbed a store. Craig records the conversation. This is **no search.** Both the recording and Craig's testimony regarding the conversation are **legal**, and **no warrant** is necessary because Craig **consented to the recording**.

> **For Example:** Craig arrests Coker in his home for dealing drugs. While Craig is in the house Tom calls. Craig answers the phone, imitates Coker's voice and records the conversation. Tom orders some dope. This evidence is **legal** because Craig was **one party** to the conversation and **he consented to a recording.**

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B. Title III of the Crime Control Act

Comprehensive federal statutes regulating electronic surveillance were enacted in 1968. They apply to the interception of **wire or oral communications** only. If federal agents violate these statutory rules when conducting electronic surveillance the evidence collected is **not admissible in any state or federal proceeding.**

Electronic surveillance by the **Executive Branch** for protection of **national security** is exempt from the Act.

The Act requires that the Attorney General or a **specially designated** Assistant Attorney General must get a federal court order based on **probable cause** before wiretaps and bugs can be placed. Evidence must be shown that a **specific person** has committed an **enumerated crime** and that the surveillance **will produce evidence** about the crime.

Such court orders allow law enforcement officers to make **covert entries** to place the taps or bugs.

Special steps must be taken to prevent recording the **communications of non-targeted parties**. If the wiretap produces incriminating evidence against non-targeted parties, they may challenge that insufficient steps were taken to avoid indiscriminate recording of their communications.

7. Unreasonable Arrest and Search

Even police have a warrant or probable cause for an arrest or search without a warrant **the arrest or search must be done in a reasonable manner.** Otherwise it is an illegal arrest or search.

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A. Balance Test

Whether or not an arrest or search is done in a reasonable manner requires a **balancing** of the rights of the individual against the needs of society for effective administration of justice and protection of the police in the specific circumstances that exist at the time.

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B. No News Cameras in the Home

It is **always unreasonable** for the police to bring **news media** with them into a **private home** during an arrest or search.

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C. Reasonable Force in Executing Arrest

Arrests are unreasonable and therefore illegal if **unreasonable force** is used. Whether the force used is reasonable or not depends on the circumstances. But, **deadly force** is NEVER reasonable force if it is used merely to **stop a fleeing suspect**.

> **For Example:** Craig calls for Tom to halt, but he tries to flee. So Craig shoots him in the leg to stop him. This is an **illegal arrest** because deadly force was used to stop Tom. Tom can still be under arrest, but if he blurts out a confession it has been illegally obtained the same as if Tom was tortured until he confessed.

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D. Probable Cause Necessary for Arrest

To get an arrest warrant **probable cause** must be shown, and to arrest without a warrant, the police must prove they had **probable cause** at the time of the arrest. This is a Constitutional requirement.

Beyond Constitutional requirements of the 4th Amendment, state statutes may restrict police authority to arrest. A violation of such statutes is not an issue of Constitutional dimension, and therefore would not trigger the application of the Exclusionary Rule.

If the police have an arrest warrant, they can enter the **property of the accused** to execute the arrest. Otherwise police must prove **exigent circumstances** justified the entry of any private property to arrest a suspect. The means of entry cannot be unreasonable under the circumstances.

An arrest warrant can be executed **any time of the day** and at **any length of time** after the warrant is issued. But this is NOT true for a search warrant as explained below.

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E. Reasonable Time, Place and Manner for Executing Searches

To be reasonable a search based on a warrant must be conducted in **daytime hours** unless there are exigent circumstances, and usually those should be stated in the warrant.

A search with a warrant is unreasonable and therefore illegal if it is not conducted **within a few days** after the warrant is issued. Federal statutes require a search **within 10 days** after issuance. This is statutory and not binding on states. But a search conducted long after a warrant is issued is inherently unreasonable because the **warrant is stale** and there is **no longer any probable cause** to believe the evidence sought would still be found at the same location.

To be reasonable the police must **announce** their **identity** at the place to be searched, state that they **have a warrant** and **intend to execute** the search and **request admittance**. If the police are not then admitted they may enter forcibly. Forcible entry without an announcement is allowed if **exigent circumstances** show the announcement may cause **destruction of evidence** or **danger to the police**.

> **For Example:** Craig gets a warrant to search Gary's house for a stolen bicycle. He kicks down Gary's front door. This is an **illegal search** because Craig failed to **announce** his presence and **request entry under the warrant**.

Courts have debated how long police must wait after announcing who they are and that they have a warrant before entering a structure by force. If there is a **reasonable suspicion** the occupants of a structure will destroy the evidence being sought before police can enter a structure the police

may be allowed to enter very quickly after announcing their presence and intentions. Otherwise they must give the occupants sufficient time to open the door.

> **For Example:** Craig gets a warrant to search Gary's house for a stolen bicycle. He knocks on the door and yells, "Police! Open the door! We have a search warrant!" Then he kicks down the door four seconds later. This is an **illegal search** because it is **unreasonable** to kick down the door in this circumstance. If the bicycle was in the house at all it certainly was not going to be flushed down the toilet or swallowed by Gary.

A search must be **restricted** to the **area to be searched** and **the things to be seized** as stated in the search warrant. If the police reasonably believe the **things to be seized are on a person**, the person can be searched. Except for a **"stop and frisk"** and a **protective sweep** police cannot search people that are not to be arrested or places where the things to be seized would not be found.

> **For Example:** Craig gets a warrant to search Gary's house for a stolen bicycle. He finds drugs hidden in Gary's dresser drawer. This is an **illegal search** because the bicycle could not possibly be hidden in the drawer.

Evidence that is not listed in the search warrant may be seized if it is observed in **plain view** (or smelled or heard) and is **clearly incriminating**.

> **For Example:** Craig gets a warrant to search Gary's house for a stolen bicycle. He sees some marijuana on the kitchen table and seizes it. This is a **legal seizure** because the evidence seized was **clearly incriminating** and discovered in **plain view** without moving it or opening a container.

8. Application of the Exclusionary Rule

The **Exclusionary Rule** was explained briefly earlier and it will be explained in greater detail later. It is a judicial invention created by the Courts as a prophylactic measure to deter police from engaging in improper practices.

The Court has **discretion** whether to exclude evidence that is the product of an **illegal search, seizure** or **arrest** either directly or indirectly under the **fruit of the poisonous tree** doctrine.

In deciding whether or not to exclude improperly obtained evidence the Court will **balance** the **wrongfulness** of police acts and **deterrent effect** exclusion would have in preventing such acts in the future against the **negative impact** the exclusion would have on the administration of justice.

Although the Court (judge) has discretion, there are certain circumstances in which a judge will be found to have abused his discretion if he admits illegally obtained evidence that was obtained by **outrageous police conduct**. In that case the lower Court will be **reversed on appeal**. If the judge admits illegally obtained evidence that could have been excluded **without adversely affecting** the outcome of the case, it will generally be held to be **harmless error** and the lower Court will not be reversed on appeal

Chapter 8: The Right to Counsel

Amendment VI [adopted 1791]

> **"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic]."**

Although the 5th Amendment comes before the 6th Amendment numerically, it is simpler and more logical to explain the guarantees of the 6th Amendment first because judicial interpretation of the 6th Amendment guarantee of **right to counsel** must be understood before addressing the famous 1966 holding in *Miranda v. Arizona.* The *Miranda* decision arose out of prior case law concerning both the right to counsel and the 5th Amendment prohibition of forced self-incrimination. So the 6th Amendment will be explained here, and the 5th Amendment and the *Miranda* decision will be explained later.

The defendant's **right to counsel** is heavily tested on both law school and Bar exams.

1. The Right to Assistance of Counsel

The 6th Amendment provides that,

> **"In all criminal prosecutions the accused shall enjoy the right to … have the Assistance of Counsel …"**

This has been interpreted to mean that a person accused of a **serious crime** has a right to be represented by an attorney, and if the accused cannot afford an attorney the court will appoint one. But more than that, if accused individuals wish to represent themselves, they may do that, and they can still have an attorney advise them on how best to do that, even if the attorney does not speak for them in Court.

A. Appointment of Counsel.

An **indigent** defendant has a right to have counsel **appointed for him** (and paid for) by the government, and virtually all judicial interpretation of the 6th Amendment is based on appointed counsel situations.

A person is **indigent** if they lack the funds needed to pay an attorney without causing **substantial hardship to himself or his family.** Defendants cannot be denied appointed counsel merely because wealthy friends or relatives have money or because they have posted bond.

A defendant that is appointed counsel at government expense can be required to **reimburse the expenditure** later when they are financially able to do so as long as the terms of repayment are **reasonable** and **do not discriminate** between defendants that are acquitted and those that are convicted. And reimbursement of defense expenses can be established as a **probation condition.**

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B. Assistance of Retained Counsel

Defendants have an absolute right to retain their own counsel using their own funds. But, it is not a violation of the defendant's right to hire counsel if the state legally seizes the defendant's assets simply because it leaves the defendant financially unable to retain counsel.

> **For Example:** Police search Jones' house and seize a large quantity of cash and drugs. Jones argues that he needs the cash back to retain a good attorney, and that his right to retain counsel is being denied. This argument will **fail** because Jones' right to retain independent counsel is not violated by a lawful police seizure of his assets as evidence or as a "civil penalty" on illegal activities.

A defendant cannot retain independent counsel if it creates a conflict of interest that **violates the rights of a co-defendant** to a fair trial.

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C. The Right of Self-Representation

Defendants have the right to defend themselves without counsel (i.e. To proceed **pro se**.) To do so, the defendants must 1) **knowingly and intelligently** waive the right to counsel, 2) follow the procedural and substantive rules of law and 3) conduct themselves with proper decorum and respect for court rules. When defendants elect to proceed pro se they **waive any right to appeal** on a claim that they were **denied effective assistance of counsel**. They do not waive the right to have assistance of counsel, so if they want to have an attorney advise them, but not speak for them in Court, they have that right.

> **For Example:** Dan insists on representing himself at trial. He is convicted. He appeals that the trial judge should have refused to let him represent himself because he is an idiot. His appeal will be rejected because he waived the right to appeal on those grounds **unless** it can be shown that he did not knowingly and intelligently waive the right to counsel.

> **For Example:** Dan insists on representing himself at trial but asks to have an attorney help him. The judge rules he has waived his right to assistance of counsel by refusing to let an attorney represent him. On appeal his conviction will be reversed because the 6th Amendment guarantees "assistance" of counsel, not "representation" by counsel. [4]

2. No Right to Appointed Counsel Unless a Jail Sentence Results

Criminal defendants only have a 6th Amendment right to appointed counsel if they are charged with a crime that **results in a jail or prison sentence.** It does NOT depend on whether they are charged with felonies or misdemeanors. And it does NOT depend on whether a jail or prison sentence was a legal possibility during their prosecution. Rather, a defendant's fundamental right

[4] Pay close attention to the exact words used in the Constitution, all other black letter law, and exam questions, especially if they are quoted! Semantics is the mother's milk of attorneys. If the 6th Amendment meant "representation" it would have said so. It does not. It says "assistance" and that is what is guaranteed.

to appointed counsel under the 6th Amendment ONLY exists when the crime charged **actually results** in a sentence of incarceration at the conclusion of the prosecution.

Since there is no right to appointed counsel merely because the prosecution has a **possibility** of incarceration, the trial court is subjected to a "Monday Morning Quarterback" situation. If a trial Court (judge) refuses to appoint counsel to a defendant, the propriety of that decision is judged based on the ultimate result of the prosecution, and that is something the trial Court may not be able to clearly foresee at the time the decision must be made regarding whether to appoint counsel or not.

Regardless of the 6th Amendment, some state laws (e.g. California) provide a right to counsel if incarceration (jail) is at all possible, whether incarceration actually results in the end or not.

Of course, if a criminal charge is serious (e.g. murder) it is clear that the defendant must be appointed an attorney because the defendant clearly will be given a prison sentence if convicted. But with respect to lesser offenses a Court that fails to provide counsel to defendants during prosecution is necessarily prevented from sentencing the same defendants to jail at the end of trial, or else it will be reversed on appeal. The same rule apparently applies whether the defendant is sentenced to "time served" or to a suspended sentence.

> **For Example:** Dick is tried for a crime that carries a maximum possible sentence of 20 years in prison. Before and during trial he is denied appointed counsel. After being found guilty he is fined but **not sentenced to any incarceration**. This does not violate the 6th Amendment because no jail or prison sentence resulted from his prosecution. But as stated above under the California Constitution he did have a right to counsel in the beginning because the accused crime posed a possibility of incarceration.
>
> **For Example:** At his trial for domestic violence Dan is denied appointed counsel. He is found guilty and given a **suspended sentence** on the condition that he attend anger-management classes. This violates the 6th Amendment because he was given a **sentence of incarceration** even though it was suspended. Why? Because he will be jailed if he does not attend the classes.

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A. Prior Convictions without Counsel can be used to Increase Sentence

A conviction at which a defendant requested and was denied an attorney can be used later to **increase sentences** in subsequent prosecutions where there is a right to counsel.

> **For Example:** Don is tried on drunk driving charges three separate times. At each trial he is denied an attorney and is fined. This did not violate the 6th Amendment because he was **not incarcerated**. Later Don is charged with vehicular manslaughter and appointed counsel. His three prior convictions without assistance of counsel **can be used** at the manslaughter trial to increase his jail sentence even though he had no counsel in the prior convictions.

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B. Non-Criminal Commitment Proceedings

The right to counsel extends to at any **government action to significantly deprive liberty**, whether it is called a "criminal" action or not. These actions may include **juvenile proceedings, immigration actions** and **involuntary conservatorships**.

> **For Example:** Harjo, a 14-year old Creek boy, is charged with **juvenile delinquency** because he is truant from school. At a Bureau of Indian Affairs "administrative hearing" he is denied an attorney. Judge Buford finds that Harjo is a "delinquent" and orders him committed to the Bureau's Indian School for Boys. This would be a violation of Harjo's right to counsel even though Harjo was not charged with any actual "crime."

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C. Comparison of Right to Counsel with Right to Jury Trial

A distinction should be recognized between prosecutions in which defendants have a right to counsel and prosecutions in which defendants have a right to a jury trial. Oddly enough the defendant's right to a jury trial is theoretically broader than the right to counsel. Defendants have a right to demand a jury trial if there is a **possibility of incarceration**, whether incarceration results or not. In comparison, Defendants have a right to counsel only if the prosecution **actually results in a sentence of incarceration**. This is a trivial difference except that it can become perplexing to a law student unless expressly noted and understood.

3. The Right to Counsel "Attaches" at the First Critical Stage

A defendant's right to counsel is violated if at any **critical stage of prosecution** the lack of counsel **substantially violated** the defendant's **right to due process** as guaranteed in the 5th and 14th Amendments.

Defendants have no right to counsel **before they are arrested,** because at that point they are not defendants at all. Defendants' right to legal counsel **arises** or **"attaches"** when the criminal proceedings against them reach a **first critical stage.** At that point the appointment of a defense attorney is necessary in order to protect the defendant's rights to fair treatment and due process.

At every "critical stage" the defendant has a right to **legal assistance** and at most critical stages the attorney must be **physically present** to provide the defendant legal counsel and assert the defendant's rights. Once defendants have an attorney appointed for them **counsel will represent them** from that point forward in the prosecution. That has implications explained below.

> **For Example:** Dick is arrested and brought to the police station. Police take his fingerprints. This is NOT a **critical stage** in his prosecution, so he does not have a right his attorney present at the taking of fingerprints.

> **For Example:** Don is brought before a magistrate for a **first appearance.** This is a **first critical stage** so the **right to counsel "attaches."** Once an attorney is appointed to represent Don police **cannot question** him about **this particular crime** further without that attorney present. But they can question him about other crimes without the presence of counsel, as long as *Miranda* rules are followed. That is explained in the next Chapter.

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A. Recognized Critical Stages

The **critical stages** at which the defendant has a right to assistance of counsel are as follows:

1. When **requested** by the defendant during **custodial interrogation** by police. This will be explained later regarding the *Miranda* rule;
2. At a **physical line-up** and **show-up** or other situations **after being charged with a crime** where a **witness is asked to identify** the defendant as the perpetrator of that crime;
3. At the **first appearance** in court**;**
4. When **bail** is set;
5. At a **preliminary hearing**;
6. Upon issuance of an **indictment**;
7. At the **arraignment**;
8. When the court orders a **psychiatric examination** of the defendant that will be used against the defendant;
9. At **trial** (Duh);
10. At **sentencing**;
11. In the preparation of the defendant's **first appeal as a matter of right**.

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B. Rationale for Each Critical Stage

The reason a defendant has a right to counsel at each of these **critical stages** is to prevent **denial of due process.** The rationale is a little different in each case.

- At a **custodial interrogation** the **presence of counsel** is necessary to prevent police from **coercing the defendant into a confession** in violation of the 5th Amendment;
- At **physical line-ups** the **presence of counsel** is necessary to prevent police from **coercing witnesses into false identification** of the defendant as the perpetrator of the crime AND so that the defense attorney can effectively challenge the identification that resulted as being unreliable;
- At the **first appearance** and at the **arraignment** the **presence of counsel** is necessary to prevent the defendant from **pleading guilty out of fear or ignorance** of the law;
- At the **setting of bail** the **presence of counsel** is necessary to argue for **reduced bail**;
- At the **preliminary hearing** the **presence of counsel** is necessary to cross-examine witnesses and show **probable cause is lacking**;
- The reason defense counsel should be **notified** that a **psychiatric examination** will be taken for use against the defendant is so the defense can **decide whether to submit** to the exam and exercise some **control over** the eventual use of the exam results;
- At the **sentencing** the **presence of counsel** is necessary to argue for a **reduced sentence**;
- At the **first appeal as a matter of right** the **assistance of counsel** is necessary to help the defendant submit a **properly prepared appeal**.

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C. Stages When NO Right to Counsel Exists

Generally, the **right to appointed counsel** does NOT exist:

1. At the time of **arrest** (assuming no custodial interrogation at that time);
2. At a physical line-up or other situation where a witness is asked to identify the defendant as the perpetrator of a crime **before any formal charge is filed**;
3. At an identification of the defendant based on **photographs** (a "photo line-up");
4. At the taking of **fingerprints, blood samples, voice exemplars, clothing samples, fingernail scrapings, handwriting samples,** etc.;
5. For the filing of **petitions for discretionary review** or **habeas review** following the first appeal as a matter of right. [5]

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D. Right to Retained Counsel Can Exist When No Right to Appointed Counsel Exists

Although there is no right to have **appointed** counsel present in certain situations the defendant may still have a right to the assistance of **retained counsel** in some of those situations.

> **For Example:** Bob is in prison and wants to file a habeas corpus petition. Although this does not give him a right to demand **appointed** counsel, he **cannot be denied** an opportunity to confer with an attorney that he or others **retain** to help him.

4. Right to Counsel is Automatic Except in Custodial Interrogation Situation.

The right to counsel is **automatic** at each critical stage **except custodial interrogations**. In that one situation defendants have a right to an attorney but they **must actually request an attorney.** In all of the other critical stages listed above the **state has a duty to provide** the defendant with defense counsel whether the defendant asks for an attorney or not.

If the defendant is not provided an attorney at a critical stage it is a denial of due process. The state cannot later use that failure to the defendant's disadvantage.

> **For Example:** Bob is arrested for murder. At the first appearance he has no attorney, but he does not ask for one either. The magistrate asks him to enter a plea. Bob pleads guilty. Later he gets an attorney and his guilty plea is withdrawn. At trial the prosecution presents Bob's initial guilty plea as evidence of his guilt. This is **reversible error** because he was denied due process when he was not provided with an attorney at this critical stage. The state cannot later use the guilty plea as evidence of Bob's guilt because it is **the product of its own failure** to provide legal counsel. The fact that Bob didn't ask for an attorney is irrelevant because **the state had a duty to provide** an attorney whether Bob asked for one or not.

[5] This is why some prison convicts become so proficient at drafting writs of habeas corpus for other inmates they are known as 'writ writers'.

> **For Example:** John is arrested for murder. When questioned at the police station Craig the cop tells John he has **the right to request an attorney**. John ignores him and makes incriminating statements. These statements are **legal evidence**, even though John did not have an attorney present, because John **had to request an attorney** in this one situation. This situation will be explained further later as part of the *Miranda* rule.

5. The Right to Counsel can be Waived

Defendants can **waive** their right to counsel. In all of the critical stage situations listed above the defendant must **knowingly and intelligently waive** the right to counsel. And the **state has the burden to prove** by the **preponderance of the evidence** that the defendant's waiver of the right to counsel was voluntary and deliberate.

Further, except in a custodial interrogation, waiver almost always must be evidenced by some **express statement** on the defendant's part.

> **For Example:** Bill is arrested for murder. At the first appearance the magistrate tells him, "You have a right to an attorney if you want one, but it will cause unnecessary delay." Bill says, "I guess I don't need one yet." The magistrate asks him to enter a plea. Bill pleads guilty. The guilty plea is inadmissible evidence because Bill's waiver was **express** but NOT given **knowingly and intelligently**. He was just "guessing" about something he did not really understand.

In any situation where the defendant **pleads guilty without assistance of counsel** the state must prove by a preponderance of the evidence that the defendant was fully aware of his/her legal situation including the **nature of the charges,** the **statutory offenses** implied, the **possible punishments**, and his/her possible **legal defenses.** This is virtually impossible as a practical matter, so almost every guilty plea entered without assistance of counsel is reversible.

In the case of **custodial interrogation** the defendant can give an **implied waiver** that will be effective if it can be shown that it was **voluntary** and given **knowingly and intelligently.** This will be explained further under the *Miranda* rule discussion below.

> **For Example:** Tom is arrested for robbery. At the police station Craig the cop reads him his *Miranda* rights. Tom responds, "I know all that. I been arrested dozens of times. Look, I admit I robbed the old lady. So what?" This would **be admissible** because Tom's statement is an **implied waiver** of the right to have an attorney present. The waiver is implied because Tom **heard and understood** the *Miranda* warning and still blurts out an admission. The waiver is **effective** because it was given **knowingly and intelligently** since he 1) understood English, 2) understood the warning and 3) was experienced with the warning's legal implications.

> **For Example:** Osama bin Laden, a person with limited English skills, is arrested. He is read his *Miranda* rights in English. He subsequently makes incriminating statements. This would NOT be **admissible** unless the state can prove Osama **understood the warning** and **voluntarily** waived his right to an attorney.

6. Only "Effective" Counsel is Promised

The 6th Amendment has been interpreted as a promise of **"effective counsel."** This does not mean that the accused has a right to demand the services of the best attorney, or even a very good attorney. Rather, the promise is for the services of an attorney with the **minimal competence** necessary for a practitioner to remain in good standing in the profession.

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A. Right to Conflict-Free Counsel

An attorney must be **free from conflicts of interest** to be effective. If two or more defendants are arrested and tried for the same crime, a conflict of interest inherently exists between them because the best defense for each is usually to blame the other! Therefore, each defendant has a right to **individual counsel**. However, they may waive their right to have individual counsel.

> **For Example:** Tom and Dick are arrested for murder. Tom's cousin, Vinnie, volunteers to defend them. Clearly, Vinnie's family relationship with Tom gives him an incentive to protect Tom at the expense of Dick. Get your own lawyer, Dick! [6]

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B. 2-Prong Test for Ineffective Assistance of Counsel

Whether or not a defendant was denied the assistance of effective counsel is judged by a 2-prong test. The defendant must prove on appeal that he was denied effective counsel because 1) his legal representation was **constitutionally deficient,** and 2) it caused **actual prejudice.**

> **For Example:** Gloria is appointed to be Don's attorney. At the arraignment Gloria is drunk, and she advises Don to plead guilty since the evidence against him is conclusive. His appeal would be **denied** because although Gloria's representation was **constitutionally deficient** (because she was "drunk") it did **not cause actual prejudice** because he would have been convicted anyway since the evidence against him was "conclusive."

7. No Interrogation outside Presence of Counsel after the Right to Counsel Attaches

The whole import of the "attachment" of the right to counsel is that once the defendant has a right to counsel the **police cannot further question** the defendant **about that specific crime** without defense counsel present.

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[6] If you see this scenario on a Bar exam it simply cries out for discussion of a professional responsibility cross-over issue. No ethical attorney will represent two clients with clearly conflicting interests.

A. Questioning Restriction

There are actually two different types of questioning restrictions after the right to counsel attaches, and it depends on whether the right to counsel arose during a **custodial interrogation** or at one of the **other critical stages** listed above.

1) Right to Counsel in Custodial Interrogation

If the defendant requests an attorney at a custodial interrogation the *Miranda* rule requires police to **stop questioning** the defendant **about anything and everything** in **custodial interrogation** until defense counsel is present. This rule is based on 5th Amendment concerns over **coerced confessions** and will be explained in detail later in the chapter concerning *Miranda.* This right to counsel is said to be **non-case specific** because police are barred from **all questioning** until the attorney is present.

> **For Example:** Craig stops Henry on the street and questions him about a robbery. Henry says, "I want to talk to an attorney." Craig starts questioning Henry about an unrelated burglary. Bevis makes incriminating statements. This would be an **illegal interrogation** because the *Miranda* rule requires Craig to stop questioning about **anything and everything** until an attorney is appointed. This is explained in a later chapter.

2) Right to Counsel at Other Critical Stages

If the right to counsel arises because the prosecution has reached a critical stage, and not during a custodial interrogation, police must **stop questioning** the defendant **about the crime charged** without the presence of the defense attorney appointed to represent the defendant regarding that particular crime. This right to counsel is said to be **case specific** because police may still question the suspect about other, unrelated crimes without defense counsel present (as long as they follow *Miranda* rules). This rule is based on 6th Amendment concerns.

> **For Example:** Bob is arrested and charged with a robbery. Larry the lawyer is appointed to represent him. After Bob is released on bail Craig the cop calls him on the phone and asks him questions about the same robbery. This is an **illegal interrogation** because Bob's right to counsel attached when Larry was appointed, and he cannot be questioned further **concerning the same robbery** without Larry present.

> **For Example:** Joe is arrested and charged with robbery. Al the attorney is appointed to represent him. After Joe is released on bail Craig the cop calls him on the phone and questions him about an **unrelated burglary.** This would be **legal questioning** because Joe's right to counsel was only to have Al present when questioned about the robbery he has been charged with. Craig can still question Joe about other crimes.

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B. Eliciting Incriminating Statements – The *Massiah* Rule

Subject to the 4th Amendment restraints explained earlier, police can freely question and attempt to elicit incriminating statements by defendants **before the right to counsel attaches**. And as stated immediately above, **after the right to counsel attaches** police may not question a defendant further about the crime charged outside the presence of counsel.

Since police cannot question the defendant directly outside the presence of counsel after the right to counsel attaches the police also cannot have some agent do it for them indirectly or secretly. The case of *Massiah v. U.S.* established that police cannot direct a co-defendant to act on their behalf in an effort to **elicit incriminating statements** by a defendant. The Court held this was just a **surreptitious interrogation** that the police were barred from undertaking openly. This is called **The *Massiah* Rule**.

> **For Example:** After Tom and Dick were arrested and charged with a crime, Dick agreed that in exchange for a reduced sentence he would help the prosecution get evidence against Tom. So, after they were released on bail Dick asked Tom questions about the crime they had committed. Dick secretly recorded Tom's responses. Under *Massiah* this is **illegal evidence** because the police are barred from questioning Tom without his attorney present, whether directly or indirectly by having Dick to it for them.

Often law students think the *Massiah* Rule is restricted to the issue of the 6th Amendment right to counsel but it actually has much broader application than that. The basic holding of *Massiah* is that **police agents are bound by the same rules as the police themselves**.

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C. Use of Voluntary Incriminating Statements

Defendants may always have voluntary statements used against them. In such cases the defendant is held to have waived the right to counsel.

Police also may **eavesdrop** on defendants in **police stations and jails** as explained in the prior chapter concerning search and seizure. A defendant that makes incriminating statements in a jail or police station is held to have waived the right to counsel.

> **For Example:** After Percy was arrested and charged with murder he approached Craig the cop without his attorney present and said, "I am going to cut you open like I cut the old lady." This admission can be used against Percy because it is a **voluntary statement** and he is deemed to have **waived his right to counsel**.

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D. Statements to Jail-house Snitches

A jail-house snitch is a jail inmate that gives information about other inmates to the guards or police. If the snitch merely relays statements by the defendant that are **overheard**, then the snitch is not **eliciting** incriminating statements, even if the police deliberately placed the snitch in the defendant's presence and are rewarding the snitch in some manner. In this situation the snitch is nothing more than a "human microphone," and the statements are **legally obtained.**

And if the snitch **acts independently** from any involvement or knowledge by police to **elicit incriminating statements**, the statements are still **legally obtained** because the snitch is not acting as an agent of the police.

But if the **police know the snitch will act to elicit** incriminating statements, and the **police put the snitch** in the defendant's presence with that knowledge and for that purpose, then the snitch is a **tool of the police.** As was the case in *Massiah,* any evidence obtained in this manner is **illegal**. This would even be so if the police did not expressly tell the snitch to elicit the incriminating statements.

A matter of jail administration that many law students seem unaware of is that defendants **awaiting arraignment** are segregated from the "general population" of prisoners that have been **convicted**. So an exam question that says a defendant that has just been arrested is placed in a cell with a "convict" almost certainly means the police are employing the "convict" as their agent. That alone is not illegal, but it becomes illegal as soon as the "convict" asks the accused any questions intended to elicit incriminating responses like, "What are you in here for?"

8. Line-Ups and Other Identifications

Scientific studies prove that "eyewitness identifications" are notoriously bad. But once eyewitnesses first "identify" the defendant they tend to stick to their position with an unjustified level of conviction.

Defendants have a right to counsel at any 1) **corporeal line-up** or **show-up** that is conducted 2) **<u>after</u> formal proceedings begin** against them for that specific crime. This means a situation where police **first charge** the defendants with a crime and then pose them in front of witnesses to that same crime, either with some other people posing as suspects or by themselves, and ask the witnesses to identify the defendant as the criminal perpetrator. This rule is based on two concerns that "line-up identifications" may be unreliable.

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A. Biased Line-ups

The first concern is that police may deliberately or negligently place the defendant at a line-up with people that look nothing like either the defendant or the perpetrator. The police would have no incentive to avoid this if they already believe the defendant is the criminal perpetrator and have **already began formal proceedings** against him/her. And if the defendant is the only person in the lineup that looks at all like the perpetrator the witness would be more likely to pick them out as the perpetrator at the line-up.

> **For Example:** Shaquille, a tall Black man, is arrested and **formally charged** with a robbery. Al is appointed to be his attorney. Then Shaquille is put in a line-up with a bunch of short White men to be viewed by Wally, a robbery witness. Shaquille has a right to have his attorney Al present at the line-up because formal proceedings against him have begun. If Al is not at the line-up to monitor the identification procedure and object to its biased nature, the identification of Shaquille as the robber can be suppressed at trial as a violation of due process.

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B. Coerced Identification

The second concern is that the police may pressure, coerce or make suggestive remarks to the witnesses that cause them to identify the defendant as the perpetrator. Again, the police may do this because they are **convinced** the defendant is the perpetrator or because they have **begun formal proceedings** and wish to avoid the professional embarrassment (and possible legal liability) that would result from "arresting the wrong guy."

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C. No Right to Counsel at Line-Ups Prior to Formal Proceedings

Defendants do NOT have a right to counsel at any corporeal line-up or show-up that is conducted **before formal proceedings** begin against them. This means the type of situation where police place several suspects in a line-up.

> **For Example:** Bob is arrested for a liquor store robbery. Gloria is appointed to be his attorney. But **police suspect** Bob was responsible for **another robbery** at a dry-cleaners. Bob is put in a line-up to be viewed by Wally, a witness to the **robbery at the dry-cleaners**. If Gloria is not at the line-up, an identification of Bob by Wally can NOT be suppressed at Bob's trial for the dry-cleaners robbery because the line-up occurred **before formal proceedings began** against Bob for the dry-cleaner robbery. In fact, Gloria is only Bob's attorney for the charged "liquor store robbery" and she is not Bob's attorney for the unrelated and uncharged "dry-cleaner robbery."

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D. No Right to Counsel at Photo Line-Ups

Defendants do NOT have a right to counsel at a **photo line-up** where the witness is asked to identify the defendant from photographs, even if the witness is only shown a single photograph of the defendant.

> **For Example:** Joe is arrested and **formally charged** with a robbery. Larry is appointed to be his attorney. Then Wally, a robbery witness, is shown photographs of Joe and other people outside Larry's presence. Any identification by Wally can NOT be suppressed at Joe's trial because Joe did not have any right to the presence of counsel at a photo line-up.

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E. Subsequent Identification Presumed to be Fruit of Poisonous Tree

If witnesses at a corporeal line-up identify the defendant without defense counsel present (after the right to counsel attached) it is an **illegal identification** in violation of the right to counsel. That taints any **subsequent identifications** of the defendant by the same witnesses under the **fruit of the poisonous tree** doctrine. There is a **rebuttable presumption** that if the first identification was made illegally all subsequent identifications are simply the illegal result. This presumption is based on three concerns:

- First, the initial illegal identification may **change the witnesses' memories** of actual events and cause them to honestly but mistakenly identify the same defendant as the criminal perpetrator in subsequent identifications.
- Secondly, once the witnesses have **gone on record** as identifying the defendant as the perpetrator they may be reluctant to admit their original identification could be wrong.
- Third, in subsequent identifications the witnesses may be convinced they picked the "**right** guy" the first time so they only try to "pick the **same** guy" the second time.

The prosecution has a heavy burden to override the presumption that subsequent identifications are the result of the improper initial line-up. But this may be possible where the witness had 1) **familiarity with the defendant before the crime,** or 2) **prolonged exposure** to the defendant **during the crime** or 3) other facts make it **highly unlikely** the witness could have made a mistake in identity.

> **For Example:** Victor is robbed. Dan is **formally charged** with the robbery. Then, without Dan's attorney present, police show Dan to Victor and say, "This is the guy that robbed you." Later Victor is shown some photos and asked, "Can you pick out the guy that robbed you?" Victor picks Dan's photo. At trial Victor is asked, "Do you see the guy that robbed you?" Victor points to Dan as the robber a third time. All three identifications will be **inadmissible** because the first identification was in violation of Dan's right to counsel and the second two identifications would be viewed as **fruit of the poisonous tree.**
>
> **For Example:** Victor is robbed by Dan, a person he has seen on the street several times before but does not personally know. Dan is **formally charged** with the robbery. Then Dan is put in a line-up to be viewed by Victor without Dan's attorney present. Victor positively identifies Dan as the robber. Then at trial Victor points to Dan as the robber again. The identification at trial MIGHT be **admissible** because Victor **was familiar with Dan** before the robbery.
>
> **For Example:** Victor is kidnapped by Dan and held for several hours. Dan is **formally charged** with the kidnapping. Victor identifies Dan at a line-up where Dan's attorney was not present. Then at trial Victor points to Dan as the kidnapper again. The identification at trial MIGHT be **admissible** because Victor had such a **prolonged exposure to Dan during the crime** that his second identification is not likely to be the result of the first improper identification.

9. Collateral Legal Rights and Proceedings

The right to **assistance of counsel** extends to a guarantee of certain collateral rights and proceedings because appointed counsel needs adequate **resources** to present an effective defense.

The "collateral" rights most often recognized are:

- The right to have an appointed **psychiatrist** to help prepare an insanity plea;
- The right to have **expert witnesses** paid for at government expense;
- The right to have **investigators** paid for at government expense to locate witnesses;
- The right to be given a **trial transcript** (at government expense) for use in preparing the first appeal of right.
- The right to be have **access to a law library** for preparing appeals and petitions.

10. Precursors to *Miranda*

As explained above, one critical stage when a defendant has a right to counsel is **during custodial interrogation, if the defendant requests an attorney.** This right was not established until the 1966 case of *Miranda v. Arizona.* It will be explained in detail in the next chapter. Prior to *Miranda* it was not clearly established that a defendant had any right to counsel before being formally charged.

Since "suspects" before *Miranda* had no legal right to speak with an attorney until they were formally charged with crimes, police would often interrogate them in a coercive manner. Three important cases, *Crooker v. California* (1958), *Spano v. New York* (1959) and *Escobedo v. Illinois* (1964) addressed the problem of confessions coerced through denial of counsel.

The *Escobedo* ruling was narrow in application, but it set the stage for *Miranda.*

Chapter 9: Coerced Confessions and *Miranda*

Amendment V [adopted 1791]

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

The defendant's 6th Amendment **right to counsel**, as explained in the prior Chapter, and the 5th Amendment prohibition against **self-incrimination** formed the foundation for the 1966 ruling in *Miranda v. Arizona*. The *Miranda* decision and the criminal procedure rules based on it are probably the most heavily tested criminal procedure issues on law school and Bar exams.

1. Coerced Confession and the 5th Amendment

In the study of criminal procedure and the events that led to the *Miranda* decision, the most important guarantee of the 5th Amendment is that,

> **"No person shall be … compelled in any criminal case to be a witness against himself…"**

This phrase means that a criminal defendant cannot be **forced** to **confess** or **give self-incriminating evidence** to the police. (Duh.)

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A. Voluntary Evidence is Admissible

Evidence that is **revealed** to police **voluntarily** or with the **actual consent** of the accused was discussed in the previous chapter on "unreasonable search and seizure." Such evidence has **always been admissible**, and that remains the rule. Therefore, it is of little interest in a criminal procedure class.

> **For Example:** Bob calls Craig the cop on the telephone and tearfully confesses that he has killed Vickie. This confession would **always be admissible**. Since Bob is calling on the **phone** it cannot be argued that he has been forced to confess.

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B. Forced Confessions are Not Admissible

Confessions that are **forced** by threat of violence, torture and similar means by police or other government personnel are **now clearly inadmissible**. Therefore, it is of little interest in a criminal procedure class.

For Example: Bob confesses he Vickie Butthead after Craig the cop puts a gun to his head and threatens to kill him. This confession would be **inadmissible.** And it does not matter if Bob really killed Vickie or not.

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C. Business Records can be Seized but Not Compelled

A defendant cannot be compelled by subpoena to produce incriminating business records. But this is a minor issue because the same records can be seized under execution of a **search warrant**.

For Example: Bernie is charged with the crime of income tax evasion. He is served with a subpoena that demands that he produce all of his income records that would show he was violating the law. This would be an **unenforceable subpoena** because it attempts to compel him to produce evidence against himself. Even though the records already exist, the act of production **self-authenticates** the validity of the records and acts as compelled self-incrimination.

For Example: Bernie is charged with the crime of income tax evasion. A search warrant is executed at his office and his records are seized. This is **not compelled self-incrimination**. The **records already existed** and he has not been compelled to either create them or to admit to their authenticity.

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D. Coerced Confessions are the Main Focus of Study

The situation that is of major interest in the development of the rules of criminal procedure, and that is studied in criminal procedure classes, is when the defendant confesses to a crime because of coercive police interrogation. This is the situation that troubled the Court and led it to issue the *Miranda* decision.

Originally **coerced and forced confessions** were admitted in both federal and state courts. Police frequently often "solved" crimes by beating, abusing and threatening ignorant, weak-willed, gullible and often innocent suspects until they "confessed" to crimes.

The U.S. Supreme Court barred **coerced confessions** from use in federal courts in the late 1800s, but forced confessions were still used in State courts until 1936 when the Supreme Court held states could not **beat suspects until they confess** to crimes because it violated the 14th Amendment guarantee of due process. (*Brown v. Mississippi.*)

After *Brown* police continued to use coercive tactics to elicit confessions. Among the tactics that police used were to question the suspect for long periods of time, to deny the suspect food, water, sleep and access to bathroom facilities, to deny access to an attorney and to make threats against the suspects and their family members unless they "confessed."

The Court addressed these practices in a number of criminal cases. Each case presented different facts and resulted in a complex and confusing body of thought. The Court created various "tests" in an effort to **balance** the need to **protect individual rights** against the need to promote effective **administration of justice.** The Court based its holdings in these cases on various considerations,

including whether the confessions were the **voluntary** result of **free choice** or the result of police tactics that violated **fundamental decency**. The Court was often divided in these decisions and a **"totality of the circumstances"** rule developed.

This evolving case law created considerable confusion, and an additional layer of confusion was added because the Court based its holdings in **federal** cases on the 5th Amendment prohibition of compelled self-incrimination, but the Court based its holdings in **State** cases on the 14th Amendment guarantee of due process.

> **For Example:** Rogers confessed after police pretended to illegally arrest his sick wife. This confession was held to be **inadmissible.**
>
> **For Example:** Townsend, who was sick, confessed after police drugged him with "truth serum". This confession was held to be **inadmissible.**
>
> **For Example:** Police arrested McNabb and kept him in custody for an extended period of time until he confessed. This confession was held to be **inadmissible.**
>
> **For Example:** Spanos confessed after police questioned him all night, for hours on end. This confession was held to be **inadmissible.**

At the same time the Court struggled with cases involving "involuntary" confessions, it was also struggling with cases where defendants confessed after being **denied legal counsel** as promised by the 6th Amendment. This was discussed in the previous chapter.

2. The *Miranda* Decision

In 1966 the Supreme Court addressed this issue in *Miranda v. Arizona.* In *Miranda* the Court created a broadly applicable bright-line rule as a **prophylactic** measure to curb police abuses and resolve the confusion that had developed in the prior case law. The facts of *Miranda* are not of much importance compared to the rule that resulted.

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A. The Miranda Rule

The *Miranda* decision produced the **"*Miranda* rule"** that whenever **police** subject defendants to **custodial interrogation** they must inform the suspect that:

1. That they have a right to **remain silent**;
2. That **anything they say** may be used against them;
3. That they have a right to ask to have **legal counsel** present;
4. That **legal counsel will be provided** if they cannot afford counsel.

This is also called the **"*Miranda* warning."** If the *Miranda* warning is not properly given, or if police continue to ask questions in a **custodial setting** after defendants asserts their rights to counsel and to remain silent, any statements by the defendants are **generally inadmissible**.

No Precise Text. The *Miranda* decision did not prescribe "exact" wording that must be stated. But there is a generally used phrasing that was popularized by a police officer that printed and sold "pocket cards" to sell to police officers who were uncertain what they were supposed to say.

Warning Must be Complete and Clear. What really matters is that the warning must be made in a manner that the defendant can understand it, and the warning must be given (in its entirety) even if the defendants are clearly aware of their rights, and even if the defendants attempt to interrupt or terminate the warning.

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B. Two Facets of *Miranda*

The *Miranda* rule has two facets. First, it enforces the 5th Amendment prohibition of **coerced confessions** by simply informing the defendant that they have a right to **remain silent**.

Secondly, the *Miranda* rule enforces the 6th Amendment right to **legal counsel** by recognizing **custodial interrogation** as a critical stage in a prosecution where access to legal counsel is sufficiently important that denial of legal counsel can result in a deprivation of **due process**.

But this second facet is less important and somewhat misleading. In truth the main reason the *Miranda* rule lets defendants demand an attorney at a custodial interrogation is NOT to simply provide legal advice about their constitutional rights. Rather, the **main reason** for the rule was to put the attorney there to protect those rights by preventing police from pressuring or forcing defendants into signing confessions in violation of the 5th Amendment.

The presence of a defense attorney at police interrogation was intended to have two prophylactic effects. First, it is unlikely police will continue to use threats, marathon questioning sessions and sleep deprivation as interrogation techniques in the presence of, and over the objections of, defense counsel. Second, if police do obtain a confession by use of such coercive techniques, defense counsel can witness that fact and testify to it at a suppression hearing.

While an attorney might give the defendant valuable advice at an interrogation, the *Miranda* rule is largely a means to prevent violation of the 5th Amendment by stationing defense counsel in the interrogation room on somewhat of a pretext that the 6th Amendment requires it. Of course the Supreme Court would never openly admit that its conclusion that the 6th Amendment required appointed legal counsel at custodial interrogations was a "pretext".

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C. *Miranda* Only Applies to Custodial Interrogation by Law Enforcement.

The *Miranda* warning is only required when there is a **custodial interrogation** by **police** (or government agents acting in a law enforcement capacity). A custodial interrogation is a situation where 1) the defendants **know** they are in the presence of **law enforcement officers** (e.g. police, INS, FBI, etc.), 2) the defendants reasonably believe they are **not free to leave** the interrogation and 3) police act to **elicit incriminating statements** from the defendant.

1) Civilian Government Employees

Generally government employees that are **not law enforcement** personnel do not have to give *Miranda* warnings.

> **For Example:** A social worker asks Bevis how his son, Buddy, was injured. Bevis admits he beat the child, and he is arrested for child abuse. This is a **legal interrogation** and Bevis' statements can be used against him because a social worker is not a law enforcement officer.

2) Police Agents

But the *Miranda* warning is required if **agents** of the police conduct a custodial interrogation as **law enforcement officers**.

> **For Example:** A private security guard questions John without reading him his *Miranda* rights. The guard works for a company that has a government contract to patrol the local Navy yards. This is an **illegal interrogation** and John's statements cannot be used against him because the "private security guard" is working under contract as a law enforcement officer for the government.

3) Psychiatric Exams

The *Miranda* warning is NOT necessary when psychiatric expert witnesses examine defendants to assess their **mental condition** but they ARE necessary if the examination is intended to support the prosecution's **penalty** arguments.

> **For Example:** John is arrested and the prosecution has a psychiatrist examine him outside the presence of his attorney. No *Miranda* warning is given. The report is presented at trial to show that prison without possibility of parole is the appropriate sentence. This is an **illegal interrogation** and the report cannot be used because the report is being used to establish **penalty** and John he had the right to remain silent.

> **For Example:** John is arrested and pleads insanity. The prosecution has a psychiatrist examine him outside the presence of his attorney to determine his sanity and competence to stand trial. This is a **legal interrogation** and the results can be used because he placed his sanity at issue and had a right to introduce the report of his own psychiatrist in rebuttal.

But the warning is not required when a private citizen independently questions the defendant because the 5th Amendment is a restraint on **government**, not private citizens.

> **For Example:** A store security guard apprehends Tom and questions him without reading him his *Miranda* rights. He admits shoplifting. This is a **legal interrogation** and Tom's statements can be used against him because a "store security guard" is a private party, not a police agent.

4) Custodial Interrogation Depends on Reasonable Appearances

A *Miranda* warning is only required if a police interrogation is "custodial" and that depends on whether a **reasonable person** in the same situation would feel they were **not free to leave** the interrogation. It does NOT matter if defendants **subjectively** believed they could not leave the interrogation. Generally interrogations are custodial if –

- The defendant has been **arrested** or taken into **custody;**
- The defendant is questioned at a **police station, jail** or **in a police car;**
- Police **block the exit** from the place where interrogation is taking place;
- Police **ask, tell** or **demand** the defendant stay and answer questions.

But interrogations are NOT custodial if –

- They are conducted over the **telephone**;
- The defendants are clearly told **they may leave** at any time;
- The defendants are questioned in **their own homes**;
- The defendants **do not know police are questioning them**.

The test of whether or not a questioning is "custodial" is **purely objective** and does NOT depend on whether the police **suspect the defendant** or intend to hold them or whether the defendants **subjectively believe** they are unable to leave.

> **For Example:** Craig the cop goes to Jones' house and requests entrance to ask some questions about a recent crime. After Jones consents and lets Craig into the house he feels he cannot reasonably tell him to leave. This is NOT a custodial interrogation because reasonable people know they can ask the police to leave their home.
>
> **For Example:** Craig the cop enters a bus passing through Texas and questions John, a bus passenger on his way to Louisiana. This is a custodial interrogation because John would be stranded without transportation if he gets off the bus, and he cannot make Craig get off the bus. Since he is "trapped" on the bus with a policeman asking him questions, it is a custodial interrogation.
>
> **For Example:** Craig the cop says to Allen on the street, "Come here. I want to ask you some questions." This is a custodial interrogation because a reasonable person would believe a demand of this nature cannot be ignored.
>
> **For Example:** Craig the cop calls David on the telephone and asks him questions. This is NOT a custodial interrogation because David cannot be "in custody" unless the police are **physically present** at his location.

5) Crime Scene Investigation

Police have a right to ask **general questions** of witnesses at the **scene of a crime** without giving *Miranda* warnings because such questioning is NOT a custodial interrogation. But when the questioning goes beyond general questioning, and when it is apparent the defendants are not reasonably free to leave the scene, the *Miranda* warning is generally required.

> **For Example:** Craig the cop sees Vick lying in the street with David standing over him. Craig approaches and says, "What happened to him?" David replies, "I shot him." This is NOT a custodial interrogation because this was **general questioning** at the **crime scene** that reasonable people in David's position would believe they could leave.
>
> **For Example:** Craig the cop investigates Vick's murder. He asks David to get into the back seat of his police car, and he asks him a number of detailed questions. This is a custodial interrogation because it goes beyond **general questioning** at the **crime scene** and it is apparent that David is not reasonably free to leave.

6) Traffic Stops

Stops of **motorists** for **minor traffic violations** are NOT custodial interrogations. The reason is that reasonable motorists would believe they are free to leave after a brief period.

> **For Example:** Craig the cop stops David for speeding. Craig says, "Where you going in such a hurry?" David says, "I just robbed a bank and they are after me!" This would be a **legal interrogation** despite the lack of a *Miranda* warning because it is not a custodial interrogation.

7) Airport Stops

Questioning of **airplane passengers** for **safety** or **customs** purposes are not custodial interrogations unless they are for extended periods of time.

> **For Example:** Sylvia the airport guard asks David, "May I ask what you have in your bag?" David says, "Vick's severed penis." This would be a **legal interrogation** despite the lack of a *Miranda* warning because it is not a custodial interrogation.

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D. Application of *Massiah* Rule to Provision of *Miranda* Warning

The *Massiah* Rule discussed in the previous chapter grew out of a case in which police had an agent surreptitiously question a defendant without his attorney present. But the rule itself, simply stated, is that **police agents are bound by the same rules as the police themselves**.

As a result, the *Massiah* Rule has direct application to the requirement for a *Miranda* warning when police agents conduct a custodial interrogation of a defendant. They are required to give the defendant the same *Miranda* warning the police themselves would be required to give.

The *Miranda* rule was adopted because of 5th Amendment concerns that defendants would be **intimidated** and **coerced** by police into making incriminating statements. Therefore, the *Miranda* warning is required when defendants are subjected to **custodial interrogation**. *Miranda* rule does NOT apply when a defendant is questioned in a setting where they reasonably would feel free to leave.

> **For Example:** Snitch, acting at the direction of the police, approaches John on the street and asks him if he knows where he can buy some dope. This is a **legal interrogation** and

John's statements can be used against him because John would reasonably believe he is free to leave at any time. As a result this is NOT a custodial interrogation.

For Example: Snitch, acting at the direction of the police, grabs John on the street, pushes him up against a wall and demands to know where he can buy some dope. This is NOT a **legal interrogation** and John's statements can be used against him because John would not reasonably believe he is free to leave at any time. As a result this IS a custodial interrogation and Snitch is required to give John the *Miranda* warning the same as a police officer would in the same situation.

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E. No Custodial Interrogation Legal Before *Miranda* Warnings Given

Under the *Miranda* rule police may not conduct a custodial interrogation until **after** they have given the *Miranda* warning. When the warning is given defendants can **waive** their rights. They can waive their right to silence, their right to have an attorney present or both rights.

If a defendant makes incriminating statements in a custodial interrogation **before** the *Miranda* warning is given, it is generally **inadmissible** and this cannot be salvaged by giving the *Miranda* warning after the fact or asking defendants to waive their rights after the fact.

For Example: Craig the cop suspects that Tom killed Vick. So he corners Tom and asks him what he knows. Tom confesses, "I held him while Dick stabbed him." Craig immediately gives the *Miranda* warning, and Tom demands an attorney. This confession is **inadmissible** and can NOT be used because it was made in a custodial interrogation **before** the proper *Miranda* warnings were given.

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F. Police "Interrogation" is Any Act Intended to Elicit Evidence

A **custodial interrogation** is any 1) **question, statement or action intended to elicit information** by 2) **police or police agents** in a situation where defendants 3) **reasonably believe they are not free to leave**.

For Example: Craig the cop takes John into custody and says, "You know what I want to know." This is a **custodial interrogation** even though Craig has asked no questions because it is intended to elicit information.

1) The "Christian Burial" Speech is an Interrogation

In a case featuring a "Christian Burial" speech it was held that any statement by police to a defendant in a custodial setting that is **intended by police to elicit incriminating statements** is an interrogation that either requires a *Miranda* warning or violates *Miranda* rights that have not been waived, whether questions are actually asked or not. (See *Brewer v. Williams* (1977) 430 U.S. 387.)

For Example: Bubba is arrested on suspicion he has kidnapped and murdered a little girl. When Bubba is given a *Miranda* warning **he requests an attorney**. Before an attorney is

provided Craig the cop says, "I am only going to point out two facts. First, the coyotes will chew that girl up before we find her. Second, there is a mother out there tonight praying to give her little girl a Christian burial." After this Bubba directs Craig to the location of the girl's body. This would be an **illegal interrogation**, even though the police did NOT ask express questions after the attorney was requested, because the purpose of the police statements about coyotes and burial was to **elicit** an incriminating response.

2) Arranged Third-Party Confrontation is Not an Interrogation by Police

No matter what police **intend** there is no violation of *Miranda* if there is **no interrogation by police** or an **agent** acting on the behalf of police. An interchange between the defendant and an independent third party (not a police agent) is NOT an "interrogation by the police" even when the **police engineer the confrontation** with an intent to cause the defendant to make incriminating statements.

For Example: Tom and Dick are arrested on suspicion of robbery. They are put in a police car with a hidden microphone and left alone for 30 minutes. Tom makes an incriminating statement caught on tape. This is NOT an **illegal interrogation by police** because the police are not asking Tom any questions, even though they **created a situation** where they intended to record incriminating statements.

For Example: Purvis is arrested on suspicion he has raped and murdered his girlfriend Wilma's little girl. Purvis requests an attorney. Craig the cop brings Wilma into the room and leaves her alone with Purvis. Wilma starts screaming at Purvis, and Purvis makes some incriminating statements in response. This is NOT an **illegal interrogation by police** because the police are not asking Purvis any questions and did not tell Wilma to question him. They just **created a situation** intended to elicit statements.

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G. Exercise of *Miranda* Rights is Presumed Unless Waiver Can be Shown

Law students often mistakenly believe that a defendant must say or do something to exercise *Miranda* rights. It is true that the defendant **must ask for an attorney**, but it is not actually true about the **right to remain silent**.

In practice, an exercise of the *Miranda* right to avoid self-incrimination is presumed, and defendants do NOT have the burden of proving that they made some statement or took some action to exercise the right to be silent. Therefore, **a defendant does not have to say or do anything at all to "exercise" the right to remain silent**.

But a defendant may **waive** the right to remain silent at a custodial interrogation. And defendants do often ignore the *Miranda* warning and start carrying on a conversation with police (especially in law school examination questions). Such behavior can constitute an **implied waiver** of *Miranda* rights. But, **the prosecution has the burden** of proving the defendant **knowingly, intelligently, voluntarily** and **intentionally** waived *Miranda* rights **with a preponderance of the evidence**. Waiver will be discussed in much greater detail below.

A prosecution claim of implied waiver may be proven where the defendant **initiates** and **continues to participate** in a discussion of a crime. But when the prosecution claims an implied waiver based on these facts, **any clear expression** by the defendant of a present intent or desire to exercise either the *Miranda* right to counsel or the right to remain silent is **sufficient evidence to overcome the prosecution claim of implied waiver**.

> **For Example:** David is arrested and read the *Miranda* warning. He asks for some water. Craig the cop asks him a question about the crime. David ignores the question and asks to go to the bathroom. Craig asks him another question about the crime. In response, David cries for his mother. Craig asks him another question about the crime, and David confesses. This is **inadmissible** because he **never waived** his *Miranda* right to be silent. Asking for water, to go to the bathroom and for his mother are NOT any evidence that he **knowingly, intelligently, voluntarily** and **intentionally** waived his right to NOT talk about the crime. Craig has violated that right by **continuing to question** him about the crime while he obviously did not want to discuss it.

> **For Example:** Manny is arrested and read the *Miranda* warning. He responds by proclaiming his innocence and blaming Moe. Craig the cop asks him a question in response to that statement, and a long and detailed conversation develops. This is **admissible** because he **impliedly waived** his *Miranda* rights. The prosecution would argue waiver based on the fact **he initiating and voluntarily participated** in the conversation about the crime and never asked for an attorney. Manny would lose because there is absolutely no evidence that his statements were involuntary.

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H. Questioning Must Stop Upon Any Exercise of *Miranda* Rights

Under the *Miranda* Rule police **must STOP** questioning and may NOT continue to **question** defendants about **ANY subject** after they exercise either *Miranda* right to either be silent or to have an attorney present. If either of those two *Miranda* rights is clearly exercised **police cannot continue questioning**. But whether police can resume questioning later depends on which right is exercised.

1) Questioning May Resume without Counsel if Only Right to Silence Exercised

If the defendant only exercises the right to silence (by just being silent or by saying they do not want to talk) and does not exercise the right to counsel (i.e. does not expressly ask for an attorney) police may approach the defendant later **after a reasonable period of time** has passed, repeat the *Miranda* warning and try to resume questioning. But after an attorney has been appointed to represent the defendant no police questioning **about the crime charged** can be conducted without the attorney present.

> **For Example:** David is arrested for murder and read his *Miranda* rights. David says he does not want to answer any questions. Craig the cop responds, "If you don't talk to us you are just digging your own grave." David answers, "I didn't mean to do it. It was an accident." This is an **inadmissible** statement because David **clearly exercised his right to remain silent** and the police had to STOP questioning at that point. They cannot try to change the defendant's mind about the exercise of rights.

> **For Example:** David is arrested for murder and read his *Miranda* rights. David says he does not want to answer any questions. The police stop questioning and put him in a holding cell. The next day Craig the cop gives David the *Miranda* warning a second time and this time David begins talking and says, "I killed Vick, so I think I need an attorney." This is an **admissible** statement because David **only exercised his right to silence** the first time and **voluntarily waived it** the second time he was questioned. He never exercised his right to have an attorney present, so the police could resume questioning after **waiting a reasonable period of time** and giving a second *Miranda* warning.

2) Questioning May Resume Only with Counsel if Right to Counsel Exercised

If the defendant exercises the right to have an attorney (by expressly asking for an attorney) police cannot question the defendant at any time after that **about the crime for which they were arrested** unless the attorney is present.

> **For Example:** David is arrested for murder and read his *Miranda* rights. David says he wants an attorney. The police stop questioning and put him in a holding cell. The next day Craig the cop gives David the *Miranda* warning a second time and this time David says, "I killed Vick." This is NOT an **admissible** statement because David **exercised his right to have an attorney** and after he did that the police cannot question him about the same crime without the attorney present.

3) Defendant can be Questioned about Different Crimes after New *Miranda*

After defendants exercise *Miranda* rights (to either be silent or to have an attorney) the police CAN question them about other crimes and events without counsel present after giving them another *Miranda* warning.

> **For Example:** David is arrested for murder and read his *Miranda* rights. David says he wants an attorney. The police stop questioning and put him in a holding cell. The next day Craig the cop gives David the *Miranda* warning a second time and this time he asks David about an unrelated burglary, not about the murder. This is legal because he only asked for an attorney with respect to the murder charge. If he wants an attorney as to the burglary charge he has to ask for an attorney a second time.

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I. Public Safety Exception

One exceptional circumstance where police may briefly question a defendant without giving a *Miranda* warning is a **public safety** situation where information is needed quickly at the time of arrest to protect the public. (e.g. See *New York v. Quarles* (1984) 467 U.S. 649.)

> **For Example:** David tries to rob a bank by using a time-bomb that will explode if a secret combination is not entered. When he is apprehended at the bank Craig the cop shouts, "What's the combination?" David reveals the combination. Although David was not given a *Miranda* warning prior to his incriminating response it would be admissible as evidence against him because the information was needed quickly to protect public safety.

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J. Clarification Question Exception

Another exceptional circumstance where police may question a defendant without giving a *Miranda* warning is when they simply ask the defendant to **clarify a prior statement** given voluntarily. They may also question after giving the warning if needed to clarify whether the defendant is exercising *Miranda* rights or not.

> **For Example:** David walks into a police statement and says, "I did it. I am guilty." That statement is not given in response to police questioning so it is admissible. But then Craig the cop takes him into another room and asks, "What are you talking about?" David says, "I killed Vick." This statement would be admissible, even though it was made in a **custodial interrogation** before the *Miranda* warning was given because it was simply a request for clarification of the defendant's voluntary statement.

> **For Example:** David is arrested and read his *Miranda* rights. In response David says, "I think I do." Craig the cop responds, "You do what?" David answers, "I killed Vick, so I think I want an attorney." This statement would be admissible, even though it was after *Miranda* warning because David' statement was **too ambiguous** to constitute an exercise of the right to counsel, and Craig's **request for clarification** was appropriate. David's admission was an **implied waiver** of *Miranda* rights if he knew he had a right to 1) be silent and 2) demand an attorney.

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K. Grand Jury Exception

Another circumstance where a person can be questioned in a "custodial setting" without being giving a *Miranda* warning is questioning before a **Grand Jury**. While individuals questioned can invoke the 5th Amendment right to refuse to testify against themselves, there is no requirement that they be given the *Miranda* warning. Generally it is held that there is no chance that any admission in such a setting would be a "coerced confession".

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L. Subsequent Interrogation Exception

As stated above, police must immediately stop questioning defendants when they exercise the right to **remain silent**. But if the defendant does not request an attorney the police may make subsequent efforts to question the defendant **after waiting a reasonable period of time**. If they do resume questioning they must first give another ***Miranda* warning**. And if the defendant again asserts the right to remain silent the police must again immediately stop questioning.

> **For Example:** David is arrested for a robbery and given a *Miranda* warning. He says, "I ain't talkin'," so police put him in a holding cell. The next day they give him a second *Miranda* warning, start questioning him about the robbery again and he confesses. This is a **legal interrogation** because the police respected his first exercise of the right to remain silent, but that did not prevent them from making a second effort after giving the defendant a reasonable amount of time to "think it over."

This exception does not apply after the defendant has **requested an attorney**. The request must be clear and unambiguous.

> **For Example:** David is arrested for a robbery and given a *Miranda* warning. He asks for an attorney. So police put him in a holding cell. The next day they give him a second *Miranda* warning and resume asking about the robbery. This is an **illegal interrogation** because the police cannot question him again about that same crime (the robbery) until his attorney is present.

A defendant can **retract a prior request for counsel.** But the retraction is **only valid if initiated by the defendant.** No retraction is recognized and all subsequent statements are inadmissible if **police initiate** subsequent conversations with defendants after they request an attorney during a custodial interrogation.

> **For Example:** David is arrested for robbery and given a *Miranda* warning. He asks for an attorney. So police put him in a holding cell. The next day **he calls the guard** and says, "I am ready to talk." The police then give him a **second *Miranda* warning**, and he waives his rights. This would be a **legal interrogation** because David can **retract his request** for an attorney.

> **For Example:** David is arrested and requests an attorney when given a *Miranda* warning. The next day Craig the cop asks him if he still wants an attorney. David says, "No, I changed my mind." Any subsequent questioning would be an **illegal interrogation** because **the retraction was invalid** since it resulted from **a conversation initiated by police.**

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M. All Statements Obtained in Violation of *Miranda* are Generally Inadmissible

Any statement obtained from a defendant in clear violation of the *Miranda* rule is generally subject to suppression under application of the **Exclusionary Rule.** It does not matter whether the statements are **incriminating** or **self-exculpatory.** The Exclusionary Rule will be explained in greater detail later.

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N. Wavier of *Miranda* Rights

The rights to be silent and to have legal counsel appointed stated in a *Miranda* warning prior to custodial interrogation are **subject to waiver**. If the defendants do not ask for an attorney after being given the *Miranda* warning, the right to counsel is presumed to have been waived. If the defendants begin talking to the police their right to silence is presumed to have been waived. If the defendants ask for an attorney or say they do not want to talk the rights have been asserted. But even after the rights are asserted defendants can, on their own initiative, voluntarily retract their assertion and waive their rights.

Although the prosecution must prove a wavier of *Miranda* rights was done knowingly and intelligently, the court will not subject the waiver to as high a level of scrutiny that would be the case when assessing 6th Amendment waiver of the right to counsel at one of the other critical stages. Specifically **implied waiver** of the right to counsel is recognized. In contrast waiver of the 6th Amendment right to counsel after any other critical stage of prosecution (e.g. at arraignment) cannot be waived by implication. It can only be waived by an express, knowing and intelligent statement of waiver by the defendant.

1) Waiver of *Miranda* Rights Must be Unambiguous

Police may proceed to question defendants without counsel if they waive their *Miranda* rights. But exercise of the *Miranda* rights is presumed and **ambiguous statements** are NOT enough to constitute a waiver. The prosecution has the burden of showing the defendant was questioned **after** giving a waiver **knowingly, intelligently, voluntarily** and **intentionally**.

> **For Example:** Wong is arrested and given a *Miranda* warning. He says, "I don't know what to do." Then Craig the cop starts asking him questions that lead to a confession. This is an **illegal interrogation** because Wong's statement is **ambiguous** and exercise of *Miranda* rights is presumed. Since he did not clearly waive his rights, police may not commence questioning him.

But an **implied waiver** may be clearly shown when defendants initiate a discussion and do not indicate any desire to have an attorney present.

> **For Example:** Clyde is arrested and given a *Miranda* warning. He says, "I don't know why you arrested me. I didn't do it. I wasn't even in town that day." Then Craig the cop starts asking him questions that lead to a confession. This is a **legal interrogation** because Clyde **makes it clear by initiating a discussion of the facts** that he does not intend to remain silent, and he does not ask for an attorney.

2) Waiver of *Miranda* Rights Can be Express or Implied

Defendants can **expressly waive** their *Miranda* rights by stating they want to make a statement and do not want an attorney. This may be stated in a signed waiver, but **a signed waiver is not required**. Defendants can also **impliedly waive** their *Miranda* rights but the prosecution must be able to prove the waiver was done **knowingly, intelligently** and **intentionally**. "Intelligently" means that the defendant was able to realize the gravity of the situation, not that the defendant has to be a particularly intelligent person.

> **For Example:** David is arrested in a state of acute intoxication. He is given the *Miranda* warning in a semi-conscious condition. His subsequent statements would be **inadmissible** because the prosecution could never prove he waived **knowingly, intelligently** and **intentionally.**

3) No Waiver is Implied by Silence Alone

A defendant has a right to remain silent, so being silent after a *Miranda* warning never implies a waiver of the right to remain silent. But a waiver may be found by implication when a defendant silently nods, shrugs and otherwise "waives off" the *Miranda* warnings and then begins making statements and answering questions.

> **For Example:** Joe is arrested and given the *Miranda* warning. When Craig the cop reads him his rights he sits silently. Craig starts asking **questions about the crime**, and Joe remains silent. But after several questions are asked Joe says, "I killed him. So what?" This is a violation of the right to remain silent because his silence indicated he was exercising his right to be silent and it was **not a waiver**. At that point the police were supposed to stop questioning him. By continuing to question him his right to be silent was violated.

> **For Example:** Joe is arrested and given the *Miranda* warning. When Craig the cop reads him his rights he silently waves his hand in a clearly dismissive manner. Craig says, "OK, what happened?" Joe says, "I killed him. So what?" This statement was not obtained in violation of the right to remain silent because a **waiver was implied** by the "body English" of the "dismissive" wave.

> **For Example:** Joe is arrested and given the *Miranda* warning. When Craig the cop reads him his rights he sits silently for a moment. Craig asks him if he understands his rights. Joe says, "I killed him. So what?" This is NOT a violation of the right to remain silent because Craig was asking him **whether he understood his rights**, NOT about **the crime.**

4) Waiver Can be Expression of Desire for Attorney "Later"

Defendants that respond to *Miranda* warnings by saying they will want to talk to an attorney "later" have waived their right to an attorney.

> **For Example:** Joe is arrested and given the *Miranda* warning. He says, "I will answer some questions, but I may need to talk to an attorney later." This statement is an **express waiver** of the right to an attorney at the present time.

5) Waiver is Effective Despite Refusal to Sign Waiver Document

A waiver, express or implied, is effective even if the defendant expressly refuses to sign a waiver. This is true even if defendants say they want an attorney "before they will sign" a waiver.

> **For Example:** Joe is arrested and given the *Miranda* warning. He says, "I will talk." But when given an express waiver to sign he says, "I will answer your questions, but I ain't signing nothin' without an attorney's OK." This statement is an **express waiver** of the right to silence, despite the fact that he requests an attorney before he will sign a written waiver agreement.

6) Waiver is Effective Despite Refusal to Let Police "Take Notes"

A waiver, express or implied, is effective even if the defendant is expressly refusing to let police "take notes" concerning their answers to questions.

> **For Example:** David is arrested and given the *Miranda* warning. He says, "I will answer your questions, but only if you don't write any of this down." This statement is an **express waiver** of the right to silence, despite the fact that he insists that nothing be "written down."

7) Waiver May be Induced by Police Deception

Defendants' waivers of *Miranda* rights are effective as long as the defendants **understand the bare essentials** of the *Miranda* rights they are waiving and **voluntarily agree to waive**. Events taking place outside the presence of the defendant are irrelevant.

Specifically, if defendants understand their rights at the time of waiver, **deliberate deception by police** will usually NOT render the waiver ineffective. For example, a **waiver of *Miranda* rights remains effective even if police –**

- Mislead defendants about the **crimes being investigated**;
- Conceal from **defendants** the **seriousness of crimes** to be charged;
- Conceal from defendants the fact that their **family has hired an attorney** for them;
- **Refuse to let attorneys** (not requested by defendants) **advise** the defendants;
- Conceal the **seriousness of crimes** to be charged from the **defendants' families and the attorneys they have hired**;
- Deceive defendants by saying **other co-defendants are confessing**;
- Deceive defendants by saying the **court will "go easy"** on them if they talk;

> **For Example:** Brad is arrested for stabbing Vick, and Karl the cop reads him his *Miranda* rights. After he is taken away his wife Angelina hires Larry the Lawyer to represent him. Larry rushes to the police station. Karl tells the desk sergeant, "I think the kid is going to waive, so get rid of the attorney." So the desk sergeant tells Larry, "He ain't here. They hauled him to the 37th precinct." Alone and in despair, Brad starts talking and soon confesses. This **waiver is legal** despite the police deception as long as Brad understood he had a right to 1) **be silent** and 2) **demand an attorney**.

> **For Example:** Brad is arrested for stabbing Vick, and Karl the cop reads him his *Miranda* rights. After he is taken away Vick dies. Karl tells Brad, "Vick is going to be fine, just a flesh wound." Believing he is not in much trouble, Brad starts talking and soon confesses to the stabbing. This **waiver is legal** despite the police deception as long as Brad understood he had a right to 1) **be silent** and 2) **demand an attorney**.

> **For Example:** Tom and Dick are arrested for stabbing Vick, and Karl the cop reads them their *Miranda* rights. At the police station they are separated. Karl tells Tom, "Dick says you stabbed Vick and he was just a witness." Afraid that Dick is putting all the blame on him, Tom states that Dick and he both participated. This **waiver is legal** despite the police deception as long as Tom understood he had a right to 1) **be silent** and 2) **demand an attorney**.

> **For Example:** Karl the cop calls Huey and asks him to come to the police station to answer some questions about a speeding ticket he received. Karl really is investigating as string of robberies. At the police station Karl says, "As you know from watching TV we now have to read everyone their rights, even for speeding tickets." Huey is read his *Miranda* rights and agrees to talk about the ticket. Then Karl starts asking questions that are really about the robberies. This **is legal** despite the police deception as long as Huey understood he had a right to 1) **be silent** and 2) **demand an attorney**.

8) Waiver by Insane Defendant is Valid

A waiver of *Miranda* rights by an **insane defendant is valid** if it is not the result of coercion. Although a waiver must be given **knowingly, intelligently** and **voluntarily**, the defendant does not have to be sane.

> **For Example:** Twitchy, a chronic schizophrenic frequently in a psychotic state goes to the police department to confess to a murder because the "voice of God" told him to. Twitchy is read his *Miranda* rights and expressly waives, agreeing to talk about the murder. This **is a legal waiver** despite the fact Twitchy is insane as long as the **preponderance of the evidence** shows Twitchy was **not coerced** into waiving his rights.

9) Waiver Extends to All Subsequent Interrogations

After a defendant waives *Miranda* rights at any custodial interrogation, the police do NOT have to give *Miranda* warnings at **subsequent interrogation sessions**, even if the subsequent interrogations are about **different crimes**, where **several days pass,** or where unbeknownst to the defendant the **circumstances have changed**, unless the defendant has been released from custody.

> **For Example:** Brad is arrested for beating Angelina, and he is given a *Miranda* warning. He gives a voluntary waiver and answers questions. A week later Angelina dies while Brad is in jail, unaware of her death. Police again question Brad, and this time they do not give him a *Miranda* warning. This is a **legal interrogation** because police do not have to give the warning a second time after a valid waiver.

10) Waiver after Retraction of Exercise of *Miranda* Rights

As explained above defendants that have **expressly exercised** their rights to be silent and/or to have an attorney can later **retract their requests** and then waive their *Miranda* rights.

If defendants originally exercise *Miranda* rights by an **unambiguous request for an attorney,** the **defendant must initiate any subsequent retraction** and waiver. A defendant does not "initiate" a retraction simply by talking casually to police. The defendant must initiate a conversation **about the criminal investigation** and thereafter give a **knowing and intelligent waiver.**

But if the defendant originally expressed only a **desire to remain silent**, **police may reinitiate** questioning (giving a new *Miranda* warning) **after a delay** of reasonable duration.

11) Retraction of a Waiver

A defendant that waives *Miranda* rights may **retract** the waiver at any time during the interrogation and exercise the right to be silent and/or request legal counsel. A **retraction is not presumed** so it requires a **clear expression** of a desire to stop answering questions or to have access to an attorney. In this event **police must immediately STOP** interrogation.

> **For Example:** Don is arrested and given the *Miranda* warning. He says, "I will answer your questions." But after answering some questions he says, "Can I talk to a lawyer now?" Karl the cop says, "You said you didn't want a lawyer." Questioning resumes, and Don eventually confesses. It is **inadmissible** because Don **retracted his waiver** when he **clearly expressed a desire** to talk to an attorney. By ignoring Don and continuing questioning, Karl effectively violated Don's *Miranda* right to counsel.

But a **request for a non-lawyer** is not an effective retraction of a waiver of the right to counsel.

> **For Example:** Don is arrested and given the *Miranda* warning. He says, "I will answer your questions." But after answering some questions he says, "I want to talk to my priest." This statement is NOT a **waiver retraction** because Don did not ask to have assistance of **an attorney**.

And an **ambiguous request** concerning a lawyer is NOT sufficient to constitute a retraction of a waiver. If an ambiguous request is made following a waiver, **police do not have a duty to clarify** the defendant's statement.

> **For Example:** Don is arrested and given the *Miranda* warning. He says, "I will answer your questions." But after Karl the cop asks him some questions Don says, "I wonder if I should talk to an attorney." Karl ignores this statement and continues to interrogate. This is **legal interrogation** because the statement was **ambiguous** and insufficient to constitute a **waiver retraction.** Karl the cop did NOT have any duty to ask Don to clarify his desires.

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O. *Miranda* Rule Inapplicable After Next Critical Stage Occurs

As explained in the prior chapter on the 6th Amendment, the right to counsel attaches at the "first critical stage." Under *Miranda* the right to counsel attaches when it is requested at a custodial interrogation, so this constitutes a "critical stage" if an attorney is expressly requested by the defendant. But after custodial interrogation, the next "critical stage" would usually be a **first appearance.** It could also be a corporeal **line-up.**

When a defendant requests an attorney under *Miranda* the right to counsel is based on both 5th and 6th Amendment considerations. But at the next critical stage the right to counsel is based only on the 6th Amendment. At that point the *Miranda* rule no longer applies.

If a defendant has NOT requested (or expressly waives) an attorney in custodial interrogation, that fact or waiver does NOT constitute any waiver of the right to counsel at any following critical stage. Under the 6th Amendment **implied waiver is not recognized.** So if a defendant expressly or impliedly waives the right to counsel following a *Miranda* warning (i.e. prior to custodial

interrogation) counsel will still be automatically appointed at the next critical stage unless the defendant **expressly waives** the right to counsel a second time at that later critical stage.

> **For Example:** Don is arrested and given the *Miranda* warning. He says, "I don't want an attorney." But after he is formally charged he is placed in a line-up, and no attorney is there for him. The line-up identification that results is **inadmissible** because his waiver of an attorney at the interrogation did not constitute a wavier of the right to counsel at subsequent critical stages of the prosecution.

Further, police can resume questioning defendants **about unrelated crimes** without the presence of defense attorneys appointed for charged crimes. If the subsequent interrogation is "custodial" new *Miranda* warnings must be given.

> **For Example:** Don is arrested for burglary and given the *Miranda* warning. He says, "I want an attorney." Larry the lawyer is appointed to represent him. Later Don is charged with the burglary, and Larry remains his appointed counsel. After that Karl the cop goes to see Don in jail without Larry present and gives him a *Miranda* warning. Don does not request a lawyer this time. Karl then questions Don about an unrelated robbery. This is a **legal interrogation** because Don's right to have Larry present at subsequent interrogations only concerns the burglary charge. He has no right to have Larry present at subsequent interrogations concerning **different crimes**. If Don wants an attorney present at this subsequent interrogation about a robbery **he must request counsel a second time** in response to the second *Miranda* warning.

3. The Use of Illegally Obtained Evidence

The prior three chapters have focused on an explanation of the 4th, 5th and 6th Amendments and situations in which evidence is illegally obtained by police.

- **Physical evidence** may be illegal because it was the result of an **unreasonable search or seizure** in violation of the 4th Amendment;
- **Incriminating statements** or **guilty pleas** may be illegal because they are the result of **denial of counsel** in violation of the 6th Amendment;
- **Confessions** may be illegal because they are the result of **coercion** in violation of the 5th Amendment; and
- **Incriminating statements** and **confessions** may be illegal because they are the result of **violations** of the ***Miranda* rule** established to protect 5th and 6th Amendment rights.

The **Exclusionary Rule** is a restriction on the use of these types of illegally obtained evidence. It is a rule devised by the courts to deter the police from engaging in illegal activities. As explained above, the Exclusionary Rule does not prevent the use of such evidence in Grand Jury investigations. The next and last chapter of this outline explains the application of the Exclusionary Rule in criminal trials.

Chapter 10: The Exclusionary Rule

The **Exclusionary Rule** is simply that **the Court (judge) has discretion to exclude** from a criminal trial any evidence obtained by the police through **violations of the defendant's Constitutional rights**.

However, exclusion is a matter of **Court discretion**, and **exceptions** exist. The Exclusionary Rule is a **judicially created remedy** and NOT a Constitutional right of the person whose rights have been violated.

The Court (judge) has discretion, but it is not unlimited discretion. If a trial judge allows illegally obtained evidence to be admitted at trial the defendant may appeal claiming the judge abused his discretion and that it caused prejudicial error. If the Appeals Court agrees the trial court judge **abused his discretion** AND that it was not a **harmless error** the lower court holding will be **reversed and remanded** for retrial.

1. Standing to Object to Admission

The first requirement of defendants seeking to suppress evidence under application of the Exclusionary Rule is to prove **standing to object.** Generally the defendant's **own Constitutional rights must be violated**. A defendant generally has NO standing to object to violation of another person's rights.

The **basic standing rule** is that defendants generally only have standing to object if their **reasonable expectations of privacy** were violated.

As a general rule, there is no reasonable expectation of privacy and no standing to object to evidence that is outside the possession of the defendant at the time police obtain it. Specifically, there is no Constitutional basis to claim standing to object to evidence that results from:

- The illegal arrest of another person;
- The illegal search of another person's home (unless the defendant is an overnight guest);
- The illegal search of another person's property (e.g. purse, car, land);
- The coercion of another person to give statements and reveal evidence;
- The violation of another person's right to counsel;
- The violation of another person's right to be silent;
- The violation of another person's *Miranda* rights;

The **standing rule** is not Constitutionally based so it does not bind the states. Some states (e.g. California) hold that evidence obtained as a result of an unreasonable search or seizure **cannot be admitted into evidence at any defendant's trial** even if another person's 4th Amendment rights were violated.

Further, there are many situations where the "fruit of the poisonous tree" principal allows a defendant to object to evidence even though standing otherwise is lacking.

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A. Inadmissibility of Suppression Hearing Statements

A request that illegally obtained evidence be excluded at trial is made at a **suppression hearing**. Admissions or claims made at suppression hearings cannot be used against a defendant at trial. So defendants may **claim standing based on ownership** at a suppression hearing to oppose the admission of evidence and later **deny ownership** of the same evidence at trial as part of their defense.

> **For Example:** Karl the cop searches a jacket lying next to Bob and finds dope. Bob objects that it was an illegal search. And he also claims that the jacket was not his, anyway. In order to have standing to object to the search, Bob must claim he owned the jacket at the suppression hearing. But if the jacket is admitted at trial over his objections he can claim at trial that the jacket was not his at all. His statements at the suppression hearing cannot be used against him at the trial.

2. Purpose and Application of Exclusionary Rule

The Exclusionary Rule is a **prophylactic measure** created for the dual **purposes** of:

1. **Deterring illegal police conduct** by prohibiting police from later using evidence obtained through Constitutional violations; and
2. **Protecting court integrity** by preventing criminal prosecutors from using the courts in a pattern of illegal practices.

Of these two purposes, **deterrence of police misconduct** has been the more frequently stressed theory.

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A. The Balancing Test

The Exclusionary Rule requires a **balancing test** by which the court considers these factors:

- How do the **societal benefits** of exclusion compare to the **societal costs** of exclusion?
- Did the **police** act wrongfully to obtain the evidence, or **some other party**?
- Was the police misconduct **deliberate** or did they act in **good faith**?
- Is the party that wants to use the evidence the **same party that violated the law** to get it?
- Would the evidence have been **discovered anyway**?
- If the evidence is excluded **what deterrent effect will it have on police**?
- If the evidence is excluded will it **seriously impair the administration of justice**?

Evidence is less likely to be excluded if it would have **little deterrent effect on police** but cause a **high social cost** by impairing the administration of justice.

> **For Example:** Kathy the cop searches Bob's house in good faith with a facially valid warrant and finds anthrax Bob intended to use in a terrorist attack. Unfortunately the warrant is invalid because of a technical error. This evidence would probably not be excluded, because the **police did nothing intentionally or obviously wrong**.

And evidence is more likely to be excluded if that would have a **deterrent effect on police** at **little social cost**.

> **For Example:** Juan murders Butthead in front of three witnesses. Craig the cop questions Juan without a *Miranda* warning and Juan confesses. The confession would probably be excluded because it is illegal and excluding poses no social costs since Juan is going to be convicted anyway based on the testimony of the three witnesses.

B. No Exclusion for Non-Constitutional Violations

The Exclusionary Rule only applies when evidence is obtained in violation of **Constitutional guarantees**. It does not apply to exclude evidence obtained in violation of other laws.

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C. The Court has Discretion to Apply Exclusionary Rule

Generally, the trial court will apply the Exclusionary Rule to exclude all evidence illegally obtained by police. But the **court has discretion** in this. The trial court will only be **reversed on appeal** if it is found there 1) was an **abuse of discretion** AND 2) it was **not harmless error**.

1) Abuse of Discretion.

In some situations it is almost always an abuse of discretion to allow this evidence to be admitted:

- Evidence obtained through **forced, involuntary confessions**;
- Evidence obtained through **bad-faith police practices** such as perjury;
- Evidence that the **defendant remained silent** after being arrested.

But it is NOT an abuse of discretion for a trial court to allow evidence that **the defendant knew of a crime and failed to report it**. In many situations admission of illegally obtained evidence is not an abuse of discretion. These situations are "exceptions" to the Exclusionary Rule.

2) Harmless Error

No matter how bad a trial judge's abuse of discretion may be regarding admission of evidence that should have been excluded the **conviction will not be reversed** on appeal if the appellate panel finds it to be **harmless error**. This will be the case when there is other ample evidence of guilt so the defendant will be convicted even the objectionable evidence is excluded.

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D. Application of Exclusionary Rule to Fruit of the Poisonous Tree

Evidence obtained in violation of Constitutional protections is not inadmissible if **it is no longer tainted** by the illegality of the original violation because of intervening events. Whether or not evidence remains tainted depends on subsequent events and there are numerous **special rules**.

1) Confession Following Illegal Arrest

A **confession** following an **illegal arrest is always tainted**, and the **taint is not removed** by giving the defendant a *Miranda* warning after the fact.

> **For Example:** Karl arrests Wong **without probable cause** and reads him a correct *Miranda* warning. Wong waives his right to silence and confesses. This is an **inadmissible** confession because **the illegal arrest taints the confession**.

2) Confession Following Prior Inadmissible Confession

A **confession** following a **legal arrest** is **illegal** if the defendant is **not given a proper *Miranda* warning**, but the taint doesn't spread to a **second confession** after a proper *Miranda* warning.

> **For Example:** Conner **legally** arrests Stanley but does not giving him a proper *Miranda* warning. Stanley confesses. Later Conner gives Stanley a correct *Miranda* warning and Stanley confesses a second time. This is an **admissible** confession because **the first improper confession does not taint the second proper confession**.

3) Evidence Revealed by Inadmissible Confessions

Evidence revealed in an inadmissible confession is more likely to be suppressed if it resulted from **intentional police misconduct** and less likely to be excluded if it resulted from an **unintentional** or rather **technical violation** of the *Miranda* rule.

> **For Example:** George is arrested **illegally without probable cause** and he reveals the **location of a gun** he used in a robbery. The confession is inadmissible, and **the gun will be probably inadmissible** too because the evidence all "flowed from" the illegal arrest.

> **For Example:** George is legally arrested and given a **proper *Miranda* warning**. He requests an attorney. The next day he is given a second *Miranda* warning by officers that are **unaware of his prior request for counsel**. He reveals the **location of the gun** he used. **The confession is inadmissible** because it resulted from a violation of his right to counsel, but **the gun may be admissible evidence** since the police error was unintentional.

4) A Guilty Plea Following an Inadmissible Confession is Not Alone a Reversible Error

A guilty plea entered by a defendant following an illegally obtained confession is not generally a reversible error **unless the defendant also receives ineffective assistance of counsel**.

> **For Example:** Sam is arrested for robbery and is questioned **without any *Miranda* warning**. He confesses. At the first appearance he has no attorney, and he is asked to enter a plea. He pleads guilty, believing that his situation is hopeless because the confession will be used against him. On appeal, he is **likely to get a new trial** because the confession was inadmissible and he did not have legal counsel to advise him before he pled guilty.

5) Testimony Given to Rebut an Illegal Confession can be Suppressed on Retrial

A defendant that testifies at a first trial to rebut an illegally obtained and improperly admitted confession can suppress that prior testimony at the retrial of the case.

> **For Example:** Don is arrested for robbing an old lady of her purse and is given **no *Miranda* warning**. He confesses. At his first trial the confession is entered into evidence over his objection. To rebut the confession to **robbery** he testifies and admits to facts showing he committed **larceny.** His conviction for robbery is overturned because the confession should never have been admitted. And at a second trial Don can **suppress both the confession and his prior testimony** as fruit of the poisonous tree because he would not have testified at all at the first trial but for the admission of the illegal confession.

6) Evidence Discovered During an Illegal Stop

A defendant that is **illegally stopped** by police can generally **exclude evidence** discovered by the police as a result of the stop, even if the defendant takes some action that reveals the evidence.

> **For Example:** Officer Otto stops Jones' car without cause. Frightened, Jones throws his reefer (marijuana cigarette) out the window. Otto arrests Jones for drug possession. At trial the dope will be **inadmissible**, even though Otto saw Jones toss it before he stopped him, because it is the result of the illegal stop, and thereby fruit of the poisonous tree.

3. Recognized Exceptions to Exclusionary Rule Application

There are a number of **recognized exceptions** where failure to apply the Exclusionary Rule has been found NOT to be an abuse of trial court discretion.

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A. The Independent Source Exception

If evidence against a defendant is obtained by police in two **independent** ways, the fact that one way was illegal **does not taint the evidence obtained the other way.** The second source of evidence cannot be an indirect result of the first illegal act or else it would be "fruit of the poisonous tree".

> **For Example:** Craig the cop **illegally enters** Smith's yard and finds marijuana growing. As he is leaving the yard Nosey Neighbor approaches him and reports that she went into Smith's yard the day before and found a strange weed. She gives Craig a sample she picked. Craig gets a search warrant based on an affidavit reporting **both** his observation and the statement and sample picked by Nosey Neighbor. The yard is searched under the warrant and the evidence seized. Smith moves to suppress all evidence on the grounds that Craig **first discovered** the evidence through an illegal entry. But **Nosey's statement and sample** are an **independent source** of evidence and **not fruit of the poisonous tree**. That evidence is sufficient alone to supply probable cause for the warrant, even if Craig's own illegal observations are redacted. Since the warrant would remain adequately supported by probable cause, the evidence seized under it remains both legal and admissible.

> **For Example:** Karl the cop **legally obtains** evidence that gives him **probable cause** sufficient to get a warrant to arrest Wilson and search his house for sale of cocaine but does not do so. Instead he arrests Wilson outside the house, goes inside and sees marijuana. Another occupant, Dennis, is also in the house. So Karl stays in the house to prevent destruction of evidence while a warrant is obtained based on his initial information. After the warrant is issued Karl searches the house thoroughly and finds cocaine. The cocaine would NOT be excluded because Karl already had probable cause for that search warrant **before he illegally entered** the house. Although his entry was illegal, the **discovery of the cocaine was not clearly the fruit** of that illegal act. Rather, it resulted from an **independent legal source** of information. But the marijuana probably would be excluded unless the police can prove **they would have gotten a warrant and discovered it anyway**. This is called the **inevitable discovery exception**, and it is covered next.

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B. The Inevitable Discovery Exception

If evidence is discovered in an illegal manner that would have been **inevitably discovered by police in a legal manner anyway**, the Exclusionary Rule will not always be used to suppress it. The reason is that the purpose of the Exclusionary Rule is to deter police from violating the defendant's Constitutional rights to either 1) improve their own position or to 2) worsen the defendant's position. But when police could and would have legally obtained the very same evidence anyway, the defendant is no worse off and the police are no better off than would otherwise have been the case. If the defendant is no worse off than otherwise there is no point in excluding the evidence. [The sports phrase for this argument is "No harm – no foul."]

> **For Example:** Purvis is seen kidnapping a girl. He gets away, kills her and hides her body deep in the forest. Police capture Purvis, and a search party follows his trail in the woods with bloodhounds. Purvis is not given a *Miranda* warning, and just before the body would have been found anyway he confesses and tells the police where to find the body. At trial he moves to suppress all evidence regarding his confession and the body because he was not given a *Miranda* warning. Without the body, murder cannot be proven. Evidence of the body (i.e. photos, testimony concerning it) may NOT be suppressed under the Exclusionary Rule because **the discovery of the same evidence was inevitable within a short period of time**. Since Purvis is no worse off than he would have been anyway, there is no point in excluding the body. However, Purvis' statement that he knew where the body was may be excluded, since it was illegally obtained. Exclusion of that would pose no societal cost because witnesses saw him take the girl in the first place, and it can easily be shown Purvis murdered her without using his statement.

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C. The Purged Taint Exception

When evidence is "fruit of the poisonous tree" and "tainted" by illegality, the taint does not last forever. It can be "purged" with the **passage of time** and **intervening independent events**. This is similar to the concept of **probable cause** in negligence actions can terminate a tortfeasor's liability. If enough time and events pass that the "taint" has been purged, the evidence will be admissible despite the prior illegal acts.

In particular illegal police acts that **merely cause them to become aware of and investigate** possible criminal activity by other individuals will usually not taint the evidence that eventually results from the investigation because the **passage of time** and **gathering of additional evidence** are intervening independent forces.

> **For Example:** Officer Otto the cop arrests Vick **illegally** without probable cause and finds drugs in his pocket. Vick confesses that he bought the drugs from Coker. For the next month Otto observes Coker engage in a pattern of suspicious activity. After a month Otto stops Coker on the street. A proper *Miranda* warning is given, he waives his rights and he confesses that he is selling drugs. At the **trial of Vick** the drugs and his confession would be **excluded** because they are directly the result of his illegal arrest. But at the **trial of Coker** the drugs and the confessions of both Vick and Coker would NOT be excluded. Coker's objection that the drugs and Vick's confession were obtained from Vick's illegal arrest is generally ineffective because Coker has **no standing to object** to the violation of another person's rights. Coker can only object to the violation of his OWN rights. Coker's objection that **his own confession** was the **fruit of Vick's illegal arrest** is ineffective because sufficient time passed to "purge the taint."

But **sufficient time must pass** to purge the taint of prior police misconduct, especially following an **arrest without probable cause.** If the illegal arrest results in an **immediate confession** it will usually be excluded as **fruit of the poisonous tree**. But when an illegal police act (e.g. arrest without probable cause, search of a home without a warrant, use of illegal wiretap, "stop and frisk" without justification) results in a **confession at a much later time** the confession will probably **be admitted.**

> **For Example:** Kathy the cop arrests Mary **illegally** without probable cause. Fingerprints taken after arrest show that Mary is the person that robbed a store. An arrest warrant is issued while Mary is already in custody. Mary is questioned three times in six hours, and each time he is given a *Miranda* warning. Confronted with the fingerprint evidence, Mary confesses to the robbery. This confession WOULD be excluded because it was the result of the fingerprints, and those were the result of the illegal arrest. Insufficient time has passed to remove the taint. The fact that an arrest warrant was obtained is irrelevant because it was after the fact and merely the fruit of the illegal arrest.

If an arrest is **illegal but supported by probable cause**, a subsequent confession is much less likely to be excluded than where the arrest is without probable cause at all.

> **For Example:** Kate the cop **enters Joan's home without a warrant** to arrest her based on **adequate probable cause** to believe she has committed a felony. There is **no exigent circumstance** to justify entry of the home. Joan is taken to the police station, given a proper *Miranda* warning, and she confesses. This confession is UNLIKELY to be excluded, despite the fact it followed an illegal arrest, because the confession is not particularly "tainted" by the arrest. This effectively combines elements of the **independent source** and **inevitable discovery** exceptions. If probable cause for the arrest already existed, and a warrant could have been gotten anyway, Joan would have been in the same interrogation even if the original arrest was under a warrant. The fact she was arrested without a warrant was not the reason she confessed.

And, an **illegal arrest** will not cause **later identification evidence** to be excluded, even if the identification follows from the illegal arrest.

> **For Example:** Karl the cop arrests Bob **illegally** without probable cause on a mere suspicion he might be the "East Area Rapist." Bob's photo ("mug shot") and fingerprints are taken and he is released. Later a rape victim identifies Bob from the photo as her assailant. **At trial** the victim identifies Bob as the rapist. The identification by the rape victim will NOT be excluded from evidence because it occurred at the trial that resulted from the photo that resulted from the illegal arrest.

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D. The Different Crime Exception

Evidence concerning a crime will not be excluded from the trial for that crime merely because it was **fortuitously discovered** as a result of an **illegal arrest** that concerned a **totally different crime.** This concerns situations where police find evidence they had **no intention of seeking or expectation of finding**.

> **For Example:** Craig the cop arrests Don **illegally** without probable cause for robbery, and Officer Otto **legally** arrests Mark for rape. At the police station Don, Mark and some other prisoners arrested for parole violations and other offenses are put in a line-up in the belief that the rape victim will identify Mark. The rape victim surprisingly identifies Don, not Mark, as her assailant. The identification by the rape victim will NOT be excluded from evidence at Don's trial just because Don happened to be in the jail at that time as a result of an illegal arrest. It is just a fortuitous discovery that did not stem from the illegality of his arrest for an entirely different crime.

> **For Example:** Karl the cop arrests Dan **illegally** without probable cause for robbery. His photo ("mug shot") is taken and saved by police, and he is released. A rape victim later picks Dan out as her assailant based on the photo. The identification by the rape victim will NOT be excluded from evidence at Dan's trial because the "taint" of the illegal arrest does not adhere to a photo later used to solve a totally different crime.

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E. The Different Law Enforcement Agency Exception

Evidence concerning a crime MIGHT not be excluded from trial if the **illegal acts** were committed by a **totally different police agency** than the agency seeking to use the evidence. The rationale for this exception is that **wrongdoing is not deterred by punishing a police agency that has not done anything wrong.** This exception is very much like the "good faith" exception explained below, except this does not involve an invalid warrant.

> **For Example:** The county sheriff receives an FBI bulletin that Al is wanted for bank robbery. Shortly thereafter Al is arrested based on the bulletin. The sheriff finds dope in Al's pocket in a search incident to arrest. In fact, the **arrest is illegal** because the FBI bulletin was issued in error. The dope MIGHT not be excluded from evidence because the county sheriff acted in **good faith** and not wrongfully. And excluding the evidence would have **no deterrent or prophylactic effect** on the FBI.

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F. Witness Testimony Exception

The testimony of a **witness** to a crime will seldom be excluded from trial merely because police discovered the witness as a result of illegal acts.

> **For Example:** Columbo the cop sees a pile of dirt in Ed's back yard. Curious, he **illegally** enters the yard without a warrant and smells the odor of a corpse. Because of this he questions Nosey Neighbor next-door. She reports that she saw Ed dig the grave in the night after he had a loud and violent argument with Vick, and Vick disappeared that same night. Although Columbo smelled the corpse when he entered the yard illegally, and the smell led him to question Nosey, it is UNLIKELY Nosey's testimony about her observations would be excluded as "fruit" of Columbo's illegal search.

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G. Impeachment Exception

The prosecution cannot use **illegally obtained evidence** in its case-in-chief if it has been suppressed under application of the Exclusionary Rule. But **if defendants testify in their own defense** the illegally obtained evidence **can be used to impeach the honesty of the defendants' testimony.** This rule applies both to direct testimony (elicited from the defendants by the defendants' attorneys) and cross-examination testimony (elicited from the defendants by the prosecution).

This exception should be remembered in **every law school exam** that has a question stating a **defendant testifies** at trial!

> **For Example:** Columbo the cop sees a pile of dirt in Ed's back yard. Curious, he **illegally** enters the yard without a warrant and finds a shovel next to the hole with bloody fingerprints. Later Vick's body is found in the grave. The blood on the shovel turns out to be Vick's and the fingerprints turn out to be Ed's. At trial the shovel is **excluded from evidence** because it was illegally obtained. But then **Ed takes the stand** and **denies any involvement** in Vick's death. He claims that he must have been out of town when Vick was killed and buried. In response, the prosecution **can admit the shovel to impeach** Ed's testimony because it **contradicts** Ed's testimony. It proves he was **present** when Vick was killed and buried.

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H. The "Good Faith" Exception

The **good faith exception** applies only to violations of the 4th Amendment warrant requirement. But the rationale is similar to the "Different Law Enforcement Agency" exception, above. When police properly conduct a search or arrest with a **good faith belief** that they are executing a valid warrant, the evidence seized will NOT be excluded simply because there was not a valid warrant.

This judicially created exception is based on the argument that the purpose of the Exclusionary Rule is to prevent **improper police conduct** and there is NOT any police misconduct when the police act with a **reasonable good faith belief** they are executing a valid warrant. The purpose of the Exclusionary Rule is NOT to prevent improper conduct by **magistrates** or other parties.

The good faith exception requires particular application of the **balance test** in which the **societal benefits** from excluding evidence to encourage warrants to be issued according to proper procedures is balanced against the **societal costs** from impairing the administration of justice.

1) Warrant Based on Truthful and Adequate Affidavit

For police to be acting in reasonable good faith, the warrant must be issued based on an affidavit reciting facts the police **honestly and reasonably believe to be true**. Conversely, the warrant cannot be based on facts the police claim **recklessly** or that they **know are false**.

And the affidavit must cite sufficient facts for the police to reasonably believe **probable cause exists and has been shown**.

2) Issued by Neutral Magistrate

The good faith exception will NOT apply if a warrant is issued by a magistrate that is **not neutral** or merely **"rubber stamps"** police requests for warrants. Police can hardly claim to have a **reasonable** belief a warrant is valid knowing it was issued by an incompetent magistrate.

3) Facially Valid Warrant

Further, **the warrant must be facially valid.** The police cannot have a reasonable good faith believe a warrant is valid if it is facially insufficient.

> **For Example:** Conrad the cop searches Tom's house under authority of a warrant that states he is to search the residence, "for any and all evidence of crime, whatsoever." This warrant is facially **invalid** because it is overbroad and **fails to state with particularity** the evidence sought. Conrad would or should know the warrant is overbroad, so he cannot claim he acted in "reasonable good faith."

4) Application to Arrest Warrants

The "good faith" exception almost always concerns the execution of an **invalid search warrant**. But it can involve an **invalid arrest warrant.**

> **For Example:** Ken the cop legally stops Dick for a traffic violation. Then he arrests him when his computer indicates an arrest warrant has been issued for Dick. After arrest Ken finds dope in Dick's pocket. In fact the **arrest is illegal** because the warrant shown in the computer was quashed the preceding week. At trial the dope MIGHT NOT be excluded because Ken legally stopped Dick and was acting with **reasonable good faith** that a valid warrant existed. This would especially be true if this was a **court error** and NOT **police error** since there is no deterrent effect in punishing the police for an error they did not commit.

Chapter 11: Conclusion

This outline provides a concise explanation of the black letter law and bright line rules of **CRIMINAL PROCEDURE**. **Black letter law** means statutes and basic rules of broad theoretical application. And **bright line rules** are those decisional rules or logical guidelines created by the Courts for the determination of close cases.

To make the explanation here simple and avoid unnecessary confusion some of the details and minor splits of authority have been ignored or avoided in this outline. But the foregoing reflects about ninety percent of everything you should know to succeed in law school, and more than enough explanation of the rules of law for you to pass any bar examination.

Among the materials that have been excluded from this outline are legal theories that have been widely abandoned, extreme minority views, rare exceptions, fact-bound cases, history of the law's development, most cases, highly unusual situations and dwelling on subtle distinctions. These issues and concepts are either unnecessary for your legal education, OR your professor will direct them to your attention.

Each professor of law, in every subject, holds a keen interest in narrow areas of the law of personal interest. Frequently this interest is based on their own legal education or their experiences in the Courts. When your professor expounds on an area of law given summary treatment in this outline it will be necessary for you to consult authoritative reference materials such as hornbooks to gain a greater understanding.

If your professor is adamant about some theoretical concept note that proclivity and modify your explanation of the law as necessary to humor those proclivities. But, you will find the bar examiners far less interested in such marginal issues and much more concerned with the breadth of your knowledge of the rules of law set forth herein.

Other than those cases where a professor demands further knowledge in a narrow area, the foregoing should be entirely sufficient to impart an adequate **understanding** of the **law of criminal procedure**. However, mere **understanding is NOT ENOUGH** for you to succeed. Law school and the bar examinations require **both understanding** and ability to **explain the application** of the **law to the facts and facts to the law**.

This outline is NOT written for the purpose of explaining to you how you should explain the law on your examinations. You is urged to consult Nailing the Bar's **"How to Write Essays for Criminal Procedure Law School and Bar Exams"**. Information about that publication is available at the back of this book.

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