

## Criminal Procedure I

Angela Davis - Fall, 1998

### CRIMINAL PROCEDURE

#### I. INCORPORATION AND RETROACTIVITY (1-30)

##### A. Criminal v. Civil Case

1. When the Legislature says so
2. Rights afforded by 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> do not apply to civil cases

##### ***United States v. L.O. Ward***

- *if Congress intends penalty to be civil, it will be so unless it is so punitive to negate Congress's intentions*

1. Civil Commitment Proceedings deemed civil though mentally ill will be in a jail-like setting

##### ***Allan v. Illinois***

- *persons committed were kept in max. security institutions housing prisoners in need of psychiatric care - legislature characterized statute as civil*

##### ***Kansas v. Hendricks***

- *Hicks served jail time then transferred to locked facility as a sexually violent predator - Court declared not double jeopardy*
- *legislature designated it civil law; act failed to accomplish some things criminal statutes seek to do; mentally ill cannot be deterred b/c of their illness; state should be able to confine dangerous mentally ill so long as appropriate due process is adhered to and procedural safeguards are provided; although he did not get treatment under the act, this did not make it illegal b/c Kansas did not have treatment available*

##### ***Hicks on Behalf of Feiock v. Feiock***

- *if relief is punitive to vindicate the authority of the court, it is criminal*
- *if a person is locked up for a stated amount of time, it is criminal*
- *if you are jailed in order to change your behavior and when changed, you are released, it is remedial (Susan McDougall)*
- *even if he paid the support, he would remain in jail = punitive, criminal*
- *punitive = criminal remedial = civil*

1. State can provide more protection for criminal def. than Supreme Court does

#### 2. INCORPORATION

##### a. Selective Incorporation

- b. 4<sup>th</sup>, 5<sup>th</sup> against double jeopardy and self-incrimination, 6<sup>th</sup> right to counsel
- c. right to jury trial in civil case, grand jury, and bail HAVE NOT been

##### ***US v. James Daniel Good Real Property***

- *fewer safeguards under 4<sup>th</sup> than 14<sup>th</sup> amendment*
- *fourteenth amendment requires notice and hearing before real/drug property could be seized for civil forfeiture proceedings*

##### a. General Rules

1. If Bill of Rights applies, you **can't** use Due Process Clause
2. If Bill of Rights has been traditionally used, then **can't** use DPC
3. If govt. activity goes beyond criminal investigations, **can** use DPC

#### 1. RETROACTIVITY

- a. RULE: New decision applies to person who brought the case and to future conduct, but not those convicted under old laws
- b. Current Supreme Court Approach

- new rules are applied retroactively to cases that are not final (cert denied or time to file for cert. has run out)
- new rules not applied to habeas petitions (used to determine if state court applied fed. law appropriately as it existed at the time)

***Teague v. Lane*** (SC 1989)

- *new rules not applicable to habeas cases with two exceptions:*
  1. *if the rule is so fundamental that it bears upon the integrity of the criminal justice system (without the rule, an innocent person may have been unfairly convicted)*
  2. *if the new rule shows that the def should not have been tried at all or was not subject to the penalties involved in his case*
    - a. What is a New Rule

***Butler v. McKellar***

- *rule is new if reasonable minds could have differed about the result of the decision before it was rendered*

I. FOURTH AMENDMENT - SEARCHES AND SEIZURES

"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."

A. KATZ (31-44)

1. People

***United States v. Verdugo-Urquidez***

- *4<sup>th</sup> amendment did not apply to the search of a house belonging to a non-resident alien living outside the country*
- *presumably, even if you are not a citizen but living in the country, the 4<sup>th</sup> applies*
  1. Persons and Things (telephone conversations are not covered)
  2. Reasonableness and Warrant Clause
    - assumption that reasonableness trumps the warrant clause
    - reasonableness requirement must be met even with an exception to warrant
  1. State Action Requirement: does not apply to private action
  2. Reasonable Expectation Test: does govt. activity rise to level of search and seizure

***Katz v. United States*** (SC 1967)

- *def had conversation re: illegal gambling at tapped pay phone*
- *tap placed on top of booth and did not invade space or physically trespass*
- *court held there was expectation of privacy in phone booth*
- *Issue became:*
  1. *Was there an expectation of privacy? (subjective expectation)*
  2. *Was the expectation seen by society as reasonable? (societal & reasonable)*

1. Interests Protected by Katz

- a. privacy interests with searches clause
- b. possessory interest with seizure clause

1. Illegal Activity: not protected, but officers did not know Katz was engaged in illegal activity until after they tapped the phone booth

A. APPLICATIONS OF KATZ (44-68)

1. Open Fields

***Oliver v. United States***

- *person does not have a legitimate expectation of privacy in an open field*
- *open field need neither be open nor a field*

- *if the public can see, the cops can search it*
1. Curtilage: protects the area around the home b/c home is given greater regard  
*US v. Dunn*
    - *police went through numerous fences and trespassed onto property to find drug laboratory in a barn*
    - *court stated outside the curtilage of the home and not protected by 4<sup>th</sup>*
  1. Access by Member of the Public: if an aspect of a person's life is subject to scrutiny by society, than there is no legitimate expectation of privacy in it
    - a. Consensual Electronic Surveillance  
*US v. White*
      - *informant was talking on radio transmitter in a consensual conversation which was listened to by an agent*
      - *assumed the risk when he ran his mouth on a transmitter which someone else could listen to*
      - *thought he was telling member of public and so no expectation of privacy*
    - a. Financial Records  
*California Bankers v. Schultz*
      - *banks are parties to the transactions and bank records can be turned over to the govt - not a search and not protected*
    - a. Pen Registers  
*Smith v. Maryland*
      - *records phone numbers dialed from your house, police get numbers from phone company*
      - *no search and no warrant is required - no expectation of privacy*
    - a. Electronic Pagers  
*United States v. Merriwether*
      - *pager seized from suspected drug dealer and recorded 40 numbers*
      - *traced number to def who was implicated in drug deal*
      - *no expectation of privacy, no search, no warrant, no protection*
    - a. Cordless Telephones  
*State v. Neisler*
      - *police used transmitter to intercept conversations re: drug deal*
      - *no search, no warrant, no protection*
    - a. Trash  
*California v. Greenwood*
      - *garbage is readily available and accessible to anyone - no expectation of privacy, no warrant, no protection*
    - a. Aerial Surveillance  
***Florida v. Reilly***
      - *surveillance of backyard by helicopted hovering 400 feet was not a search*
      - *public could have accessed information in backyard and so police could*
  1. Investigation Which Can Only Uncover Illegal Activity
    - a. Canine Sniffs  
*United States v. Place*
      - *canine sniff of closed luggage was not a search*
      - *investigative procedure was limited to both the manner which the information was obtained and the content of the information revealed*
      - *seizure of the cocaine in the luggage was illegal and the the 90 minute seizure was unreasonable b/c cops did not act reasonably or dilligently*

## Dog Problems

### *United States v. Lyons*

- *dog sniffed package, became alerted, and tore package in two - cocaine*
- *tearing open package was not a search b/c the act was a natural occurrence and conduct could not be attributed to police unless misconduct was involved*

## Dog Sniffs of Places

### *United States v. Thomas*

- *sniff outside apartment was search; greater privacy in home than luggage*

### *United States v. Coyle*

- *sniff outside Amtrack sleeping compartment not a search*

#### a. Chemical Drug Testing

### *United States v. Jacobson*

- *upheld warrantless field-testing of powder obtained from fed-ex package*
- *chemical test which discloses whether or not a substance is cocaine does not compromise any legitimate interest in property*
- *although not a search, was seizure b/c substance was destroyed to test*

### *State v. VonBulow*

- *chemical testing of pills received from victim's children who had searched def's closet, bathroom and study without permission was improper without warrant*

### *Skinner v. Railway Labor Executives*

- *testing of urine samples was a search b/c could uncover innocent secret information and process of collection was intrusive and embarrassing*

#### a. Thermal Detection Device

### *United States v. Pinson*

- *probable cause based on infrared device revealing that window and skylight were emitting excessive amounts of heat*
- *no reasonable expectation of privacy to heat radiating from house into air space b/c voluntarily vented it outside*
- *no intimate details of home observed and intrusion on individuals within*

## 1. Sensory Enhancement Devices

#### a. Electronic Beepers

### *United States v. Knotts*

- *placed beeper inside 5gallon container and traced it to def's cabin*
- *visual surveillance would have revealed the same facts*
- *nothing in 4<sup>th</sup> preventing police from augmenting visual search*

### *United States v. Karo*

- *informant told cops that ether was used to extract cocaine from clothes*
- *placed beeper in can of ether and followed def to house, obtained search warrant and found cocaine and lab equipment*
- *placement of beeper in can did not violate 4<sup>th</sup> amendment rights*
- *any privacy right that may have been violated was from monitoring the beeper, not from placing it in the can*

### *United States v. Jones*

- *suspected mailman of stealing mail and put beeper in mail bag*
- *use of beeper was not a search b/c the govt. placed it in its own property*

#### a. Others

### *United States v. Tabora*

- *invaded privacy when used telescope to view things in suspect's apartment not visible to naked eye*

*United States v. Mankani*

- no violation where agent overheard conversations through pre-existing hole in the wall

*Texas v. Brown*

- use of artificial means to illuminate darkened area does not constitute search

*Dow Chemical v. United States*

- use of aerial surveillance and expensive equipment to take pictures of areas between buildings was not a search

1. Jails, Prison Cells, and Convicts

*Hudson v. Palmer*

- prisoner has no expectation of privacy in his prison cell or in papers or property in the cell

*Bell v. Wolfish*

- at best prisoners have expectation of privacy of diminished scope
- strip searches and body cavity searches of pretrial detainees after contact visits were reasonable

1. Public Schools and Public Employees

*New Jersey v. TLO*

- no reason to conclude that public school students have waived all rights to privacy in items merely by bringing them onto school grounds

*O'Connor v. Ortega*

- rejected argument that governmental employees can never have a reasonable expectation of privacy in their place of work
- did not decide whether psychiatrist had expectation of privacy in his office, but found that he did have one in his desk and file cabinets

A. WARRANT REQUIREMENT (68-83)

1. Searches and seizures conducted without a warrant are presumed unreasonable

***Johnson v. United States*** (SC 1948)

- confidential informant stated that unknown persons were smoking opium in hotel
- narcotics agents went to hotel and recognized strong odor of burning opium
- def denied smell, agent said they were going to search the room which turned up opium
- entry into the room was granted in submission to authority and not as understanding and intentional waiver of constitutional rights
- no reason offered for not obtaining search warrant except for inconvenience to officers and some slight delay

1. Obtaining Search Warrant - Demonstrating Probable Cause - INFORMANTS

a. Two-Prong Test

***Spinelli v. United States*** (SC 1969)

- Informant told FBI that def was running a handbook out of an apartment by means of two telephones
- RULE: Where informant's tip is necessary element in finding of probable cause, its proper weight must be determined by:
  - a. Aguillar Test #1: affiant swore that his **informant was reliable and credible** but offered the magistrate no reason in support of his conclusion
  - b. Aguillare Test #2: tip does not contain **sufficient statement of the underlying circumstances from which the informer concluded** that def was running a bookmaking operation
- none of the activity was suspicious of illegal activity and the tip and informant were not proven reputable

A. GATES (83-106) - PROBABLE CAUSE DETERMINATION

***Illinois v. Gates***

- **TOTALITY OF CIRCUMSTANCES TEST ADOPTED**
  - *Police receive information through anonymous letter that defs are transporting drugs from Florida to Chicago (one flies, the other drives down and drive back)*
  - *Court abandons Spinelli two-prong test*
  - *Reviewing court may only determine whether any reasonable person could have found probable cause - no de novo review of magistrate determination*
1. Corroboration
    - United States v. Warner*
      - *confidential reliable source annd anonymous caller stated that def fired gun at a residence - check uncovered no registered firearms - supported warrant*
  1. Gates Test Applied
    - Massachusetts v. Upton (SC 1984)***
      - *court states that it did not merely refine two-prong test, but rejected it*
      - *lower court had to examine the affidavit for a warrant in its entirety to determine probable cause*
  1. Citizen Informant - distinguished between traditional police informer and paid informants from the ordinary citizen who presents himself to report a crime
  2. Quantity of Information Required for Probable Cause
    - a. Equivocal Activity
      - United States v. Prandy-Binett*
        - *cops in Union Station spotted suspicious passenger getting off train*
        - *officer searched the bag and found a perfume bag with a restangular block which he stated was a gift*
        - *officer handcuffed def, seized the block and gym bag*
        - *based on the totality of the circumstances, there was a fair probability that the block contained drugs and upheld the conviction on which the search and seizure were based*
    - a. Probable Cause to Arrest
      - United States v. Valez*
        - *officer watched undercover agents buy drugs from two men, officer later saw man matching description, arrested him, and found cocaine*
        - *undercover agents discovered that def was the wrong man*
        - *court held that the description was not overly general and the officers acted properly, with probable cause in arresting Valez.*
        - *no reason to suppress the evidence which came about as a result of well-intentioned byt misguided actions*
    - a. Mistaken Arrests
  1. Collective Knowledge
    - Whiteley v. Warden*
      - *once officer A demonstrates probable cause for a search or arrest, any officer can make the search or arrest*
  1. Staleness of Information
    - United States v. Harris*
      - *considerations: maturity of the information; nature of the suspected crime, habits of the accused, character of the items sought, and nature and function of the premises to be searched*
  1. First Amendment Concerns

*New York v. PJ Video*

- warrants authorizing the seizure of adult tapes from a video store were supported by probable cause to believe that the tapes were pornographic
- application of warrant for material protected by the 1<sup>st</sup> amendment should be evaluated under the standard of probable cause

A. PROBABLE CAUSE, SPECIFICITY, REASONABLENESS (106-135)

1. Things That Can Be Seized

***Warden v. Hayden***

- before this case, officers could only take fruits of the crime or contraband, but not evidentiary material
- court holds: 4<sup>th</sup> amendment allows intrusions upon privacy under certain circumstances and there is no viable reason to distinguish intrusions to secure mere evidence from intrusions to secure fruits, instrumentalities, contraband

1. Probable Cause as to Location of Evidence

*Zurcher v. Stanford Daily*

- where the search is conducted depends on what goods are being looked for

1. Searches of Non-Suspects Premises

*Zurcher v. Stanford Daily*

- photographer took pictures of demonstrators that attacked police officers
- warrants may be issued to search any property, whether or not occupied by a third party
- critical element to a reasonable search is not that the owner is suspected of a crime, but that there is reasonable cause to believe that the things to be searched for and seized are located on the property to which entry is sought

Law Office Searches

*National City Trading v. United States*

- search of law office should be executed with care but is proper if there is reasonable cause to believe that the specific items are located on the property to be searched

1. Describing a Place to be Searched

*Maryland v. Garrison*

- officer had warrant for third floor apartment but in fact there were two - searched wrong one and found contraband which led to def's arrest
- court upheld validity of warrant as based on facts the officers knew at the time they obtained the warrant

*United States v. Ellis*

- warrant was to search third mobile home
- when officers arrived, were told by neighbor that def did not live there, but pointed to where he did live
- accepting the neighbor's word at face value was not sufficient
- this was not reasonable b/c the warrant did not particularly describe the premises to be searched

Search of the Person

*United States v. Nelson*

- def ordered to undergo an endoscopy to remove the drugs
- court held that it was not the search of a person

1. Particularity of Arrest Warrant

***Andersen v. Maryland*** (SC 1976)

- *warrant to search law officers stated "together with other fruits, instrumentalities and evidence of crime at this time unknown"*
- *court held this not too general b/c it was not a separate sentence and appeared at the end of another containing a list of specified items*
- *warrant only authorized the search of evidence pertaining to one crime*

#### 1. Executing the Warrant

##### a. Notice of Purpose and Authority - Knock and Announce

*United States v. Contreras-Ceballos (9<sup>th</sup> cir. 1995)*

- *Three Purposes of Knock and Announce Requirement*
  1. *protects citizens and officers from violence*
  2. *protects privacy*
  3. *prevents destruction of property*

*Wilson v. Arkansas (1995)*

- *sometimes you have to knock and sometimes you don't but court can't tell*
- *Factors to consider:*
  1. *hot pursuit of suspect*
  2. *risk of destruction of evidence*
  3. *safety of officers*

*Richards v. Wisconsin (SC)*

- *No Blanket Knock and Announce Rule in felony drug cases*
- *Police must prove the following to ignore the rule:*
  1. *reasonable suspicion that knocking and announcing under the circumstances of that case would be dangerous or futile or that*
  2. *knocking and announcing would inhibit the investigation*

##### a. Exceptions to Notice Rule

###### No Breaking

*United States v. Remigio*

- *if the door is open, there is no breaking and so the rule does not apply*

###### Emergency Circumstances

- *lower courts have held that emergency circumstances excusing the knock and announce requirement are the same as those re: exigent circumstances*

##### a. Timing and Scope of Execution

*United States v. Ross*

- *lawful search extends to entire area where the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required*

###### Destruction and Excessiveness

*Tapley v. Green*

- *some amount of property destruction may be necessary for efficiency but officers can be held civilly liable for unreasonable conduct*

###### Unnecessarily Intrusive Searches

*Hummel-Jones v. Strobe (8<sup>th</sup> cir. 1994)*

- *search of alternative birthing clinic deemed intrusive and unconstitutional*
- *couple was not suspected of crime, but entered clinic at 2am after giving birth, seized couple by telling they could not leave, followed couple, took pictures, seized video tape*

###### Presence of Occupant

- *if officers have search warrant, they do not have to search in your presence*

###### Screening Magistrate

- must be neutral evaluator/ neutral and detached
- prosecutors and attorneys general may not be magistrates
- must understand probable cause

*Connelly v. Georgia*

- *may not be paid for each warrant issued*

*Shadwick v. City of Tampa*

*- clerk may be magistrate so long as neutral and detached*

#### A. ARRESTS (136-160)

##### 1. Arrests in Public and in the Home

###### a. Standards for Warrantless Arrests

1. officer has reasonable suspicion to believe that suspect as committed a felony or misdemeanor and that he will not be apprehended unless immediately arrested or may cause injury to himself or others, or damage to property
2. misdemeanor committed in the officer's presence
3. **MUST ALWAYS HAVE PROBABLE CAUSE EVEN W/O WARRANT**

###### a. Arrest versus Summons

*Gustafson v. Florida (SC 1973)*

- *custodial arrest of petitioner for a minor traffic offense violated his rights under the 4<sup>th</sup> and 14<sup>th</sup> amendments*

*Dobbs v. Huff (N.D. Ga. 1977)*

- *constitution does not require pls be afforded a chance to turn themselves in without being arrested*

###### a. Constitutional Rule: Arrests in Public

***United States v. Watson (SC 1976)***

- *inspected def's car with his consent, found the credit cards and arrested*
- *rule is that police may arrest without a warrant one believed by the officer upon reasonable cause to have been guilty of a felony*
- *rule permitting arrests only with a warrant or upon exigent circumstances would hamper effective law enforcement*

#### Use of Excessive Force in Making an Arrest

*Tennessee v. Garner (1985)*

- *deadly force may only be used to apprehend a suspect if*
  1. *it is necessary to prevent the escape*
  2. *officer has probable cause to believe that suspect poses a significant threat of death or serious physical injury to the officer or others*

*Graham v. Connor (1989)*

- *all claims of excessive force (deadly and non-deadly) must be analyzed under the standards of reasonableness*
- *relevant factors to consider:*
  1. *severity of the crime*
  2. *suspect poses immediate threat to the safety of the officers or others*
  3. *suspect is actively resisting arrest or attempting to evade by flight*

#### Excessive Force and Public Protest

*Forrester v. City of San Diego*

- a. *police did not threaten or use deadly force and did not deliver physical blows or cuts*
  - b. *city had a legitimate interest in quickly dispersing and removing the lawbreakers with least risk of injury to police and others*
- *officers were not required to use less painful techniques*

a. Protections Against Warrantless Arrests

*Gerstein v. Pugh* (SC 1975)

- if a person is arrested without a warrant, he is entitled to a prompt post-arrest assessment of probable cause by a magistrate

***County of Riverside v. McLaughlin*** (SC 1991)

- county was combining probable cause hearing with arraignment hearing
- court holds that waiting 48 hours for a probable cause hearing is prompt, but after that amount of time, the burden is on the govt. to prove exigent circumstances
- in certain circumstances, 48 hours may be unreasonable, but the def has the burden of proving that he should have been afforded his probable cause hearing sooner
- prompt determination required, not immediate determination

Remedy for McLaughlin Violation

*Powell v. Nevada*

- def made exculpatory statement between the 48 and 72 hour marks
- probable cause was not based on the statement which he made
- remedy should not be throwing out the statement even though it was made while def was not supposed to be detained

a. Arrests in the Home

Payton Rule

*Payton v. New York* (SC 1980)

- **RULE: arrest warrant required for arrests in the home**
- Search warrant requires higher degree of proof standard b/c the item must be described, where it is located, etc. (specificity requirement)
- With the arrest warrant, you can arrest him wherever you find him - must only have probable cause to believe that he committed a crime

Arrests in Home of Third Party

*Steagald v. United States* (SC 1981)

- **RULE: search warrant required to arrest suspect in home of 3<sup>rd</sup> person**
- Went into home without warrant, found cocaine, arrested homeowners
- Search warrant required in this case absent exigent circumstances

Is Arrest at Home or in Public

*United States v. Holland* (2<sup>nd</sup> cir. 1985)

- 2<sup>nd</sup> floor apartment in two person house, def arrested in common hallway
- common hallway considered public space rather than part of the home

Overnight Guests

*Minnesota v. Olson* (SC 1990)

- **RULE: arrest warrant required to make arrest of overnight guest in home of third persons**

Temporary Guest

*United States v. McNeal* (6<sup>th</sup> cir. 1992)

- for purposes of arrest, it the home is a public place b/c you do not live there, nor are you staying overnight
- third person homeowner could challenge the entry, but not the def

A. STOP AND FRISK (161-175)

***Terry v. Ohio*** (SC 1968)

- officer observes def and another walking up and down a street, stopping to look in the same store window each time; third man joined them and quickly walked away

- officer patted down outer clothing (frisk) of two men, felt gun inside def's pocket, took his jacket off and removed the gun
- officers are required to have a **reasonable suspicion** before they stop and frisk

#### A. SEIZURES / GROUNDS FOR A STOP (175-223)

##### 1. LEGAL STANDARDS

1. Encounter: no legal standard
2. Stop: articulable reasonable suspicion
3. Arrest: probable cause

##### 1. FREE TO LEAVE TEST

###### **United States v. Mendenhall** (SC 1980)

- officers suspected def in airport of being a drug courier
- officers return identification and ask her to step into a back room
- **RULE:** a person has been seized only with a reasonable person under those circumstances would not feel he was free to leave
- **Factors to Consider:**
  - a. public place
  - b. officers not in uniform
  - c. no weapons drawn
  - d. language used
  - e. tone of voice
  - f. number of officers
- determining factor here was that the officers returned the ticket and id

###### **Florida v. Royer** (SC 1983)

- detectives did not return id or ticket
- def did not consent to producing id and ticket, going into back room, or to opening the suitcase, but all of them
- when asked if he objected to opening second suitcase he stated "no, go ahead"
- a reasonable person under these circumstances would not feel he was free to leave
- initial stop was okay, but taking him into the back room without returning his things was an unreasonable seizure of def's person
- there was a search of the bags and a seizure of the person; b/c the initial seizure was not valid, the search of the baags was also unreasonable

##### 1. FACTORY SWEEPS

###### **INS v. Delgado** (SC 1984)

- officers did not seize workers when conducting surveys for illegal aliens
- since employees were at work and not leaving in any event, guards at the exits could not have had a coercive or custodial effect

##### 1. BUS SWEEPS

###### **Florida v. Bostick** (SC 1991)

- Officers boarding buses at scheduled stops to obtain consent to search luggage of passengers did not constitute a seizure
- Must use totality of circumstances approach and cramped confines of a bus is only one factor to consider
- Def was passenger on bus departing and would not have felt to leave anyway
- Reasonable person test involves the innocent person, not sensitive guilty

###### **In re JM**

- based on juveniles youth, time of arrest, and that def did not know he was able to refuse consent, three judge panel held search unreasonable

- *en banc* reversed stating that officers would never know in advance whether their conduct constitutes a seizure
1. STATE OF MIND Required for a Stop  
*Brower v. County of Inyo* (SC 1989)
    - Seizure = there is a governmental termination of freedom of movement through means intentionally applied
    - Officers placed roadblock with intent to stop the suspect and in fact he was stopped
    - Therefore, suspect was seized although not in manner officers intended
  1. SUSPECT WHO DOES NOT SUBMIT  
*California v. Hodari* (SC 1991)
    - non=physical show of force becomes seizure only when the individual submits or is subdued
    - two types of seizures
      1. physical touching or grasping = always a seizure
      2. non-physical show of authority = person must not be free to leave and must actually submit or be subdued by the officer
    - seizure cannot occur when an officer chases a suspect and he does not yield to officer's non-physical chasing
    - a suspect who flees does give the officer reasonable suspicion
    - in this case, the suspect did not submit when the officer chases him, so there is only seizure when he is handcuffed; at that point, there was reasonable suspicion and maybe probable cause to stop and handcuff him (b/c he fled and threw the cocaine rock)
    - running by itself when seeing an officer does not create articulable reasonable suspicion (must be more, high crime area, profile, etc.)

*United States v. Hernandez*

    - cops identify themselves, Hernandez stopped momentarily and began running
    - momentary pause did not constitute a submission

*United States v. Coggins*

    - def states that he has to use the bathroom and is repeatedly told no; then ran
    - when he was first told no and sat back down, that was submission and seizure
  1. ANONYMOUS TIPS  
*Alabama v. White* (SC 1990)
    - RULE: anonymous informant's tip which was significantly corroborated provided reasonable articulable suspicion for a stop
    - Corroboration is less than in *Gates* b/c reasonable suspicion is less stringent standard than probable cause

*United States v. Cortez*

    - Particularized Suspicion Test (deciding someone needs stopped)
      1. basis must be based on totality of the circumstances of a trained officer
      2. process must raise suspicion that individual being stopped is engaged in wrongdoing
- PROBABLE CAUSE = FAIR PROBABILITY**  
**REASONABLE SUSPICION = FAIR POSSIBILITY**
1. ASSESSMENT OF PROBABILITIES  
*United States v. Ornelas-Lodesma* (7<sup>th</sup> cir. 1974)
    - confusion regarding Spanish surnames

- *factors such as make and type of car, state it came from, etc. would have created suspicion by themselves, but along with the NADDIS hits, tipped the balance in favor of finding a reasonable suspicion*
1. REASONABLE SUSPICION EXAMPLE  
*United States v. Trullo (1<sup>st</sup> cir.)*
- *officers in combat zone saw two men sitting in car and followed it to a deserted area*
  - *officer walked to car, noticed bulge, conducted pat down, found knife, and arrested him for illegal possession*
  - *court upheld reasonable suspicion*
1. REASONABLE SUSPICION LACKING  
*United States v. Rodriguez (9<sup>th</sup> cir)*
- *hispanic man, driving Rancho, sitting up straight, both hands on wheel, does not acknowledge officers when driving by, appears nervous*
  - *factors were not sufficient for reasonable suspicion*
1. REASONABLE SUSPICION OF A COMPLETED CRIME  
*United States v. Hensley (SC 1985)*
- *court holds that officers could stop someone when they assume the driver has an outstanding warrant for his arrest (only regarding a felony)*
1. RELEVANCE OF SUSPECT'S RACE  
*City of St. Paul v. Uber (Minn 1980)*
- *white man driving through bad neighborhood, tags reveal from Minneapolis suburb, officers assume he is looking for prostitute*
  - *court says no way - no reasonable suspicion*
- United States v. Weaver (8<sup>th</sup> cir.)*
- *Weaver in airport does not consent to search; cops search anyway*
  - *Court states okay to use race as a factor, but not the only factor*
  - *Seizure was legal here b/c officer knew that LA gangs were flooding the Kansas City area with cocaine, coupled with his race and other factors*
1. USE OF PROFILES  
*United States v. Berry*  
*Primary Characteristics:*
1. *arrival from or departure to a source city*
  2. *carrying little or no luggage or empty suitcases*
  3. *unusual itinerary*
  4. *use of an alias*
  5. *lots of currency in small denominations*
  6. *purchasing tickets in small denominatin currency*
  7. *unusual nervousness*
- Secondary Characteristics*
- a. *exclusive use of public transportation and cabs*
  - b. *making telephone call after deplaning*
  - c. *leaving false call-back telephone number with airline*
  - d. *excessively frequent travel to source or distribution cities*
- United States v. Sokolow (SC 1989)*
- *RULE: relevant inquiry is not whether or not the conduct is innocent or guilty, but the degree of suspicion that attached to the non-criminal acts combined together*

- *Paid from roll of \$20's, went from Honolulu to Miami and back in 48 hours, had no luggage - created reasonable suspicion*
1. FRISK CANNOT BE USED TO SEARCH FOR EVIDENCE  
*Minnesota v. Dickerson (SC 1993)*
    - *terry frisks are justified only for protective purposes and cannot be used to search for evidence*
    - *officer felt small hard object, knew it was not a weapon, prodded and squeezed it, and additional investigation revealed it to be crack cocaine*
    - **NEW EXCEPTION = PLAIN FEEL EXCEPTION**
    - *If officer is doing a legitimate frisk and can tell that they feel cocaine, they can search and take it out - this was not a simple pat down and removing the cocaine was illegal*

**TO STOP = REASONABLE ARTICULABLE SUSPICION**  
**TO FRISK = REASONABLE SUSPICION THAT SUSPECT IS ARMED AND DANGEROUS**  
**TO SEARCH = MUST FEEL WHAT IS BELIEVED TO BE A WEAPON**
  1. PROTECTIVE SEARCHES BEYOND SUSPECT'S PERSON  
*Michigan v. Long (SC 1983)*
    - *RULE: Terry permits a limited examination of the area from which a person, who police reasonably believe to be dangerous, might gain immediate control of a weapon*
    - *Officers though def was drunk, stop him, he gets out of the car, keeps walking toward his car, cops see knife in car, and conduct protective search of the car*
  1. PROTECTIVE SEARCHES OF PERSON OTHER THAN THE SUSPECT  
*Ybarra v. Illinois (SC 1979)*
    - *RULE: court refused to uphold the frisk of a bar patron who happened to be present when police arrived to conduct a search pursuant to arrest warrant*
    - *Mere presence in bar does not give rise to valid search of person*
  1. PROTECTIVE SWEEPS  
*Maryland v. Buie (SC 1990)*
    - *protective sweep = quick and limited search of premises, incident to an arrest, and conducted to protect safety of officers or others*
    - *RULE: protective sweep incident to an arrest could be justified by officer's reasonable suspicion that the area harbored an individual posing a danger*
    - **CONFINED ONLY TO ARREST SITUATION (Michigan v. Long was not)**
    - *Cursory inspection of those spaces where person may be found*
  1. BRIEF AND LIMITED DETENTIONS - LINE BETWEEN STOP / ARREST
    - a. Forced Movement of Suspect to Custodial Area  
*Florida v. Royer*
      - *in order for seizure to be a stop and not an arrest, it must be no longer than necessary to effectuate the purpose of the stop*
      - *force movement of suspect to custodial area can be considered an arrest*
    - a. Forced Movement for Identification  
*People v. Hicks*
      - *okay to remove to scene of crime for identification by victim or witness*
    - a. Interrogations Pursuant to Terry Stop  
*Davis v. Mississippi*
      - *two fingerprinting sessions and interrogation did not comply with 4<sup>th</sup>*

- victim failed to identify def multiple times and although fingerprints on house, he was a gardener there

a. Time Limits on Terry Stops

*State v. Sharpe*

- Supreme Court rejected absolute time limits on Terry Stops
- Examine whether officer dilligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain def

a. Showing of Force During Terry Stop

*United States v. Alexander*

- use of guns or handcuffs does not necessarily convert stop into an arrest

a. Detention of Property under Terry

*United States v. VanLeeuwen*

- reasonable to retain package assumed to carry drugs for one day

a. Unreasonable Detention

***United States v. Place***

- 90min delay of luggage unreasonable and violated 4<sup>th</sup> amendment
- officers knew bags were coming and could have had the dog there

1. LIMITED SEARCH FOR EVIDENCE

***Arizona v. Hicks***

- officers enter run-down apartment after gun is fired and see brand new stereo equipment, which he turns over to view serial number
- search is a search is a search
- turning speaker over went beyond plain view and required probable cause rather than reaonable suspicion

A. SEARCH INCIDENT TO AN ARREST / PRETEXTUAL STOPS / PLAIN VIEW AND PLAIN TOUCH (223-259)

1. Search Incident to Arrest

a. Special Limitations

***Chimel v. California (SC 1969)***

- def's wife let officers into home with arrest warrant
- when def arrived they asked to look around and def said no, on the basis of the lawful arrest, the officers conducted the search
- **RULE:** search incident to arrest may be a search of the person for evidence to be seized in order to prevent its concealment or destruction, or the area within the arestee's immediate control (grab area) for the safety of the officers
- **VERRULES RABINOWITZ AND HARRIS**
- Search of the entire house was unconstitutional

*United States v. Lucas*

- upheld search of kitchen cabinet after def handcuffed

*Davis v. Robbs*

- upheld seizure of rifle after handcuffed and placed in police car

a. Post-Arrest Movements

***Washington v. Chrisman (SC 1982)***

- followed student to his dorm room to get id and while outside smell drugs, enter the room, and find paraphenalia
- court upheld officer's right to enter the room b/c the student was lawfully under arrest and they had a right to stay close by, drugs in plain view

a. Arrest Leading to Exigent Circumstances

*Vale v. Louisiana (SC 1970)*

- *def walked quickly toward his home when officers who had probable cause to believe he engaged in drug transaction outside, approached him*
  - *officers arrest def and go inside his house to search*
  - *search violated 4<sup>th</sup> b/c cops did not meet burden of showing exigent circumstances; they had no reason to believe they were in harm or evidence would be destroyed*
- a. Sequence of Search and Arrest

*Cupp v. Murphy*

- *can search before the arrest when they have probable cause to believe that the suspect will get rid of the evidence*
- a. Removal from Arrest Scene

*United States v. Edwards*

- *arrested for breaking into post office at midnight, needed to test clothes and did not have a change that night - ran search (tests) incident to the arrest the next morning*
- a. Searches of Person Incident to Arrest

***United States v. Robinson (SC 1973)***

- *placed under arrest for driving without a license and frisked, took out cigarette pack, opened it, and found vile of heroine*
- ***RULE: everytime there is a custodial arrest, there should be a complete search for protection of the officer and for evidence, regardless of the charge***

*Gustafson v. Florida (SC 1973)*

- *arrested for driving without a license*
  - *as opposed to Robinson, it was the officers discretion whether to stop, arrest, issue a citation, or search*
  - *Supreme Court did not care about the distinction and upheld the search*
- a. Arrest Power Rule Applied to Automobiles

***New York v. Belton (SC 1981)***

- *pull def over and see "Supergold" on the floor of the car*
- *arrested everyone in the car and search them, including a jacket on the backseat of the car*
- ***RULE: an officer may, contemporaneous with a valid arrest, search the passenger compartment of the car and any container inside the passenger compartment, even if it is not within the grabbable area***
- ***DO NOT HAVE TO USE THIS CASE WHEN DEALING WITH A CAR B/C THE COURT HAS EXPANDED THE REACHEABLE AREA IN CARS***

1. Pretextual Stops and Arrests

*United States v Causey (5<sup>th</sup> cir. 1987)*

- *suspected def of bank robbery but did not have probable cause*
- *picked him up on an outstanding arrest warrant and while questioning, he confessed to the robbery*
- *though arrest was pretext to question him it was lawful and proper*
- ***MAJORITY VIEW***

*United States v. Miller (11<sup>th</sup> cir)*

- *no reasonable officer would have stopped car for wheels going over white line for 6 seconds - stop pretextual*
- ***MINORITY VIEW***

*United States v. Whren (SC 1996)*

- *adopted the majority objective test*
  - *so long as the officers acting reasonably could have pulled the defs over for the offenses - if the police have probable cause or reasonable suspicion to stop you for a traffic offense, it does not matter what was in his head*
1. Plain View and Plain Touch Exceptions
    - Horton v. California (SC 1990)***
      - *officer went to residence with warrant to search for particular property and saw weapons in plain view*
      - *officer admitted that finding the weapons was not inadvertant b/c he was actually looking for weapons*
      - *RULE: an object which comes into view during a search incident to an arrest that is appropriately limited in scope under existing law, may be seized without a warrant*
    - Arizona v. Hicks (SC 1987)***
      - *RULE: probable cause is necessary to justify a search that precedes a plain view seizure*
      - *Probable cause must be readily apparent = must exist without the necessity of a further search*
      - *Stereo equipment was turned over to reveal serial numbers*
    - Minnesota v. Dickerson (SC 1993)***
      - *PLAIN TOUCH CASE*
      - *If cop had discovered that it was cocaine by doing the simple Terry frisk, he would hav ebeen able to remove it under the plain feel exception*
  - A. SEARCHES OF AUTOMOBILES (259-278)
    1. Carroll Doctrine
      - Carroll v. United States (SC 1925)***
        - *federal prohibition agents spotted car coming from Detroit, stop the car and made a warrantless search*
        - *RULE: Officers need probable cause to believe that there is evidence of ciriminal activity in the car in order to search the car without a warrant*
        - *Probable cause was created upon the finding of the liquor*
        - *Stress upon the inherent mobility of the automobile*
    1. Carrol versus Search Incident to Arrest
      - a. *automobile exception: must have probable cause to search*
      - b. *search incident to arrest: probable cause to arrest (only search grabbable area)*
    - Chambers v. Maroney (SC 1970)***
      - *legal right to search on th scene also allows search at the station*
      - *given probable cause to search, either is reasonable under the 14<sup>th</sup>:*
        - a. *searching immediately without a warrant*
        - b. *holding the car until presenting the probable cause issue to the magistrate*
    1. Car Mobility
      - Coolidge v. New Hampshire (SC 1971)***
        - *police obtained warrants for def's arrest and search of his car*
        - *car was seized from driveway and searched two days later and twice more*
        - *warrant were defective b/c not issued by neutral magistrate*
        - *automobile exceptions no applicable b/c the absence of exigency - car was parked, currently at police station, wife removed from premises, police had control of the car, police could have gotten a warrant*
  1. Diminished Expectation of Privacy and Motor Homes

*California v. Carney* (SC 1985)

- teenagers were being given marijuana for sex in a mobile home
- less rigorous warrant requirement for automobiles b/c expectation of privacy is less than that of the home
- validly searched the mobile home when parked downtown in a lot, driven around, regulated by the state, public can see in the windows

1. Movable Property

*United States v. Chadwick* (SC 1977)

- mobility of footlocker justified its seizure but warrant required for search
- heightened expectation of privacy for footlocker than a car

*Arkansas v. Sanders* (SC 1979)

- search of luggage inside a car was unreasonable and warrant was required

*United States v. Ross* (SC 1982)

- officers had probable cause to search the entire car for drugs, rather than the containers
- if officers were informed that there were drugs in the bag, probable cause would apply to the bag; but the drugs were identified as being in the trunk, therefore probable cause applied to the entire car

***California v. Acevedo*** (SC 1991)

- cops found fed-ex package filled with drugs and set up a ring to get the guy to pick it up, def picked it up and left it in his car
- cops were afraid of losing the evidence, stopped the car, opened the trunk and searched the entire car
- probable cause that the car contains evidence of criminal activity gives the officers probable cause to search any container in the car
- **OVERRULES SANDERS**

A. EXIGENT CIRCUMSTANCES (278-299)

Two Reasons: Immediate action necessary to:

1. safeguard police or public safety or
  2. to protect against the loss or the destruction of evidence
- must have probable cause to believe that the person inside has committed a crime or that evidence of the crime is inside the house
  - must show that there is greater difficulty to arrest or search with a warrant than without or that it is much more likely that they would lose evidence or be hurt than if they went in right away

1. HOT PURSUIT

*Warden v. Hayden*

- police chasing suspect, go into home, find incriminating clothes in the washing machine
- cops had right to search washing machine for weapons and once lawfully there, they saw clothes in plain view
- **IMPORTANT:** does not apply if the suspect does not know he is being pursued

*Welsh v. Wisconsin*

- person left scene of drunk driving and went home

- police could not use hot pursuit b/c the driver did not know the police were following or looking for him

1. POLICE AND PUBLIC SAFETY

*United States v. Riccio*

- shootout at trailer and def was hit by police gunfire

- *police go into the home and find evidence*
  - *once the police went in (exigent circumstances b/c someone got shot) and once there lawfully saw evidence in plain view*
1. RISK OF DESTRUCTION OF EVIDENCE
    - United States v. MacDonald*
      - *police make drug buy, come back with more officers, they knock and announce themselves, they here shuffling feet, get a radio signal that someone is escaping out the window and enter with the battering ram*
      - *factors which might allow cops to enter*
        1. *gravity or violent nature of offense*
        2. *whether suspect is armed*
        3. *belief that suspect has committed the crime*
        4. *suspect is on the premises*
        5. *likely that suspect will escape*
        6. *peaceful circumstances of the entry*
  1. MURDER SCENES
    - Mincey v. Arizona*
      - *no exigency merely b/c the scene is that of a homicide*
  1. MINOR OFFENSES
    - Welsh v. Wisconsin*
      - *will not destroy sanctity of the home for a minor incident*
  1. IMPERMISSIBLE CREATED EXIGENCY
  2. PRIOR OPPORTUNITY TO OBTAIN A WARRANT
  3. TELEPHONE WARRANTS
  4. SEIZING PREMISES IN ABSENCE OF EXIGENT CIRCUMSTANCES
  5. FIRE SAFETY
  - A. SPECIAL NEEDS SEARCHES AND ROADBLOCKS (299-300, 312-348)
    1. SAFETY INSPECTION OF HOMES
    2. ADMINISTRATIVE SEARCHES OF BUSINESSES
    3. SEARCHES OF INDIVIDUALS PURSUANT TO SPECIAL NEEDS
      - a. Drug Testing
      - b. Random Testing
  1. ROADBLOCKS AND SUSPICIONLESS SEIZURES
    - a. Individual Stops
    - b. Permanent Checkpoints
    - c. Temporary Checkpoints
      - Michigan Dept of State Police v. Sitz*
        - *temporary checkpoints set up at officer discretion, everyone stopped*
        - *no special need beyond criminal law enforcement required*
        - *nature of intrusion similar to Terry stops*
      - a. Roadblocks and Pretext
        - Merrett v. Moore (11<sup>th</sup> cir 1995)*
          - *use of canine sniff at roadblocks constitutional*
        - a. Suspicionless Searches for Law Enforcement Purposes
          - *only permit search without probable cause for weapons and dangerous people, and where there are needs beyond criminal law enforcement*
          - *search for criminal activity must be supported by probable cause*
  1. INVENTORY SEARCHES
    - a. Reasons for Searches

1. protect person's property while in police custody
2. protect police from being accused of theft
3. protect police and others from danger

*Cady v. Donbrowski*

- officer looking for service revolved in cop's car after being in accident
- found bloody clothes in plain view - search upheld

a. Warrantless Suspicionless Searches

***South Dakota v. Opperman*** (SC 1976)

- warrantless search of car impounded for parking violation upheld
- must be procedures and search limited in scope

a. Property Carried by Arrestee

***Illinois v. Lafayette*** (SC 1983)

- police did an inventory search of the shoulderbag of man arrested on street for disturbing police, at the stationhouse
- three interests supporting inventory searches were fully applicable to stationhouse searches
- (if police did not believe the man would be held at the station, the search would not have been valid)

a. Limits on Police Discretion

***Colorado v. Bertine*** (SC 1987)

- guidelines gave police discretion to decide whether to impound the vehicle or to park and lock it
- court states that nothing in *Opperman* and *Lafayette* prohibits the exercise of police discretion if it is exercised according to standard criteria

***Florida v. Well*** (SC 1990)

- search of locked suitcase inside a car held invalid b/c there was no procedure or policy regarding the search of locked containers
- police discretion may only be exercised pursuant to departmental regulations

## 1. BORDER SEARCHES

- never need a warrant, do not need probable cause, often don't need suspicion

***United States v. Ramsey*** (SC 1977)

- mail sent internationally crosses the border and border search rules apply
- no need for warrant or probable cause to search envelopes suspected of carrying heroine

a. Routine versus Non-Routine

1. Routine = searchers need no level of suspicion, crossing border sufficient
2. Non-Routine = some level of suspicion required

*United States v. Braks*

- woman taken into room with female officer and asked to lift her skirt was non-routine

Factors to determine non-routine search:

- a. search results in exposure of intimate body parts
- b. physical contact
- c. force used
- d. pain or danger to suspect
- e. manner in which search conducted
- f. reasonable expectation of privacy involved

a. Degree of Suspicion Required for Non-Routine

***United States v. Montoya*** (SC 1985)

- *balloon carrier of drugs underwent strip search, refused to use bathroom*
- *officers get warrant for rectal exam and x-ray, find 88 balloons*
- *court upholds detention and search b/c she chose not to use bathroom*
- *non-routine border search but had reasonable suspicion needed*
- *heavy state interest, diminished expectation of privacy in border crossings, and delay created by suspect herself*

a. Searches Away from the Border

Three Types

1. Permanent Checkpoints
2. Temporary Checkpoints
3. Roving Patrols

*United States v. Ortiz (SC 1975)*

- *warrantless searches at internal checkpoints are unconstitutional without probable cause*
- *one year later (Martinez-Fuertes) held that warrantless stops for limited questioning, away from the border, without reasonable suspicion of probable cause, may be upheld*

MAJOR POINTS

1. Checkpoints
  - a. Stops Away from Border: legal without probable cause or suspicion
  - b. Search Away from Border: must have probable cause
1. Roving Patrols
  - a. Stops: reasonable suspicion required
  - b. Searches: probable cause required

A. CONSENT SEARCHES (348-363)

*Schneckloth v. Bustamonte (SC 1973)*

- *officers asked for consent; def said sure go ahead*
- *totality of circumstances test used to determine if consent was voluntary*
- *whether def knew he had a right to refuse consent is only one factor to consider*

1. Impact of Custody

*United States v. Watson (SC 1976)*

- *custody is merely one aspect to be considered in totality of circumstances*

1. Totality of Circumstance

*United States v. Gonzalez-Basulto (5<sup>th</sup> cir 1990)*

*Factors to determine whether consent is Voluntary*

- a. *voluntariness of custodial status*
- b. *presence of coercive police conduct*
- c. *extent and level of cooperation*
- d. *def's awareness of right to refuse consent*
- e. *def's education and intelligence*
- f. *def's belief that no evidence will be found*

*Ohio v. Robinette*

- *def stopped for speeding and officer asked to search car - sure go ahead*
- *supreme court held that officers did not have to tell def he was free to go*

1. Third Part Consent

*Frazier v. Cupp*

- *upheld search of duffle bag when cousin, joint user, voluntarily consented*
- *def allowed cousin to use bag and assumed the risk he would consent*

1. Actual Authority

***United States v. Matlock*** (SC1974)

- arrested in front of home; woman who shared home had actual authority to consent to search of the home
- assumption of the risk

1. Apparent Authority

***Illinois v. Rodriguez*** (SC 1990)

- ex-girlfriend had key to home and apparent authority but not actual
- validity of consent search is determined by whether officers had reasonable belief that she had actual authority

1. Mistakes of Law

*Stoner v. California* (SC 1964)

- nightclerk in hotel cannot give consent to search patron's room
- guests give implied consent to repairmen and cleaning personnel, but not to nightclerks

1. Duty to Investigate

*United States v. Dearing* (9<sup>th</sup> cir. 1993)

- live-in babysitter lacked apparent authority to consent to search of employer's bedroom

1. Consent Among Family Members

*United States v. Peterson* (4<sup>th</sup> cir. 1975)

- cases different in each jurisdiction
- no parental consent when part of premises is exclusively reserved for child
- reluctant to let minor children consent to search of homes
- siblings permitted to consent to search of jointly occupied premises

*United States v. Duran*

- non-consenting spouse must overcome the presumption of joint control by showing that the consenting spouse was denied access to the area searched

1. Common Authority

*United States v. Johnson*

- police entered apartment to free kidnapped girl, who led them to a closet where guns were kept
- officers illegally seized guns b/c girl did not have authority to give consent to search the apartment

1. Scope of Consent

*United States v. Blake*

- def agreed to search of his person in the airport
- cops groping groin area is not what a reasonable person would consider giving consent to when consenting to search of his person

***Florida v. Jimeno*** (SC 1991)

- scope of consent is determined by standard of objective reasonableness
- officer can assume that when suspect gave general consent to search of his car, he also consented to search of a paper bag lying on the floor
- person, rather than the officer, must limit the scope of the search

1. Withdrawing Consent

- have right to revoke consent, but not retroactively
- can be done after search has started but before it is complete
- must be clear and not ambiguous

*United States v. Carter* (DC cir. 1993)

- officer pull paper bag out of tote bag which def gave consent to search, def snatched the bag away from them
  - def's unusual manner of retracting consent could be used as part of the totality of the circumstances b/c the manner could be considered suspicious independent of the withdrawal of consent itself
- A. REACH OF FOURTH AMENDMENT (363-367, 370-372)
- search by private citizen not covered by 4<sup>th</sup> unless he is acting as govt. agent
  - when there is mixed private and public action, 4<sup>th</sup> does apply
  - if govt. participated in, encouraged, or endorsed the behavior, it is state action
1. Limits Imposed by Initial Search
- Walter v. United States*
- FBI received film from private citizen, did not know what was on it, viewed it
  - Court held FBI could seize film but not view it without a warrant
1. Reopening Permitted
- United States v. Jacobson (SC 1984)*
- fed ex man found package tork open, put powder back in box and called agent
  - agents arrive, open bags, remove powder, complete field test
  - court upholds search b/c (1) search by employee not covered by 4<sup>th</sup> and (2) officers would not learn any more than they did from the employee
1. Undercover Agents
- when you invite someone into your home or room and voluntarily turn information over, you assume the risk that they are undercover agents
- Lopez v. United States*
- testimony of undercover agents not protected by 4<sup>th</sup>
  - court upheld use of recorded testimony of IRS agents
  - recording only revealed what def revealed to the agency which could go to the government and testify
  - recording merely provided more reliable evidence
- Lewis v. United States*
- invites agent into home where he sees and hears evidence of illegal activity
  - this is not to be treated as a home, b/c when you use your home for specific purpose of executing felonious sale of narcotics, you have diminished expectation of privacy
- Gouled v. United States*
- def invited agent into hotel room where he volunteered incriminating evidence
- A. EXCLUSIONARY RULE / STANDING (378-416)
1. History of Exclusionary Rule
- Weeks v. United States (SC 1914)*
- exclusionary rule first applied only to federal cases
  - two rationales for applying the rule
1. only meaningful way to ensure that officials protect 4<sup>th</sup> amendment rights
  2. protects integrity of the court by not promoting illegal activity
- Wolf v. Colorado (1949)*
- applied 4<sup>th</sup> amendment to states but would not apply exclusionary rule
  - 31 states had rejected the Weeks doctrine
- Mapp v. Ohio (1961)*
- overruled Wolf and declared that any evidence obtained illegally through 4<sup>th</sup> amendment violations could not be used at trial

- *what good is it to have the 4<sup>th</sup> amendment with no remedy*
1. Arguments for and Against - page 398
  2. Standing
    - Jones v. United States (1960)*
      - *if you are charged with an offense, you could challenge the evidence used against you*
    - Rakas v. Illinois (1978)***
      - *four passengers in car when pulled over*
      - *RULE: people who do not have ownership or possessory interest in either the car or the evidence seized in the car have no expectation of privacy in that car and no standing to challenge the search*
      - *Fourth amendment rights are personal and can only be asserted by the person who owns those rights*
      - *Legitimate expectation of privacy analysis used*
    - Rawlings v. Kentucky (SC 1980)*
      - *def did not have legitimate expectation of privacy in his girlfriend's purse and therefore has no standing to suppress his drugs found there*
    - United States v. Carter*
      - *def and driver give conflicting stories and cops become suspicious*
      - *driver refuses to give consent to search his van but cops search anyway*
      - *search is illegal but Carter has no standing to challenge the search and evidence found in the van may be used against him at trial*
  1. Fruits of the Search
    - Wong Sun v. United States***
      - *Toy arrested without probable cause; Toy implicates Yee in drug trafficking; officers seize heroine from Yee who snitches on Toy and Wong Sun; officers arrest Wong Sun who returns to station days later and confesses*
      - *TEST: whether the evidence which there is an objection to, was obtained by exploiting the original illegality or whether it was obtained by means sufficiently distinguishable or independent to be purged from its original taint*
      - *Confession was not excluded b/c there was sufficient time (few days) between the arrest/release and the confession - sufficiently attenuated*
    - Brown v. Illinois (SC 1975)***
      - *distinguished from Wong Sun*
      - *Brown went home, was placed under arrest by two police officers, home was searched, taken to station, given Miranda warnings, and confessed*
      - *Confession was two hours after illegal arrest, he was in the officer's control the entire time, and the illegal arrest was flagrant*
      - *Second confession was a fruit of the first and both were excluded*
      - *Decision are to be based on case-by-case basis; no bright line rule*
    - Dunaway v. New York (SC 1979)*
      - *def arrested without probable cause, goes to station, gets Miranda warnings, gives up rights and confesses*
      - *even if confession is voluntary, it is illegal if obtained by exploiting the original illegal arrest*
    - Taylor v. Alabama (SC 1982)*
      - *arrested, given warnings, allowed to see fiance and friend*
      - *this was not enough to make the confession attenuated from the illegal arrest*

*Rawlings v. Kentucky (SC 1980)*

- *detention was at resident, confession was given with no show of force, and statements were given in response to finding evidence rather than as a result of the illegal detention*
- *purpose of officers was not to induce incriminating statements*

***New York v. Harris (SC 1990)***

- *probable cause to arrest but did not have warrant - illegal arrest*
- *warrant is needed for an arrest when:*
  1. *it is made inside the home*
  2. *it is a misdemeanor arrest not committed in the presence of an officer*
- *def's confession made pursuant to an illegal arrest should not be excluded*
- *once he was outside the home, he could lawfully have been arrested, was lawfully under custody, and so the confession is permissible in court*
- *court will provide remedy for Payton violations if the police seize any physical evidence in the home without a warrant (evidence suppressed)*

A. INDEPENDENT SOURCE / GOOD FAITH (416-428, 436-448, 460-465)

1. Independent Source Doctrine

***Murray v. United States (SC 1988)***

- *two men drove vehicles out of factory, turned them over to different men, were arrested for marijuana possession*
- *officers forced entry into warehouse and observed burlap bags in plain view, left and obtained a warrant*
- *DOCTRINE: applies to evidence initially discovered during, or as a consequent of, an unlawful search, but later obtained independently from activities untainted by the initial illegal search*
- *RULE: officers can go inside illegally, but they cannot use anything they see inside to obtain a warrant or against def's at trial; b/c officers did not rely on what they saw to obtain the search warrant, their illegal entry is excused*
- *Officers violated rights but fixed it by obtaining a warrant*

1. Inevitable Discovery Doctrine

***Nix v. Williams (SC 1984)***

- *Christian burial speech*
- *Court states that the source of the violation (confession) and the source of the statement (location of body) are the fruit of the poisonous tree*
- *officers get to use the body b/c they would have eventually found it anyway*
- *court will not place the officers in a different situation than they would have been regardless of the illegal activity - they would have found the body anyway, so they will not be punished by taking away that evidence*

*United States v. Andrade*

- *found cocaine through a search an hour after the arrest*
- *even if the search could not be justified as a search incident to an arrest, they would have discovered the drugs through a routine inventory search (DEA procedure)*

1. Good Faith Exception

***United States v. Leon (SC 1984)***

- *If officer relies in good faith on a warrant (later deemed invalid) and obtains evidence based on the invalid warrant, the evidence may be used in court.*
- *courts disagreed whether the affidavit presented for a warrant justified probable cause*

- *in this case, the officers assumption of the warrant's validity was objectively reasonable and the extreme sanction of exclusion was not appropriate*

**Massachusetts v. Sheppard (SC 1984)**

1. Alternatives to Exclusion
  - a. Tort Liability
  - b. Senate Proposal
  - c. Criminal Prosecutions
  - d. Police Rulemaking and Other Administrative Solutions

**I. FIFTH AMENDMENT - PRIVILEGE AGAINST SELF-INCRIMINATION**

- "nor shall a person be compelled in any criminal case to be a witness against himself"
- applies in any type of proceeding, criminal or civil, formal or informal, in and out of court, if a answers to questions may incriminate him in a future criminal proceeding
- if answers may be used against you in future civil case, 5<sup>th</sup> does not apply

**A. HISTORY AND SCOPE OF PRIVILEGE (466-490, 504-507)**

1. Applicability to Non-Criminal Cases

**Boyd v. United States (SC 1886)**

- *forfeiture proceeding was deemed quasi-criminal*
- *compulsory production of private books and paper of owners of goods sought to be forfeited is compelling him to be a witness against himself*

1. Detention for Treatment

**Allen v. Illinois (SC 1986)**

- *Illinois Sexually Dangerous Persons Act*
- *State could rely on statements made to psychiatrists to determine if he should be committed*
- *Whether a proceeding is criminal is of statutory construction*

1. Compulsion - Use of Contempt Power

**Cruel Trilemma (each option carries possibility of punishment)**

1. tell the truth and confess to a crime
2. tell a lie and face perjury charges
3. remain silent and face contempt charges

1. Privilege is Personal

**Fisher v. United States (SC 1976)**

- *attorney could not plead fifth on behalf of def b/c the information revealed by the def could implicate the attorney*

1. What is Protected (only testimonial evidence)

**Pennsylvania v. Muniz (SC 1990)**

- *line between testimonial and non-testimonial is whether the def faces the cruel trilemma in disclosing the evidence*
- *drunk def asked date of sixth birthday*
- *Three Pieces of Evidence*
  1. *slurred speech was physical evidence b/c relevance was divorced from content of words themselves*
  2. *failing sobriety test was not considered*
  3. *not knowing birthdate considered testimonial b/c def faced cruel trilemma*

**Schmerber v. California (SC 1966)**

- *withdrawal of blood and use of analysis did not involve compulsion*

1. Immunity

- *guarantees that person will not be prosecuted*
- *if granted immunity, have no right to plead the fifth and ordered to testify*

Two Types:

1. Derivative Use Immunity: neither the testimony given nor any evidence derived from that testimony will be used in a future criminal prosecution
2. Transactional Immunity: broad guarantee against future incrimination; no transaction about which a witness testifies can be the subject of a future prosecution against the witness → almost never given

***Kastigar v. United States***

- *use immunity is good enough of a guarantee to compel the person to testify*
- *govt. doesn't have to give transactional immunity before compelling testimony*

A. CONFESSIONS AND DUE PROCESS (511-523)

1. Analyzed Under Three Amendments

- a. Due Process Clause of 5<sup>th</sup> and 14<sup>th</sup>
  - presently used to exclude confessions that are involuntary
- a. 5<sup>th</sup> Amendment
  - applies to statement that are made during custodial interrogation
  - while in custody and before formally charged (before indictment)
- a. 6<sup>th</sup> Amendment
  - applies after def has been formally charged

***Graham v. United States***

- *used 5<sup>th</sup> amendment to suppress confession*
- *after this case, court turned to due process analysis*

***Brown v. Mississippi (SC 1936)***

- *court used due process clause to suppress confession obtained after three defs repeatedly hung black man accused of murdering white man from a tree*
- *other two defs were beaten and told it would continue until they confessed*
- *bruises and scars were apparent at trial and participants admitted to beatings*

1. Issue of Involuntariness

- a. Personal Characteristics: youthfulness, mental deficiency, education level
- b. Treatment: severe brutality, denial of food, preventing amenities
- c. Psychological Influence: sustained interrogation, rewards or inducements, apprised of right to counsel and to remain silent
- d. Totality of Circumstances Test: police conduct in procuring confession and def's ability to withstand the coercion

***Spano v. New York (SC 1959)***

- *def involved in bar fight, while dazed shot opponent, ran, indicted while in hiding, calls friend Bruno (cop), turned himself in and eventually confesses*
- *use of Bruno four times to induce guilt about pregnant wife*
- *Totality of Circumstances Test: each thing taken together was violation of 14<sup>th</sup> amendment due process rights and together constitute a violation*
- a. *foreign born, uneducated, not familiar with system*
- b. *sleep deprived*
- c. *incessant questioning over long period of time into the night*
- d. *persuasion, coercion and trickery from friend Bruno*
- e. *psychological influence*

1. Modern Due Process

Extremely rare that confessions are found involuntary - Following voluntary:

- a. *Sumpter v. Knicks: promised psychological help if he testified*
- b. *McCall v. Dutton: wounded while cops holding guns on him*
- c. *Moore v. Dugger: functioned as 11 year old and no food or sleep for 26 hrs.*

- d. *United States v. Kelly*: handcuffed and suffering from heroine withdrawal
1. Deception and False Promises by Police
    - Green v. Scully* (2<sup>nd</sup> cir. 1988)
      - threatened def with the electric chair although no capital punishment in state
      - questioned at length and falsely told they had evidence against him
      - suspect stated that confessing was the only to get psychiatric help
      - confession voluntary: street-wise, above average intelligence, short interrogation
    - Florida v. Cayward* (Fl App. 1989)
      - presented false written DNA evidence
      - confession involuntary b/c lie in writing is more coercive than oral lie
  1. Promises of Consideration → will not automatically render confession involuntary
  2. Threats of Physical Violence
    - Arizona v. Fulminante* (SC 1991)
      - held on firearms charge but suspected of murder
      - FBI informant tells def that he will protect him in jail if he confesses murder
      - Statement was involuntary b/c it was obtained by threat of violence
  1. Focus on Police Misconduct
    - Colorado v. Connelly* (SC 1986)
      - man approached officer on street, confessed to murder and wanted to talk
      - suspect's state of mind not at issue here, confession voluntary, no coercion
- A. MIRANDA (527-599)
- Miranda v. Arizona* (SC 1966)**
- prosecutors may not use statements made during custodial interrogation unless procedural safeguards have been given
  - rights may be waived if done so intelligently and knowingly
  - court concerned with statement being made from free choice not intimidation
    - a. right to remain silent
    - b. right to attorney either retained or appointed
    - c. right that attorney be present during questioning
    - d. right to waive rights
  - if suspect indicates at any time that he wants an attorney, questioning must cease, if it does not and a statement is procured, there is a heavy burden on the state to prove that suspect waived his right
  - no distinction between inculpatory and exculpatory statements b/c exculpatory statements may be used in court to impeach def's testimony
  - **MIRANDA AND VOLUNTARINESS ISSUES ARE SEPARATE AND DISTINCT**
  - **MUST HAVE CUSTODY AND INTERROGATION**
1. Circumstances Under Which Court will allow statement in violation of Miranda
    - Harris v. New York*
      - def not given complete warnings
      - statement taken in violation of miranda may be used to impeach def testimony
      - statement may not be used in support of case in chief
      - if statement deemed involuntary, may not be used for any purpose
  1. Impeachment with Prior Silence
    - Doyle v. Ohio*
      - prosecutor point out that def testified at trial but not at police station
      - court decided that after miranda given, silence may not be used against def
  1. Pre-Arrest Silence

*Jenkins v. Anderson*

- prosecutor used two weeks time between when def murdered to turning himself inferring that it was not consistent with self-defense
- impeachment with pre-arrest silence did not violate 14<sup>th</sup>

1. Post-Arrest Silence

*Fletcher v. Weir*

- def remained silent between arrest and miranda rights
- pre-Miranda silence could be used against def in court

1. Leads to Witnesses

***Michigan v. Tucker***

- Miranda warnings incomplete, def states he was with H, H states that he was not with def, state uses H's testimony to impeach def's at trial
- Miranda is not constitutional protection so that fruit of poisonous tree doctrine does not apply
- RULE: is fruit of a statement made in violation of Miranda leads to other witnesses, the statements of those other witnesses does not have to be suppressed

1. Subsequent Confessions

***Oregon v. Elstad***

- person confesses, is given miranda warnings, and confesses again
- holds that second confession may be admitted b/c cat is already out of the bag
- second confession must be thrown out when:
  - a. first confession is involuntary
  - b. second confession is involuntary

1. Emergency Exception

***New York v. Quarles***

- woman raped and gave description, man found in grocery store, cuffed, saw empty should holster, asked where gun was, told them, found it
- public safety of locating gun outweighed miranda procedural safeguards

1. Custody

*Orozco v. Texas*

- at home at four in morning and told not free to leave = custody

*Oregon v. Mathiason*

- person can be held at station and not be in custody

*Stansbury v. California*

- when questioning began, not suspect nor in custody
- must look at suspect state of mind, not officer's
- officer's state of mind is one factor to consider only if he revealed his state of mind to the suspect

*United States v. Brown*

- Determining Custody Question
  - a. informed that questioning is voluntary or that he could leave, asks the officers to leave, or is not considered under arrest
  - b. freedom of movement
  - c. if def initiated contact or acquiesced to request for questioning
  - d. strong-arm tactics or deceptive strategies involved
  - e. atmosphere of questioning is police dominated
  - f. suspect is arrested after questioning

1. Terry Stops: not custodial for Miranda Purposes

2. Interrogation

***Rhode Island v. Innis***

- *def suspected of shooting cab driver, placed in car, officers told not to ask any questions, began discussing handicap school children finding gun, def confesses and led officers to gun*
- *court holds that there was no interrogation b/c the "officers should not have known that their comments were likely to illicit a response from the suspect*
- **RULE:** *any words or actions on the part of the police, other than those normally attendant to custody, that the police should know are reasonably likely to illicit an incriminating statement from the suspect = interrogation*

1. Appeals to Welfare of Others

*United States v. Calisto (3<sup>rd</sup> cir.)*

- *threat to get arrest warrant for def's daughter no interrogation and Miranda not required*

1. Confronting Suspect with Incriminating Evidence

*Edwards v. Arizona*

- *officers played tape made by def's associate with incriminating evidence*
- *was interrogation here, but not uniform throughout jurisdictions*

1. Booking Questions

***Pennsylvania v. Muniz***

- *questions considered attendant to custody/ routine booking questions*
- *def stumbled over routing questions and gave incorrect information*

1. Undercover Activity

*Illinois v. Perkins*

- *undercover officer placed in cell to obtain incriminating evidence*
- *statements admissible b/c miranda not meant to protect suspects from boasting about crime in front of others*
- *if you don't know you are talking to an officer, you cannot be coerced*

1. Completeness of Warnings

*California v. Prysock*

- *words do not have to be verbatim recital of what court said in Miranda*

*Dickworth v. Eagan*

- *"lawyer will be appointed for you if and when you go to court" upheld*

*United States v. Connelly*

- *"attorney may be appointed"*
- *warnings insufficient and misleading b/c right to counsel was implied to be at govt. discretion, and confession excluded*

1. Waiver of Rights (knowing, voluntary and intelligent)

***Moran v. Burbine***

- *two requirements must be met before suspect can be found to waive rights:*
  1. *relinquishment must have been voluntary, product of free and deliberate choice rather than intimidation, coercion, or deception*
  2. *made with full awareness both of nature of the right and the consequences of abandoning it*

1. Conditional Waivers

***Connecticut v. Barrett***

- *stated that he would give oral statement but nothing written*
- *gave oral confession that was admissible, does not matter whether he thought it would be admissible in court*

1. Information Needed for Intelligent Waiver

**Colorado v. Spring**

- believes he is waiving right to remain silent regarding firearms charge but eventually incriminates himself in a murder
- if you waive your miranda rights, you waive your right to silence regarding anything you say

**Oregon v. Elstad**

- def's ignorance of the full consequences of his decision to waive his rights does not vitiate the voluntariness

**Moran v. Burbine**

- def's waiver valid even though officers would not allow attorney retained by his sister to speak with him
- things happening outside his knowledge could not have effected his waiving his rights

1. Invocation of Right to Silence

**Michigan v. Mosley (SC 1975)**

- invoked right to silence, police ceased interrogation, resumed questioning after passage of significant period of time, gave another set of right, restricted second interrogation to crime that had not been subject of first interrogation
- miranda should not be a per se bar to resumption of questioning
- statement admitted at court

1. Invocation of Right to Counsel

**Edwards v. Arizona (SC 1981)**

- denies involvement, give alibi, then tries to make a deal, calls attorney and states that he will not talk until an attorney is present
- def transported to county jail, next morning, detectives arrive and he is instructed that he must speak with them, gives him warnings again, and confront him with incriminating tape
- violation of miranda b/c he invoked his right to counsel which is more protected than the right to silence
- RULE: one who invokes his right to counsel may only be deemed to have revoked his waiver if he initiates future contact with the officers

a. Defining Initiation

**Oregon v. Bradshaw (SC 1983)**

- given warnings, invokes right to counsel, questioning ceased, during trip to station, def asks "what is going to happen to me now?"
- Statement evinced a willingness and desire for a generalized discussion about the investigation
- Officer did tell def that he should not be talking b/c he invoked right to counsel and proceeded to have conversation

a. Ambiguous Invocation of Right to Counsel

**Davis v. United States (SC 1994)**

- must be clear and ambiguous
- answers questions for 1 1/2 hours and then states "maybe I should talk to a lawyer" then states he does not want a lawyer then states "I think I want a lawyer before I saw anything else"
- first request was too ambiguous but second was clear enough
- officers are not required to ask clarifying questions after an ambiguous request for counsel

**Smith v. Illinois**

- *def stated in response to whether he understood his rights "uh, yeah I'd like that"*  
→ enough to invoke right to counsel

a. Unrelated Crimes

**Arizona v. Roberson** (SC 1988)

- *police MAY NOT initiate interrogation for crimes other than that which the suspect has invoked his right to counsel*
- *invoking right to counsel is not offense-specific*
- *RULE: if you invoke your 5<sup>th</sup> amendment right to counsel, you may not be interrogated further regarding anything, unless you revoke the invocation of your right to counsel, which you can only do by initiating contact with the officers*

a. Which Right Invoked

**McNeili v. Wisconsin**

- *accused who is arraigned and asks for counsel invokes the 6<sup>th</sup> amendment*
- *def charged and invokes 6<sup>th</sup> amendment right to counsel before the judge*
- *police initiate interrogation concerning other crimes, def waives Miranda rights and confesses*
- *confessions were admissible b/c the 6<sup>th</sup> amendment right to counsel is offense-specific*

A. CONFESSIONS AND SIXTH AMENDMENT RIGHT TO COUNSEL (599-622)

**Massiah v. United States** (SC 1964)

- *def charged, co-def makes deal and has conversations with def while wired, def makes statement re: offense for which he was charged*
- *both 5<sup>th</sup> and 6<sup>th</sup> amendment right were violated when statements made without his lawyer were used*
- *less pressure than in custodial investigation but after someone is charged, the adversary process has begun, and he has been appointed a lawyer, questioning is not appropriate*

**Brewer v. Williams** (SC 1977)

- *police violated 6<sup>th</sup> amendment right to counsel by continuing to question him in a car after he had been formally charged and had invoked the right to counsel*
- *christian burial speech, but used inevitable discovery rule*

1. Use of Undercover Officers: Jailhouse Plant

**United States v. Henry**

- *was not a passive listener, but initiated conversations*
- *after charged, placed cop in cell, asked explicit questions re: crime*

**Kuhlman v. Wilson**

- *jailhouse agent did not ask questions but merely listened*
- *agent here did not illicit incriminating responses and so did not violate 6<sup>th</sup>*

1. MIRANDA WARNINGS SUFFICIENT TO GIVE SUSPECT ALL INFORMATION HE NEEDS TO KNOW IN ORDER TO WAIVE 6<sup>TH</sup> RIGHTS

**Patterson v. Illinois**

- *charged, signed waiver form, confessed without invoking right to counsel*
- *after indicted, police bring him in, book him, and start questioning*
- *court rules that miranda informed him of both 5<sup>th</sup> and 6<sup>th</sup> amendment rights*

1. Waiving 6<sup>th</sup> amendment right to counsel after invoking it

**Michigan v. Jackson** (SC 1986)

- *accused formally requested counsel at arraignment*
- *later interrogated for crime for which he was charged, did not initiate contact, signed waiver, confessed*

- 6<sup>th</sup> amendment rights were violated b/c he had not voluntarily initiated his right to counsel by initiating contact (applies Edwards rule re 5<sup>th</sup> amendment rights)
- distinguished from McNeal, b/c here they asked questions regarding the same crime (6<sup>th</sup> amendment right is offense-specific)

## I. IDENTIFICATIONS (623-653)

### A. Three Types

1. line-up at police station
2. photographic line-up
3. in-court identification

### **United States v. Wade** (SC 1967)

- **HOLDING:** in-court identification was tainted by out-of-court line-up
- 6<sup>th</sup> amendment right to counsel was required at any post-charging critical stage of the procedure and a line-up was such
- **Independent Source Rule:** prosecution must show that the in-court identification was independent from the out-of-court line-up
- **Factors used to determine if there is an independent source:**
  - a. opportunity to view suspect at time of crime
  - b. discrepancy between identification given by witness and actual def
  - c. lapse of time between crime and identification
  - d. any prior phot identification of def (or any other id's)

### A. Evidence of Prior Identification Itself

### **Gilbert c. California** (SC 1967)

- all witnesses were in same room identifying suspect and discussing it
- attorney must be present in post-charging line-ups

### A. Limiting Right to Counsel to Post-Charge Line-Ups

### **Kirby v. Illinois** (SC 1972)

- defs arrested for robbery and identified at police station by victim without counsel
- victim testified at trial that he identified def at station and did again at trial
- court ruled that right to counsel begins only when judicial proceedings had begun and applied only at any "critical stage of the prosecution"
- court would not grant a right to counsel in this case where there was an identification before proceedings began

### A. Photographic Line-Ups

### **United States v. Ash**

- b/c def is not present at photo line-up, there is no constitutional right to counsel
- def cannot be misled or overpowered by police in this situation

### A. Due Process Limitations

### **Stovall v. Denno** (SC 1967)

- due process clause requires exclusion if police suggested to a witness that he should pick a certain subject and it created uncertainty as to the correct suspect
- suspect was taken to hospital so that wife could id
- identification upheld b/c although procedure was suggestive, it was necessary under the circumstances (not sure how long wife would live)

### A. Applying Due Process Test

### **Simmons v. United States** (SC 1968)

- bank employees shown 6 pictures of two suspects and same two suspects were shown over and over again, suggesting to the witnesses who they might pick
- no due process violation here

- *convictions based on identification at trial set aside only if out of court identification procedure was so impermissibly suggestive so as to give rise to a very substantial likelihood of impermissible misidentification*

A. Violation of Due Process

**Foster v. California** (SC 1969)

- *identification procedure impermissible*
- *great height difference, showed man again, identified on third identification*
- *only case where identification procedures violated due process clause*

A. Independent Source

**Neil v. Biggers** (SC 1972)

- *rape victim shown line-ups, show-ups and photos for six months (def was not shown in any of the identification procedures)*
- *police did one person show up at station and victim identified def*
- *RULE: use Simmons standard which applied to an in court id to apply to out of court id → whether the procedure was reliable even though it was suggestive*
- *If there is an independent source (Wade and Gilbert) for the identification, they will find it to be reliable even if the cops used suggestive procedures*

A. Reliability as the Linchpin

**Manson v. Braithwaite** (SC 1977)

- *remains the standard to determine whether or not an identification in or out of court should be thrown out*
- *photo-id two days after the arranged drug buy*
- *does the due process clause require the court to exclude identifications when the procedures used are both suggestive and unnecessary → NO (reject the per se rule test which required any out of court id to be thrown out when there were suggestive procedures used; allowed in court identifications when there was an independent source)*
- *Standard: instead use the totality of the circumstances test and the weighing of the factors laid out in Biggers → may permit the out of court id if it maintains some initial reliability*
- *RULE: reliability is the linchpin (more concerned with reliability than suggestiveness)*

I. SIXTH AMENDMENT RIGHT TO COUNSEL

"in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense"

A. History

**Powell v. Alabama** (SC 1932)

- *court stated that person must have lawyer to represent him even if he could not afford one or did not ask for one; but only applied to capital offenses*
- *narrow requirements: if capital case, too poor, and too ignorant, you had the right*

**Betts v. Brady** (SC 1942)

- *whether due process clause of 14<sup>th</sup> incorporated 6<sup>th</sup> amendment right to counsel*
- *court determine that 6<sup>th</sup> amendment right to counsel was not a fundamental part of the right to fair trial*

A. Appointed Counsel for Indigents in Felony Prosecutions

**Gideon v. Wainwright** (SC 1963)

- *overrule Betts v. Brady*
- *right to all people, too poor to obtain one, in all felony cases*

A. Right to Appointed Counsel in Misdemeanor Cases

**Argersinger v. Hamlin** (SC 1972)

- *court extended right to all cases involving imprisonment*

- *today, no right to counsel to everyone in every criminal case*
- A. Imprisonment Requirement
- Scott v. Illinois (SC 1979)**
  - *6<sup>th</sup> amendment right to counsel did not apply to a case where a def was fined rather than incarcerated even though the court had the option of imposing jail time*
  - *judge has to determine before the trial whether or not there will be jail time*
- A. Use of Uncounseled Convictions to Enhance Sentence
- Baldasar v. Illinois (1980)**
  - *court decided that a def's right to counsel WAS denied when his misdemeanor conviction was turned into a felony based on his prior misdemeanor conviction for which he did not have counsel*
  - **OVERRULED BY NICHOLS**
- Nichols v. United States (1994)**
  - **OVERRULES BALDASAR**
  - *Deals with federal sentencing guidelines mandating that judges give certain sentences based on a number of factors laid out in a grid*
  - *Def's sentence was enhanced under guidelines for a prior conviction for which he did not have counsel (no jail time imposed)*
- A. Preliminary Hearings
- Coleman v. Alabama (SC 1970)**
  - *right to counsel at preliminary hearing*
- A. Probation and Revocation Hearings
  - *right to counsel at some such hearings but not all*
  - *determining factor seems to be whether or not the def faces jailtime*
- Mempa v. Rhay (SC 1967)**
  - *def did have a right to counsel at probation/revocation hearing*
  - *imposition of sentence deferred, put on probation, screwed up, probation revoked and sentence imposed (automatic maximum penalty) with no lawyer present*
- Gagnon v. Scarpellis (SC 1973)**
  - *sometimes you have a right to counsel and sometimes you do not*
  - *sentenced but suspended execution of the sentence*
  - *parole revocation hearings and some probation revocation hearings are not formal adversarial proceedings and under those circumstances, the person does not necessarily have the right to counsel*
  - **Determining Factors**
    1. *hearing where person is informed of right to counsel*
    2. *def makes request for counsel*
    3. *def contests violation*
    4. *def pleads guilty but there are mitigating factors*
- A. Juvenile Proceedings
- In re Gault (SC 1967)**
  - *juveniles do have the right to counsel in juvenile proceedings*
- A. Appeal
  - *Whenever a person has the right to appeal a conviction, they have the right to counsel on appeal*
  - *If there is a discretionary right to an appeal, they do not have the right to counsel*