

**LexisNexis Area of Law Summary
Criminal Procedure**

**Chapter 1
OVERVIEW OF FOURTH AMENDMENT PRINCIPLES**

§ 1.01 Text of the Fourth Amendment

The [Fourth Amendment](#) reads:

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.

§ 1.02 Persons and Actions Covered by the Fourth Amendment

[A] “People”

The [Fourth Amendment](#) is not specifically limited to citizens. For Fourth Amendment purposes, the word “people” encompasses non-citizens who have “developed sufficient connection” with the United States to be considered part of the “national community.” *United States v. Verdugo-Urquidez*, [494 U.S. 259](#) (1990).

In *Verdugo-Urquidez*, the Court assumed, but did not rule, that undocumented immigrants living voluntarily in the United States “have accepted some societal obligations” and thus possess Fourth Amendment rights. It declined to resolve the question of whether a nonresident alien, *involuntarily* detained in the United States for an extended period of time, has sufficient connection with the country to be afforded Fourth Amendment rights.

[B] Standing to Raise Fourth Amendment Claims

Fourth Amendment rights may only be asserted by one who is subjected to an unreasonable search or seizure. The rights may not be vicariously asserted. Thus, a defendant cannot challenge a search against a co-defendant. [*See* Chapter 6, Standing to Assert Fourth Amendment Claims.]

[C] Governmental Action

The [Fourth Amendment](#) only applies to actions by the government. Actions undertaken by private persons acting in the capacity of an agent of the government are also covered by the Amendment. Whether a private person is deemed an agent of the government is

determined by the degree of government involvement in the situation and the totality of the circumstances.

The [Fourth Amendment](#) is not limited to police activity and covers conduct by other public employees, such as firefighters, public school teachers, and housing inspectors. Searches by non-police government actors are generally of an administrative, not investigatory nature, and are controlled by different standards. [See Chapter 5, Administrative and Non-Investigatory Searches.]

[D] Extraterritorial Searches and Seizures

The [Fourth Amendment](#) does not apply to activities of foreign law enforcement officers acting *outside* the United States. Thus, evidence secured by a foreign officer that is turned over to the United States may be admitted against the victim of the search in a criminal trial. However, if there is sufficient U.S. involvement in the extraterritorial search of an American citizen, the Fourth Amendment applies.

In contrast, nonresident aliens located outside the United States or its territories, as well as those who are temporarily and involuntarily in the country, are not protected against foreign searches, even if conducted by United States government officers. *United States v. Verdugo-Urquidez*, [494 U.S. 259](#) (1990).

§ 1.03 “Persons, Houses, Papers, and Effects”

[A] “Persons”

For Fourth Amendment purposes, “person” includes:

- (1) the defendant’s body as a whole (as when he is arrested);
- (2) the exterior of the defendant’s body, including his clothing (as when he is patted down for weapons);
- (3) the interior of the defendant’s body (as when his blood or urine is tested for drugs or alcohol);
- (4) the defendant’s oral communications (as when his conversations are subjected to electronic surveillance).

[B] “Houses”

“House” has been broadly construed to include:

- (1) structures used as residences, including those used on a temporary basis, such as a hotel room;
- (2) buildings attached to the residence, such as a garage;
- (3) buildings not physically attached to a residence that nevertheless are used for intimate activities of the home, *e.g.*, a shed;
- (4) the curtilage of the home, which is the land *immediately surrounding* and associated with the home, such as a backyard. However, unoccupied and undeveloped

property beyond the curtilage of a home (“open fields”) falls outside of the [Fourth Amendment](#).

Factors relevant to determining whether land falls within the cartilage are:

- (1) the proximity of the land to the home;
- (2) whether the area is included within enclosures surrounding the house;
- (3) the nature of the use to which the area is put; and
- (4) the steps taken by the resident to protect the land in question from observation.

United States v. Dunn, [480 U.S. 294](#) (1987).

Commercial buildings receive limited Fourth Amendment protection on the theory that one has a greater expectation in his home than in commercial structures.

[C] “Papers and Effects”

“Papers” encompass personal items, such as letters and diaries, as well as impersonal business records. “Effects” encompass all other items not constituting “houses” or “papers,” such as clothing, furnishings, automobiles, luggage, etc. The term is less inclusive than “property”; thus, an open field is not an effect.

§ 1.04 “Search”

[A] *Katz v. United States*

In *Katz v. United States*, [389 U.S. 347](#) (1967), federal officers, acting without a warrant, attached an electronic listening device to the outside of a telephone booth where the defendant engaged in a number of telephone conversations. The controlling legal test at the time for determining whether police conduct violated the [Fourth Amendment](#) was known as the “*trespass*” doctrine. Under the trespass doctrine, the Fourth Amendment did not apply in the absence of a physical intrusion - a trespass - into a “constitutionally protected area,” such as a house.

Noting the advent of modern technology that allowed the government to electronically intercept conversations without physical intrusion into any enclosure, the Court abandoned the trespass doctrine and announced that the appropriate inquiry for Fourth Amendment challenges was whether the defendant had a “*reasonable expectation of privacy*.” Applying this new standard, the Court found that despite the fact that the telephone booth was made of glass and the defendant’s physical actions were knowingly exposed to the public, what he sought to protect from the public were his conversations, as evidenced in part by shutting the door to the phone booth. Thus, the government’s electronic surveillance of the defendant’s conversations without a warrant violated the [Fourth Amendment](#).

[B] “False Friends” Doctrine

The [Fourth Amendment](#) protects private conversations where no party consents to the surveillance and/or recording but ***does not protect conversations where one party consents*** to such activity. Thus, under the doctrine of “***false friends***,” no search occurs if a police informant or undercover agent masquerading as the defendant’s friend, business associate, or colleague in crime, reports to the government the defendant’s statements made in the informant’s or agent’s presence. *United States v. White*, [401 U.S. 745](#) (1971). A person is not deemed to have a reasonable expectation of confidentiality from a person with whom he is conversing.

The doctrine also applies where the “false friend” wears a “wire” to record the conversation with the defendant.

[C] Open Fields

Entry into and exploration of so-called “open fields” does not constitute a search within the meaning of the [Fourth Amendment](#). The “open fields doctrine” is based on the theory that people do not have a legitimate expectation of privacy in activities occurring in open fields, even if the activity could not be observed from the ground except by trespassing in violation of civil or criminal law.

[D] Other Forms of Electronic Surveillance

[1] Pen Registers

Installation and use of a pen register by the telephone company, at the behest of the government, to record the telephone numbers dialed from a private residence is not a search within the meaning of the [Fourth Amendment](#). *Smith v. Maryland*, [442 U.S. 735](#) (1979) (concluding that the defendant did not likely have an expectation of privacy in the numbers he dialed, but even if he did, such expectation was unreasonable).

[2] Electronic Tracking Devices

Surveillance of activities occurring in public falls outside the protections of the [Fourth Amendment](#). Thus, the use of an electronic tracking device attached to a suspect’s vehicle or object carried by the suspect does not constitute a search to the extent that it provides the police with information that could have otherwise been secured by visual surveillance from public places. *United States v. Knotts*, [460 U.S. 276](#) (1983). However, where such device allows the police to monitor activity inside a private place such as a home, a Fourth Amendment search occurs. *United States v. Karo*, [468 U.S. 705](#) (1984).

[3] Thermal Imagers

The use of a thermal-imaging device aimed at a home from a public area to detect relative amounts of heat within constitutes a search. *Kyllo v. United States*, [533 U.S. 27](#) (2001) (technology improperly used to confirm federal agent’s suspicion that defendant was

using high-intensity lamps to grow marijuana inside his home). Use of such technology constitutes a search if it enables the government to gather evidence from a constitutionally protected area to which it would not otherwise have access without a warrant.

[E] Aerial Surveillance

Aerial surveillance by the government of activities occurring within the curtilage of a house does not constitute a search if the surveillance:

- (1) occurs from public navigable airspace;
- (2) is conducted in a physically non-intrusive manner; and
- (3) does not reveal intimate activities traditionally connected with the use of a home or curtilage.

California v. Ciraolo, [476 U.S. 207](#) (1986) (involving aerial surveillance of defendant's backyard in which he was growing marijuana)

Construction of a fence which blocks observations from ground-level and demonstrates the defendant's desire to maintain privacy does not necessarily equate to a reasonable expectation of privacy if there any modes of surveillance possible under the circumstances, *e.g.*, airplanes and helicopters flying above, observations from taller adjacent buildings, a utility repair person on a pole overlooking the yard.

[F] Dog Sniffs and Other Tests for Contraband

Activity that is aimed at detecting the *mere presence* of contraband, or identifying a suspicious substance as such, does not constitute a search. *United States v. Place*, [462 U.S. 696](#) (1983) (a dog sniff of luggage, which was located in a public place, does not constitute a search); *United States v. Jacobsen*, [466 U.S. 109](#) (1984) (a chemical test that merely discloses whether a particular substance is cocaine "does not compromise any legitimate interest in privacy," and is, therefore, not a search). However, a test to determine *personal use* of contraband, such as a urine test to detect drug use, does qualify as a search.

[G] Inspection of Garbage

There is no reasonable expectation of privacy in garbage left for collection *outside the curtilage* of one's home. *California v. Greenwood*, [486 U.S. 35](#) (1988).

§ 1.05 "Seizure"

[A] Seizure of Property

In contrast to a search, which affects a person's privacy interest, a seizure of property invades a person's possessory interest in that property. Tangible property is seized in

Fourth Amendment terms “when there is some meaningful interference with an individual’s possessory interests in that property.”

[B] Seizure of Persons

A Fourth Amendment seizure of a person occurs when a police officer, *by means of physical force or show of authority, in some way restrains the liberty of a citizen*, *Terry v. Ohio*, [392 U.S. 1](#) (1968), or put another way, when “in view of all of the circumstances surrounding the incident, *a reasonable person would have believed that he was not free to leave.*” *United States v. Mendenhall*, [446 U.S. 544](#) (1980).

Examples of activities that constitute a seizure of persons include:

- arrests.
- physically restraining or ordering a person to stop in order to frisk or question him on the street.
- taking the person into custody and bringing him to a police station for questioning or fingerprinting.
- ordering a person to pull his automobile off the highway for questioning or to receive a traffic citation.
- stopping a car by means of a roadblock.

However, *brief questioning by itself is unlikely to amount to a seizure*. *E.g.*, *Florida v. Bostick*, [501 U.S. 429](#) (1991) (brief questioning during a “bus sweep” not a seizure); *Immigration and Naturalization Service v. Delgado*, [460 U.S. 210](#) (1984) (brief questioning about citizenship during a “factory sweep” not a seizure).

[C] “Mere Evidence” Rule

Under the “mere evidence” rule, only certain categories of evidence could be seized:

- (1) a “fruit” of a crime (*e.g.*, money obtained in a robbery);
- (2) an instrumentality of a crime (*e.g.*, the gun used to commit a robbery, or the car used in the get-away); or
- (3) contraband (*e.g.*, illegal narcotics).

So-called “mere evidence,” items that have only evidentiary value in the apprehension or conviction of a person for an offense, could not be seized.

The Supreme Court abolished the mere evidence rule in *Warden v. Hayden*, [387 U.S. 294](#) (1967). Police officers may now seize any evidence that has a connection to the criminal activity under investigation.

§ 1.06 Probable Cause

[A] Scope of “Probable Cause” Requirement

Probable cause is required as the basis for:

- (1) arrest and search warrants; and
- (2) all arrests (regardless of whether an arrest warrant is required)

Not all searches and seizures need be founded on probable cause. A lesser standard – “reasonable suspicion” – may apply where the intrusion is minor, such as a pat-down for weapons. Furthermore, where the intrusion on a person’s privacy is especially slight and society’s interest in conducting the search or seizure is significant, there may be no need for individualized suspicion, such as for society and border checkpoints and certain administrative searches.

[B] “Probable Cause” Defined

“Probable cause” exists when the facts and circumstances within an officer’s personal knowledge, and about which he has reasonably trustworthy information, are sufficient to warrant a “*person of reasonable caution*” to believe that:

- (1) in the case of an arrest, an offense has been committed and the person to be arrested committed it.
- (2) in the case of a search, an item described with particularity will be found in the place to be searched.

Probable cause is an objective concept. An officer’s subjective belief, no matter how sincere, does not in itself constitute probable cause. However, in determining what a “person of reasonable caution” would believe, a court will take into account the specific experiences and expertise of the officer whose actions are under scrutiny.

[C] Basis for “Probable Cause”

Probable cause may be founded on:

- (1) direct information, *i.e.*, information the officer secured by personal observation; and
- (2) hearsay information.

No weight may be given to unsupported conclusory statements in probable cause determinations.

[1] Direct Information

Unless a magistrate has reason to believe that an affiant has committed perjury or recklessly misstated the truth, the magistrate may consider all direct information provided by the affiant. The affiant’s information is considered reasonably trustworthy because it is provided under oath.

[2] Hearsay (“Informant”) Information

A magistrate may consider hearsay for purposes of determining probable cause, as long as the information is reasonably trustworthy. The informant's identity need not be disclosed to the magistrate unless the magistrate doubts the affiant's credibility regarding the hearsay.

The *Aguilar-Spinelli* test for determining the reliability of informant tips controlled until 1983, when it was replaced by the *Gates* "totality-of-the circumstances" test.

[a] *Aguilar-Spinelli* Test

Hearsay information had to satisfy both of the test's prongs below in order to be deemed sufficiently trustworthy to be included in the probable cause assessment:

- (1) the basis-of-knowledge prong; and
- (2) the veracity prong, of which there are two alternative spurs:
 - (a) the "credibility-of-the-informant spur" and
 - (b) the "reliability-of-the-information spur."

Aguilar v. Texas, [378 U.S. 108](#) (1964); *Spinelli v. United States*, [393 U.S. 410](#) (1969).

The ***basis-of-knowledge prong*** is satisfied if the informant personally observed the reported facts. If the information was second-hand, the magistrate would need to ascertain the reliability of that source. In some circumstances, the basis-of-knowledge prong could be satisfied by "***self-verifying detail***," where the information provided by the informant was so rich in detail that it was reasonable to conclude that he had obtained it first hand.

To satisfy the ***veracity prong***, evidence was required to demonstrate either that the informant was a credible person (the credibility spur of the veracity prong) or, if that could not be shown, that his information in the specific case was reliable (the reliability spur).

If one of the prongs was not satisfied, the hearsay evidence standing alone was deemed insufficiently trustworthy, but its trustworthiness could be resuscitated by at least partial corroboration.

[b] "Totality of the Circumstances" Test

In *Illinois v. Gates*, [462 U.S. 213](#) (1983), the Court abandoned *Aguilar* and substituted the totality-of-the-circumstances test for probable cause determinations, which requires the magistrate to balance "the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip." The factors enunciated in *Aguilar* - basis-of-knowledge and veracity - remain "highly relevant" in determining the value of an informant's tip but are no longer treated as separate, independent requirements.

Chapter 2 SEARCH WARRANTS

§ 2.01 “Oath or Affirmation”

The [Fourth Amendment](#) provides that warrants may not be issued unless they are “supported by Oath or affirmation.” An affidavit supporting a search warrant is presumed valid. However, in limited circumstances, a defendant may challenge a facially valid warrant, after the search is conducted, on the ground that the warrant would not have been issued but for the falsity in the affidavit. *Franks v. Delaware*, [438 U.S. 154](#) (1978).

The granting of a hearing on the veracity of the affidavit requires the defendant to make a “substantial preliminary showing” that:

- (1) a false statement was included in the affidavit;
- (2) the affiant made the false statement “knowingly and intentionally” or with reckless disregard for the truth; and
- (3) the false statement was essential to the magistrate’s finding of probable cause.

If the allegations are proved at a hearing by a preponderance of the evidence, the warrant is void, and the fruits of the search must be excluded from the criminal trial.

§ 2.02 “Particularity” Requirement

The [Fourth Amendment](#) provides that a warrant must describe with particularity “the place to be searched, and the persons or things to be seized.”

[A] “Place to be Searched”

The place to be searched must be described in the warrant in a manner sufficiently precise that the officer executing the warrant can identify it with reasonable effort. For example, if the warrant specifies an address which is in fact a multiple dwelling building, the police must limit their search to the unit belonging to the person named in the warrant only, which may be ascertained by reasonable effort, such as by checking names on the mailbox or by asking neighbors.

A warrant to search an automobile is sufficient if it describes the vehicle in a manner that makes it easily identifiable, such as by providing the license or vehicle identification number, or by describing its location, if the location is a one-car garage, but not if it is a two-car garage or public parking lot.

[B] “Persons or Things to be Seized”

A degree of vagueness in the warrant description may be acceptable when the police have described the item with as much particularity as can reasonably be expected. Less

specificity is required regarding contraband than is required for “papers” and “effects,” which the First Amendment protects.

§ 2.03 Execution of Search Warrants

[A] Time of Execution

Some jurisdictions, by statute or rule of procedure, require that search warrants be executed within a specified period of time from the date that the warrant was issued, often within ten days. Some jurisdictions bar night-time execution of warrants, unless expressly authorized by the magistrate.

[B] Knock-and-Announce Rule

Generally, the police may not forcibly enter a home to execute a warrant, unless they first knock at the door (or ring the bell), identify themselves, state their purpose for seeking entry, request admittance, and are refused admission. *Wilson v. Arkansas*, [514 U.S. 927](#) (1995).

The *knock-and-announce rule may be dispensed with when* the police:

- (1) have chased the person named in the warrant to his home in *hot pursuit*;
- (2) have reasonable suspicion that *evidence may be imminently destroyed*; and
- (3) have reasonable suspicion that there is a *risk of harm* to the officers or others.

§ 2.04 Scope of the Search

The police are authorized to *search only for items specified in the warrant*. They may open containers (*e.g.*, drawers, closets, trunks) within the place specified in the warrant if the containers are large enough to contain the object of the search. *E.g.*, the police may open dresser drawers in a search for narcotics but not for a stolen television.

Nevertheless, the police are authorized to *seize any item* (whether or not it is described in the warrant) if:

- (1) they discover the item while searching a place that they have the authority to search;
- (2) the item is located in such area; and
- (3) they have probable cause to believe the item is subject to seizure.

§ 2.05 Search of Persons While Executing a Warrant

[A] Public Places

When a warrant is executed in a public place, the police *may not extend the search to persons not named in the warrant* who happen to be present at the premises identified in the warrant, unless they have reasonable suspicion that such other persons are armed and

dangerous. In that case, such other persons may be frisked according to *Terry v. Ohio*. [See § 3.01, “Reasonableness Balancing” Standard.] *Ybarra v. Illinois*, [444 U.S. 85](#) (1979) (police officers, with a warrant to search a tavern and a named bartender for heroin, frisked each tavern customer for weapons, without reason to believe any were armed, and discovered heroin on the person of one of the customers).

[B] Private Homes

The Supreme Court has not directly addressed the scope of a police officer’s authority to search a person during execution of a search warrant to search a private residence. A few lower courts permit the police, while executing a search warrant of a home for narcotics, automatically to frisk occupants for weapons. Other courts require particularized suspicion that the person frisked is armed and dangerous.

[C] Detention of Persons During Searches

During the execution of a search warrant for contraband, the police have limited authority to detain all occupants of the premises to be searched. *Michigan v. Summers*, [452 U.S. 692](#) (1981). The Court has not addressed whether this authority extends to search warrants for evidence other than contraband.

Chapter 3 WARRANTLESS SEARCHES

§ 3.01 “Reasonableness Balancing” Standard

[A] *Terry v. Ohio*

Terry v. Ohio, [392 U.S. 1](#) (1968), made constitutionally permissible warrantless searches and seizures in limited circumstances. The Supreme Court ruled that in determining whether the Warrant and Probable Cause clauses of the [Fourth Amendment](#) apply to a given search and/or seizure, the “*central inquiry*” is *the reasonableness of the government’s activity under the circumstances*; “*reasonableness*” is assessed by *balancing the need to search or seize against the invasion the search or seizure entails*. This is known as the “reasonableness balancing” test. [See § 3.02 for further discussion of *Terry v. Ohio*.]

[B] “Reasonable Suspicion”

Suspicion is “reasonable” if the officer can point to specific and articulable facts that, along with reasonable inferences from those facts, justify the intrusion. Reasonable suspicion that a crime has been or is being committed may be based on one or more of the following information:

- the police officer’s personal observations.
- reliable hearsay.
- criminal profiles.
- unprovoked flight.

[1] Hearsay

Hearsay may support an officer’s reasonable suspicion of criminal activity where:

(1) the tip carries *enough indicia of reliability* to justify a *Terry* stop. *Adams v. Williams*, [407 U.S. 143](#) (1972). *E.g.*, the informant identifies himself or has provided reliable information to the police on a prior occasion.

(2) *a tip lacking sufficient indicia of reliability is corroborated* such that the totality of the circumstances justifies the *Terry* stop. *Alabama v. White*, [496 U.S. 325](#) (1990). A tip lacks sufficient indicia of reliability where the informant is anonymous and provides an insufficient basis for his statements from which the police may conclude that the informant is honest or his information reliable.

An uncorroborated anonymous tip can never serve as the sole basis for a *Terry* stop. *Florida v. J. L.*, [529 U.S. 266](#) (2000) (reasonable suspicion not found where the police received an anonymous tip that a young black male wearing a plaid shirt standing at a particular bus stop was carrying a gun and where the police observed a person matching the informant’s description, but noted no suspicious conduct suggesting criminal activity was underfoot).

[2] Criminal Profiles

An officer's observations may properly be supplemented by consideration of the typical modes of behaviors of certain kinds of criminals. For example, in drug-trafficking cases, an officer's suspicions can be buttressed by his awareness that the suspect's conduct or appearance conforms to a so-called "drug-courier profile," which is a set of characteristics purportedly often associated with drug traffickers, compiled by law enforcement agencies.

[3] Flight in "High-Crime Areas"

Unprovoked flight, when coupled with other factors – such as the presence of the police in a high-crime area – can constitute reasonable suspicion to justifying a search and/or seizure, at least in the absence of circumstances that suggest the flight is motivated by a non-criminal purposes. *Illinois v. Wardlow*, [528 U.S. 119](#) (2000).

[4] Suspect's Race or Ethnicity

Terry stops based solely on the race of a suspect are impermissible. However, race or ethnicity, when coupled with other factors, may give rise to reasonable suspicion. For example, courts have sometimes treated "racial incongruity" – the presence of a person of a particular race or ethnic group in a neighborhood where such group is not ordinarily found – as one legitimate factor in evaluating the lawfulness of a stop.

[C] Length of the Detention

The justifiability of a seizure on less than probable cause is predicated in part on the brevity of the detention, although there is no bright-line time limitation to a *Terry*-type seizure. Compare *United States v. Place*, 462 U.S. 696 (1983) (90-minute detention of person suspected of carrying narcotics in his luggage in order to subject the luggage to a dog-sniff test was held excessive in length) with *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (16-hour detention was upheld where a woman, who was suspected of having swallowed narcotics-filled balloons in order to smuggle them, refused to undergo an x-ray, and was thus detained until she had a bowel movement).

In determining whether a detention was excessive in length, the court may consider whether a less intrusive method was available and whether the police acted unreasonably in failing to recognize it or to pursue it. *United States v. Sharpe*, 470 U.S. 675 (1985).

§ 3.02 Weapons Searches

[A] Holding of *Terry v. Ohio*

At issue in *Terry* was a pat-down of a suspect that the officer observed apparently “casing” a store in order to rob it. The Court found that the brief restraint and pat-down did constitute a search and seizure. Next applying the reasonableness balancing test, the Court weighed society’s interest of effective crime prevention and detection – which would be impaired if the police could not confront suspects for investigative purposes on less than probable cause – and the police’s legitimate immediate interest in ensuring that the suspect is not armed, against the invasion of the suspect’s personal liberty. The Court held that the police conduct was constitutional, stating that ***when an officer has reason to believe that the suspect is armed and dangerous, the officer has the constitutional authority to conduct a search for weapons without probable cause or a warrant.***

[B] Weapon Searches of Persons

The purpose of the *Terry* search is limited to the sole purpose of determining ***whether the suspect is armed.*** While the appropriate manner of the protective search depends on the specific circumstances, generally, the proper technique, as approved in *Terry*, is as follows:

- (1) If an officer feels no object during a pat-down, or feels an object that does not appear to be a weapon, no further search is justifiable.
- (2) If the initial pat-down – with no further touching – provides the officer with probable cause for believing that an object felt is contraband or other criminal evidence subject to seizure, he may pull out the object without a warrant, as part of the plain-touch doctrine.
- (3) If the officer feels an object that he reasonably believes is a weapon, the officer may conduct a search by removing the object from the suspect.
- (4) If the object he pulls out is a container, he may feel the container to see if it might contain a weapon inside.
- (5) If his suspicions regarding the container are not reasonably dispelled by its size, weight, and feel, the officer may, at a minimum, retain possession of the container.
- (6) If the container could not reasonably contain a weapon, it may not be searched or seized.

[C] Weapons Searches of Automobiles

The police may search the passenger compartment of an automobile, limited to those areas in which a weapon may be found, if the officer reasonably believes that the suspect is dangerous and may gain immediate control of a weapon. *Michigan v. Long*, [463 U.S. 1032](#) (1983).

§ 3.03 Temporary Seizures of Property

Terry principles apply to seizures of property as well as to seizures of persons. Thus, for example, police officers may, without a warrant, temporarily seize luggage on the basis of reasonable suspicion that it contains narcotics, in order to investigate further, such as to conduct a dog-sniff test of the luggage. *United States v. Place*, [462 U.S. 696](#) (1983).

§ 3.04 Searches and Seizures of the Body

The taking of a blood, urine or breath sample, or subjecting the suspect to other intrusions of the body, *e.g.*, an x-ray, may be permissible without a warrant if:

- (1) the police are justified in requiring the individual to submit to the test; and
- (2) the means and procedures employed are reasonable.

Schmerber v. California, [384 U.S. 757](#) (1966) (*withdrawing a blood sample from the defendant without a warrant was found justifiable* on the ground that the evidence—the alcohol in the bloodstream—would have been lost if the police had been required to obtain a warrant).

§ 3.05 Exigent Circumstances

Exigent circumstances can justify a warrantless entry of a home to make a *felony arrest* or to conduct a search related to a serious offense under the following circumstances:

- (1) *hot pursuit* of a fleeing felon;
- (2) *imminent destruction of evidence*;
- (3) the need to *prevent a felon's escape*; or
- (4) *risk of harm* to the police or others.

The exigent-circumstances exception does not generally apply to cases involving minor offenses. *Welsh v. Wisconsin*, [466 U.S. 740](#) (1984) (warrantless entry of the defendant's home in order to arrest him for drunk driving was unconstitutional; the Court rejected the state's argument that the entry was necessary in order to collect a blood sample for testing before evidence of alcohol consumption was "destroyed").

Warrantless entry of a home may also be permitted in order to respond to emergency situations, such as when the police reasonably believe that a person within is in need of immediate aid. However, in such circumstances, the police are acting in a care-taker capacity, not an investigative capacity.

§ 3.06 Searches Incident to Arrest

[A] Areas That May be Searched Without a Warrant

Regardless of whether or not an arresting officer suspects weapons, evidence, or dangerous persons will be discovered, *contemporaneous with a custodial arrest*, an officer may conduct a warrantless search of:

[1] Arrestee's Person

The search of an arrestee may include pockets of his clothing, and any containers found therein, as well as containers immediately associated with him, such as a briefcase or shoulder bag, that are large enough to conceal a weapon or evidence of a crime.

[2] Area Within the Arrestee's Immediate Control

[a] Generally

Factors to consider in determining the arrestee's "grabbing area" are:

- whether he is hand-cuffed in front or behind his back.
- his size and dexterity.
- the size of the space he is in.
- whether containers within his reach are open or shut, and if shut, whether they are locked.
- the number of officers relative to suspects.

[b] Arrests Within a Home or Other Structure

Some courts apply a "one-room" rule allowing a search of the entire room in which the arrest occurred, regardless of the other circumstances.

Aside from those areas within a residence to which the "search-incident-to-arrest" exception applies, the police may not search the entire house without a warrant. *Chimel v. California*, [395 U.S. 752](#) (1969).

[c] Arrests on the Road

When an occupant (driver or passenger) of an automobile is arrested, the police may conduct a warrantless search of the *passenger compartment* and all containers found therein, whether the containers are open or closed. *New York v. Belton*, [453 U.S. 454](#) (1981). However, the trunk and engine compartment fall outside this rule as they are not within the immediate "grabbing area" of the arrestee.

[3] Immediately Adjoining Spaces

If the arrest occurs in a home, "closets and other *spaces immediately adjoining the place of arrest from which an attack could be immediately launched*" may be searched without a warrant. *Maryland v. Buie*, [494 U.S. 325, 334](#) (1990). This is known as a "protective search for dangerous persons" or a "protective sweep" of the residence. Such search is to be limited to a cursory visual inspection of those places in which a person could be hiding, and may last only as long as necessary to dispel the reasonable suspicion of damage, or to complete the arrest and depart the premises.

[B] Probable Cause to Seize

A police officer *may seize without a warrant* any article found during the *search upon probable cause to believe that it is criminal evidence* related to the immediate or another crime, even though probable cause is not necessary to conduct the *search*.

[C] Full Custodial Arrest

The search-incident-to-lawful-arrest rule applies to arrests in which the officer takes the suspect into full custody, which includes transporting him to the police station for booking. It does not apply, however, when an officer temporarily detains a suspect. *Knowles v. Iowa*, [525 U.S. 113](#) (1998).

§ 3.07 Automobile Searches

[A] Searches at the Scene

A police officer may conduct an immediate warrantless search of an automobile that the officer has probable cause to believe contains *contraband, fruits, instrumentalities, or evidence of a crime* if:

- (1) the officer stops the vehicle traveling on a public road; or
- (2) the officer discovers the vehicle parked, but apparently capable of operation, in a non-residential location, such as a public parking lot or gas station.

[B] Searches Away From the Scene

A warrantless search of an automobile that would be valid if it were conducted at the scene, is also permissible if it takes place shortly thereafter away from the scene, such as if the police impound the vehicle and subsequently conduct the search. The Supreme Court has authorized delays of a few days, *United States v. Johns*, [469 U.S. 478](#) (1985), but found a year-long delay unreasonable, *Coolidge v. New Hampshire*, [403 U.S. 443](#) (1971).

[C] Searches of Containers

Containers, even one belonging to a passenger who is not suspected of criminal activity, may be searched without a warrant during an otherwise lawful automobile search provided the container is large enough to hold the criminal evidence for which the police are searching. Any container that constitutionally can be searched at the scene may also be seized and searched without a warrant shortly thereafter, at the police station.

§ 3.08 Plain View and Related Doctrines

[A] “Plain View”

A police officer *lawfully present* at the scene may seize without a warrant an object of an incriminating nature if it is in “plain view” of the officer. An article is in plain view if:

- (1) the police officer *observes the object from a lawful vantage point* – *i.e.*, the officer’s presence is not in violation of the [Fourth Amendment](#). Generally speaking, an officer will be in a lawful vantage point during: the execution of a valid search warrant;

an in-home arrest pursuant to an arrest warrant; a search justified under an exception to the warrant requirement; or an activity that does not constitute a search and, therefore, falls outside the scope of the Fourth Amendment.

(2) the police officer has a **lawful right of physical access** to the object – *i.e.*, an officer’s ability to view an object is not necessarily accompanied by authority to seize it, *e.g.*, an officer may view marijuana growing in a suspect’s backyard from the street but nevertheless needs a warrant to search the suspect’s property.

(3) its nature as contraband, fruit, instrumentality, or evidence of a crime is **immediately apparent** upon observation.

[B] Inadvertent Discovery

If an officer anticipates discovery of a particular item, the plain view doctrine does not cure his failure to obtain a warrant or to include it in a warrant to search for other items. In such cases, the warrantless search and seizure of such object violates the [Fourth Amendment](#). *Coolidge v. New Hampshire*, [403 U.S. 443](#) (1971).

[C] “Plain Touch”

The Supreme Court has recognized a “plain touch” or “plain feel” corollary to the plain view doctrine. *Minnesota v. Dickerson*, [508 U.S. 366](#) (1993). Under this doctrine, the police may seize contraband detected solely through an officer’s sense of touch if, comparable to plain view, the officer had a right to touch the object in question, and upon doing so, its identity as contraband was **immediately apparent**. However, if further probing is necessary to identify the nature of the object, the search falls outside the plain touch doctrine, and a warrant is necessary to continue the search.

[D] “Plain Hearing” and “Plain Smell” Doctrines

Lower courts have similarly expanded on the “plain view” doctrine to recognize “plain hearing” and “plain smell” principles.

§ 3.09 Automobile Inventory Searches

Generally speaking, a **routine** inventory search of a lawfully impounded car is reasonable under the [Fourth Amendment](#) even though it is conducted without a warrant and in the absence of probable cause to believe that evidence of a crime will be discovered.

Consequently, if police discover criminal evidence during an inventory, they may seize it pursuant to the plain view doctrine, and introduce it in a criminal prosecution.

[A] “Routine” Nature of the Inventory

A warrantless, suspicionless search of a car lawfully in police custody is not justifiable merely because it was conducted for administrative purposes. The inventory must be a “routine” or “standard” procedure of the department conducting it.

Ideally, the regulations authorizing an inventory should give no significant discretion to the individual officer. Nevertheless, the Supreme Court has upheld inventories that permit some police discretion if “exercised according to standard criteria” and grounded on reasons other than suspicion of evidence of a crime. *Colorado v. Bertine*, [479 U.S. 367](#) (1987).

[B] Scope of Inventory Search

[1] Containers

As part of a valid automobile inventory, the police may open containers found in the car, without a warrant or probable cause. Whether an officer police may do so in his discretion, *see Florida v. Wells*, [495 U.S. 1](#) (1990), or only where routine practice mandates such procedure, *see Colorado v. Bertine*, [479 U.S. 367](#) (1987), is unclear.

[2] Locked Portions of the Automobile

An inventory search of an *unlocked glove compartment* is permissible under the [Fourth Amendment](#). *South Dakota v. Opperman*, [428 U.S. 364](#) (1976). Unresolved by the Supreme Court is whether a locked glove compartment or automobile trunk may be searched without a warrant during an inventory search, although many lower courts have authorized such searches when they are a *required part of a routine inventory*.

[3] Inspection of Papers

The Supreme Court has not determined whether or to what extent the police may examine papers and documents found during an otherwise valid inventory, but lower courts have frequently barred the introduction of evidence secured as the result of the inspection of private papers found during an inventory search.

§ 3.10 Arrest Inventories

The police may search an arrestee, as well as his personal effects – including containers, as part of a routine inventory at a police station, incident to his booking and incarceration. Neither a search warrant nor probable cause is required for an arrest inventory. *Illinois v. Lafayette*, [462 U.S. 640](#) (1983).

§ 3.11 Consent Searches

[A] Validly Obtained Consent

A validly obtained consent justifies an officer in conducting a warrantless search, with or without probable cause. If the officer discovers evidence during a valid consent search,

he may seize it without a warrant pursuant to the plain view doctrine. *Consent is valid* if it is:

(1) *given voluntarily* – The “voluntariness” of consent is determined from the totality of the circumstances. Consent that is the result of express or implied duress or coercion is involuntary. The prosecutor bears the burden of demonstrating by a preponderance of the evidence that consent was freely given.

(2) *not based on an officer’s assertion of authority to conduct a search* on the basis of a warrant, whether or not the warrant is valid. *Bumper v. North Carolina*, [391 U.S. 543](#) (1968).

[B] Scope of Search

A warrantless consent search is invalid if the officer exceeds the scope of the consent granted.

[C] Third-Party Consent

Consent to a search by one who possesses common authority over property is valid against another with whom the authority is shared. “Common authority” exists when there is “mutual use of the property by persons generally having joint access or control for most purposes.” *United States v. Matlock*, [415 U.S. 164](#) (1974). However, if a third party who lacks common authority of the property with the defendant in fact consents to a search of the defendant’s property, such evidence cannot be admitted at trial against the defendant. *Stoner v. California*, [376 U.S. 483](#) (1964).

[D] Apparent Authority

A warrantless search of a residence is also constitutional when it is based on the consent of a person whom the police, at the time of entry, reasonably believe has common authority over the premises, whether or not that authority is valid. *Illinois v. Rodriguez*, [497 U.S. 177](#) (1990).

Chapter 4 ARRESTS

§ 4.01 General Rules

Upon probable cause that the suspect has committed or is committing a felony, a police officer:

- (1) *may arrest a person in a public place without a warrant*, even if it is practicable to secure one;
 - (2) *may not arrest a person in the person's home without an arrest warrant*, absent exigent circumstances or valid consent; and
 - (3) *may not arrest a person in another person's home without a search warrant*, absent exigent circumstances or valid consent.
- [See § 3.05, Exigent Circumstances, and § 3.11, Consent Searches.]

§ 4.02 Arrest in the Home

The [Fourth Amendment](#) prohibits the warrantless, nonconsensual entry into a suspect's home in order to make a "routine" (non-exigent) felony arrest. *Payton v. New York*, [445 U.S. 573](#) (1980). A warrant is not necessary to effectuate an arrest in the curtilage of the suspect's home, however. Moreover, a suspect standing in an open doorway of his home at the time the police arrive is treated as if he were in a public place, justifying a warrantless arrest. *United States v. Santana*, [427 U.S. 38](#) (1976). Less clear is the situation where the suspect is inside the house until the police knock at the door, at which point the suspect comes to the doorway.

§ 4.03 Knock-and-Announce Rule

An arrest warrant authorizes the police to enter a suspect's home only if there is reason to believe the suspect is within. As with search warrants, the knock-and-announce rule applies. Even if the police believe the suspect is at home, they may not, absent special circumstances, forcibly enter a home to execute an arrest warrant unless they first knock, announce their purpose for entering, request admittance, and are refused entry. *Wilson v. Arkansas*, [514 U.S. 927](#) (1995).

§ 4.04 Use of Force in Making an Arrest

[A] Deadly Force

The police *may not use deadly force to make an arrest except* where:

- (1) the officer has probable cause to believe that the *suspect poses a significant threat of death or serious physical injury* to the officer or others; and
- (2) the officer reasonably believes that such force is *necessary to make the arrest or prevent escape*.

Tennessee v. Garner, [471 U.S. 1](#) (1985) (an officer in pursuit of a suspect was “reasonably sure” that the suspect was unarmed but fatally shot him when the suspect refused to stop fleeing)

If the officer can reasonably effectuate the arrest with non-deadly force, he must do so. Moreover, when feasible, the officer must warn the suspect to stop fleeing before deadly force is employed.

[B] Non-Deadly Force

All claims of excessive force by police, whether deadly or non-deadly, are to be evaluated according to the “reasonableness” standard. *Graham v. Connor*, [490 U.S. 386](#) (1989). Among the factors that may bear upon the reasonableness of the officer’s use of force in a given case are:

- the seriousness of the crime committed/being committed.
- the extent to which the suspect poses an immediate threat to the safety of others.
- the extent to which the suspect is resisting arrest or attempting to escape.

Chapter 5 ADMINISTRATIVE AND NON-INVESTIGATORY SEARCHES

§ 5.01 Building Inspections

[A] Warrant Requirement

Except in the case of emergency or consent, a warrant is required to enter a residential or commercial building for the purpose of conducting administrative health and safety inspections therein. However, such warrant is not based on probable cause to believe there is criminal activity underfoot. *Camara v. Municipal Court*, [387 U.S. 523](#) (1967), and *See v. City of Seattle*, [387 U.S. 541](#) (1967).

[B] Administrative Probable Cause Standard

In *Camara*, the Supreme Court developed a special probable cause standard to apply in administrative search cases. In such cases, probable cause exists to issue a warrant to inspect premises for administrative code violations as long as there are “reasonable legislative or administrative standards” for conducting the inspection. Administrative probable cause does not require individualized suspicion of wrongdoing and may be founded on the basis of general factors such as:

- the passage of time since the last inspection.
- the nature of the building in question.
- the condition of the entire area to be searched.

[C] Exception to Warrant Requirement

In limited circumstances, warrantless, non-exigent, nonconsensual administrative inspections of *commercial premises* are constitutional. A “closely regulated” business may be inspected without a warrant if three conditions are met:

- (1) the administrative regulatory scheme *must advance a “substantial interest,”* such as to protect the health and safety of workers;
 - (2) warrantless inspections must be *necessary to further the regulatory scheme*, *i.e.*, if there is a significant possibility that the subject of the search could conceal violations without the surprise element that the warrantless search would allow;
 - (3) the ordinance or statute that permits warrantless inspections must, by its terms, *provide an adequate substitute for the warrant*, such as rules that limit the discretion of the inspectors, regarding the time, place, and scope of the search.
- New York v. Burger*, [482 U.S. 691](#) (1987).

§ 5.02 Border Patrol Searches

[A] At the Border

Routine border searches, without a warrant and in the absence of individualized suspicion of criminal conduct, are deemed to be reasonable. *United States v. Ramsey*, [431 U.S. 606](#) (1977). Travelers may be detained at an international border or its “functional equivalent” (e.g., an airport where an international flight arrives) for a brief search of their person and belongings. Furthermore, a person lawfully stopped at a border may be detained beyond the scope of a routine customs search if agents have reasonable suspicion of criminal activity.

[B] Near the Border

The reasonableness of searches and seizures conducted near but not at the actual border depends in part on whether they take place at a fixed checkpoint or as the result of a “roving” border patrol.

[1] Roving Border Patrols

Traditional Fourth Amendment standards apply to searches and seizures conducted by roving border patrol agents. Roving border patrol agents may not detain a person in a vehicle even briefly for questioning in the absence of reasonable suspicion of illegal presence in the country or other illegal activity. Factors that may justify a brief seizure to determine whether the occupants of a vehicle are illegal aliens include:

- information about recent illegal border crossings in the area;
- furtive behavior by the occupants of the vehicle; and
- evidence that the car has an “extraordinary number” of passengers.

Reasonable suspicion may not be based, however, exclusively on the fact that occupants of the vehicle appear to be of foreign ancestry. *United States v. Brignoni-Ponce*, [422 U.S. 873](#) (1975) (roving border patrol agents improperly stopped a vehicle to question the occupants solely on the ground that they appeared to be of Mexican ancestry).

[2] Fixed Interior Checkpoints

Vehicles may be stopped and their occupants briefly detained for questioning at fixed checkpoints, without individualized suspicion of wrongdoing. *United States v. Martinez-Fuerte*, [428 U.S. 543](#) (1976). The Court distinguished fixed checkpoints from roving border patrols on two grounds:

(1) the lesser intrusion resulting from a fixed checkpoint than random stops on the highway; and

(2) the lesser discretion afforded officers maintaining the fixed checkpoints than the roving patrols.

§ 5.03 Sobriety Checkpoints

A highway sobriety checkpoint at which drivers were briefly detained (an average of 25 seconds) to search for signs of intoxication was upheld despite the lack of individualized

suspicion of driving under the influence. *Michigan Department of State Police v. Sitz*, [496 U.S. 444](#) (1990). The interest in eradicating drunk driving was found to outweigh the “slight” intrusion on drivers.

§ 5.04 Drug Interdiction Checkpoints

A highway checkpoint established for the purpose of detecting possession and/or use of illegal drugs has been held to violate the [Fourth Amendment](#). *City of Indianapolis v. Edmond*, [531 U.S. 32](#) (2000). As opposed to border and sobriety checkpoints, which are “designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety,” the drug interdiction checkpoint was aimed at detecting evidence of *ordinary criminal activity* not related to the checkpoint. Thus, when non-specific crime control is its aim, a checkpoint *must be based on individualized reasonable suspicion* of wrongdoing.

§ 5.05 License and Vehicle Registration Inspections

Stopping a vehicle solely for the purpose of checking driver’s license and registration, without a reasonable suspicion that a motorist is unlicensed or the vehicle unregistered, is unreasonable under the Fourth Amendment.” *Delaware v. Prouse*, [440 U.S. 648](#) (1979). However, the Court in *Prouse* indicated that a procedure to conduct suspicionless license/registration inspections that was less intrusive or did “not involve the unconstrained exercise of discretion” might be permissible.

§ 5.06 “Special Needs” Searches

[A] In General

The “special needs” doctrine is another exception to the warrant and probable cause requirements of the [Fourth Amendment](#). Special needs cases generally arise from searches by government actors other than police officers, such as school officials, public employers, and probation officers.

The doctrine applies when the government can demonstrate that:

- (1) it is impracticable to obtain a warrant;
- (2) the governmental interest outweighs the intrusion;
- (3) the *immediate objective* of the search is one other than to generate evidence for law enforcement purposes, even if the ultimate goal is non-criminal in nature.

[B] Searches of Personal Property and Premises

[1] Public School Students

While the Supreme Court has recognized that public school students retain a legitimate expectation of privacy in the private property they bring to school, it has held that neither

the warrant requirement nor the traditional doctrine of probable cause applies to public school searches. *New Jersey v. T.L.O.*, [469 U.S. 325](#) (1985). Public school teachers and administrators may search students without a warrant if two conditions are met:

(1) there are reasonable grounds to suspect that the search will reveal evidence that the student has violated or is violating either the law or a school rule; and

(2) the search is not excessively intrusive in light of the student's age and sex and the nature of the suspected violation.

[2] Public Employees

A public employer may search the office, including the desk and file cabinets, of an employee suspected of employment infractions, without a warrant or probable cause under the special needs exception. *O'Connor v. Ortega*, [480 U.S. 709](#) (1987). For a search to be reasonable, the employer must have "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a *non-investigatory work-related purpose*."

[3] Probationers

The Court has approved a warrantless, non-exigent search by a probation officer of the home of a probationer, based on "reasonable grounds" to believe contraband would be discovered there, pursuant to a state regulation authorizing such searches. *Griffin v. Wisconsin*, [483 U.S. 868](#) (1987).

[C] Drug and Alcohol Testing

[1] Approved Testing

In limited circumstances, drug and alcohol testing (by taking blood, urine, or breath samples) of public employees and public school students, in the absence of a search warrant and in the absence of individualized suspicion, may be constitutional.

The following general factors tend to render a drug/alcohol testing program constitutionally reasonable:

(1) regardless of the ultimate goal of the testing, the *immediate objective of the testing is not to generate evidence for criminal law enforcement purposes*;

(2) in an employment context, persons being tested are *working in an already highly regulated job*; in non-employment contexts, persons tested have a *reduced expectation of privacy*;

(3) in the employment context, there is a significant relationship between the employee's job responsibilities and the employer's concern about drug or alcohol use; in non-employment contexts, there is a significant societal reason for identifying drug users or alcohol abusers;

(4) procedures limit the risk of arbitrary application of the testing;

(5) care is taken to protect the dignity of persons tested in the specimen-collection process;

(6) a regime based on individualized suspicion would have been impracticable;

(7) there exists empirical evidence of a substantial need for the random testing program in question.

See *Skinner v. Railway Labor Executives' Association*, [489 U.S. 602](#) (1989); *National Treasury Employees Union v. Von Raab*, [489 U.S. 656](#) (1989) (upholding drug and alcohol testing of public employees) and *Vernonia School District 47J v. Acton*, [515 U.S. 646](#) (1995) (authorizing random drug testing of public school students voluntarily participating in school athletics programs where there was considerable evidence of a serious drug problem in the school district).

[2] Disapproved Testing

Drug testing programs have been found not to pass the special needs test where:

(1) the testing was ***not in response to any suspicion of drug use by the target group***, *Chandler v. Miller*, [520 U.S. 305](#) (1997) (striking down Georgia's requirement that various candidates for state office pass a drug test where there was no fear or suspicion of drug use by state officials).

(2) the ***immediate objective of the drug testing was to generate evidence for law enforcement purposes***, even though the policy's "ultimate purpose" was a beneficent one, *Ferguson v. City of Charleston*, [121 S. Ct. 1281](#) (2001) (invalidating procedures to identify and non-consensually test any maternity patient suspected of drug use who came to a public hospital, where the policy was aimed at prosecuting drug-abusing mothers and forcing them into drug treatment programs).

In cases where the "special needs" exception does not apply, a valid search warrant is required in order to conduct the testing.

Chapter 6 STANDING TO ASSERT FOURTH AMENDMENT CLAIMS

§ 6.01 Nature of Fourth Amendment Rights

Fourth Amendment rights are *personal*, not derivative. Thus, evidence seized in violation of one defendant's Fourth Amendment rights may be admissible against a co-defendant unless the co-defendant has independent grounds to assert such claim. *Alderman v. United States*, [394 U.S. 165](#) (1969).

§ 6.02 “Legitimate Expectation of Privacy” Standard

[A] General Rule

The modern test for determining whether a person has standing to contest a search on Fourth Amendment grounds is “whether the person who claims the protection of the Amendment has a *legitimate expectation of privacy* in the invaded place.” *Rakas v. Illinois*, [439 U.S. 128](#) (1978) (passenger in a car failed to prove that he had any legitimate expectation of privacy in the areas searched, namely, in the locked glove compartment and the area under the front passenger seat, and therefore, could not successfully claim the protections of the [Fourth Amendment](#)). *Rakas* rejected the notion of “target standing,” ruling that one does not possess standing to raise a Fourth Amendment claim simply because he was the target of the search that resulted in the seizure of evidence against him.

[B] Examples Involving Residences

An *overnight guest* may successfully challenge a search of another person's residence. *Minnesota v. Olson*, [495 U.S. 91](#) (1990) (defendant, an overnight guest in his girl friend's home, could challenge the police entry of the premises, notwithstanding the fact that defendant was never alone in the home, did not have a key, and lacked dominion and control over the premises).

In contrast, one who is *merely present* in a residence, without further indicia of a reasonable expectation of privacy, may not claim the protections of the [Fourth Amendment](#). In *Minnesota v. Carter*, [525 U.S. 83](#) (1998), out-of-town defendants came to another's apartment for the sole purpose of packaging the cocaine, had never been to the apartment before and were only in the apartment for approximately 2 1/2 hours. The Court focused on three factors in finding that the defendants had no reasonable expectation of privacy in the apartment searched:

- (1) the purely commercial nature of the transaction engaged in there;
- (2) the relatively short period of time in the apartment; and
- (3) the lack of any previous connections between the two defendants and the occupant of the apartment.

[C] Examples Involving Automobiles

[1] Automobile Out of Owner's Possession

Courts are split on the issue of whether the owner of an automobile has standing to challenge a search and seizure when the car is temporarily out of the owner's possession at the time of the police conduct. Most courts hold that when a car *owner lends his/her vehicle to another, at least if for a short duration, the owner maintains a legitimate expectation of privacy* in it and, therefore, can challenge a search of the car that takes place in the owner's absence.

A few courts have held that possession, and not ownership of the car is the key. Therefore, an absent owner of an automobile lacks standing to contest the search of his/her vehicle. More often, however, a court may rule that the owner lacks standing if the owner gives another person *complete control of the car and its contents for an extended period of time*, especially if the vehicle will be driven a considerable distance away from the owner.

[2] Search of Another Person's Automobile

A non-owner occupant of an automobile may have standing to contest a search, under the test set forth in *Rakas* [[439 U.S. 128](#)]. *E.g.*, where the owner lends the car to the occupant for a period of time and the occupant has complete dominion and control of the automobile at the time of the search, the occupant may be found to have had a reasonable expectation of privacy in the automobile.

Some courts have held that a passenger does not have standing to contest a search and seizure of a vehicle in which the passenger is traveling.

Chapter 7 EXCLUSIONARY RULE

§ 7.01 General Rule

Evidence gathered in violation of the [Fourth Amendment](#) is not admissible in a criminal trial against the defendant.

§ 7.02 Exceptions to the Exclusionary Rule

[A] Non-Trial Criminal Proceedings

Illegally seized evidence may constitutionally be introduced in a variety of non-trial criminal proceedings including: grand jury proceedings, preliminary hearings, bail proceedings, sentencing, and proceedings to revoke parole.

[B] Impeachment at Trial

A prosecutor may introduce evidence obtained from a defendant in violation of the defendant's Fourth Amendment rights for the limited purpose of impeaching the defendant's: (1) direct testimony; or (2) answers to legitimate questions put to the defendant during cross-examination. However, such evidence may not be used to impeach other defense witnesses. *James v. Illinois*, [493 U.S. 307](#) (1990).

[C] "Good Faith" Exception

[1] In General

Evidence obtained by a police officer in reasonable reliance on a search warrant that is subsequently found invalid may be admissible. *United States v. Leon*, [468 U.S. 897](#) (1984). It is necessary that a reasonably well-trained officer would have believed that the warrant was valid. This has come to be known as the "good faith" or *Leon* exception to the exclusionary rule. Many states, however, have rejected this exception.

[2] Circumstances Suggesting Invalidity of Warrant

Circumstances which should suggest to a police officer that a search warrant is not valid include:

(1) the magistrate who issued the warrant relied on information supplied by an affiant who knew that the statements in the document were false or who recklessly disregarded the truth;

(2) the magistrate's behavior was so lacking in neutrality that it would have been apparent to a reasonable officer, *e.g.*, where the magistrate acts as a rubber stamp for the police by signing the warrant without reading it, while in the presence of the officer who later claims reliance;

(3) the warrant is based on an affidavit lacking sufficient indicia of reliability, *e.g.*, if a warrant is issued based on a wholly conclusory affidavit;

(4) the warrant is facially deficient in that it fails to particularize the place to be searched or the things to be seized.

[3] Improperly Executed Warrants

The *Leon* [[468 U.S. 897](#)] “good faith” rule does not cure *improperly executed* warrants.

[4] Extension of Good Faith Exception

The good-faith exception has been extended to a *non-warrant search* based on an error made by a court employee, rather than by a police officer. *Arizona v. Evans*, [514 U.S. 1](#) (1995) (a police officer relied on a clerical error made by a court employee; because of the error, the patrol car computer showed that there was an outstanding misdemeanor warrant for defendant’s arrest; a subsequent warrantless search of the defendant’s car incident to the arrest revealed marijuana).

§ 7.03 “Fruit of the Poisonous Tree” Doctrine

In general, the exclusionary rule extends not only to the direct products of an unconstitutional search and seizure but also to ancillary evidence that results from the illegal search. The fruit-of-the-poisonous-tree doctrine is subject to three qualifications:

- (1) the independent source doctrine;
- (2) the inevitable discovery rule; and
- (3) the attenuated connection principle.

[A] Independent Source Doctrine

Evidence that is not causally linked to unconstitutional governmental activity is admissible pursuant to the independent source doctrine. The doctrine applies if the challenged evidence is:

- (1) *first discovered during lawful police activity*; or
- (2) *initially discovered unlawfully, but is later obtained lawfully in a manner independent of the original discovery*. *Murray v. United States*, [487 U.S. 533](#) (1988).

[B] Inevitable Discovery Rule

Evidence obtained illegally may be admissible in a criminal trial if the prosecutor proves by a preponderance of the evidence that the challenged evidence “ultimately or inevitably would have been discovered by lawful means.” *Nix v. William*, [467 U.S. 431](#) (1984).

[C] Attenuated Connection Principle

Evidence that otherwise qualifies as fruit-of-the-poisonous-tree may be admissible if its connection with the illegal police activity is so attenuated that it is purged of the taint. *Nardone v. United States*, [308 U.S. 338](#) (1939); *Wong Sun v. United States*, [371 U.S. 471](#) (1963). Factors that may influence whether fruit of the poisonous tree evidence is purged of its taint include:

[1] Temporal Proximity

The shorter the time lapse between the Fourth Amendment violation and the acquisition of the challenged evidence, the more likely it is that a court will conclude that the evidence is tainted. For example, in *Wong Sun* [[371 U.S. 471](#)], the police obtained a statement from the defendant in his bedroom immediately after his unlawful arrest. The Court suppressed this evidence, “which derive[d] so immediately from the unlawful entry.”

[2] Intervening Events

The more factors that intervene between the Fourth Amendment violation and the seizure of the challenged evidence, the more likely it is that the evidence will be deemed to have lost its taint.

[a] Intervening Act of Free Will

An intervening act of free will can remove the taint of an earlier Fourth Amendment violation. For example, in *Wong Sun* [[371 U.S. 471](#)], upon his release from jail after his unlawful arrest, the defendant later voluntarily returned to the police station and provided a written statement. The Court found that the voluntary nature of the defendant’s conduct removed from his statement any taint from the initial violation.

However, the Court has warned that *Miranda* [*Miranda v. Arizona*, [384 U.S. 436](#) (1966)] warnings alone cannot convert a confession following a Fourth Amendment violation into a product of free will, breaking the link between the statement and the violation. *Brown v. Illinois*, [422 U.S. 59](#) (1975). Therefore, if the police arrest a suspect on less than probable cause, administer *Miranda* warnings, obtain a waiver from the suspect, and thereafter secure a confession, the question of whether the subsequent statement was the product of the suspect’s free will must be determined based on the totality of the circumstances.

[b] Payton violation

Where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State’s use of a statement made by the defendant outside of his home, even when he was arrested in his home without a warrant in violation of *Payton*. *New York v. Harris*, [495 U.S. 14](#) (1990).

[3] Flagrancy of the Violation

Fruit of the poisonous tree evidence is less likely to be free of taint if the Fourth Amendment violation was flagrant rather than unintentional.

[4] Nature of the Derivative Evidence

Some evidence, by its nature, is more susceptible to dissipation of the taint than other evidence, *e.g.*, verbal evidence is more likely to be admissible than physical evidence.

Chapter 8 PRIVILEGE AGAINST SELF-INCRIMINATION

§ 8.01 Text and Interpretation of the Privilege Against Self-Incrimination

The [Fifth Amendment](#) to the United States Constitution provides in relevant part that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”

[A] “Person”

The privilege against self-incrimination applies only to natural persons. It may be invoked by witnesses as well as defendant(s). Corporations, associations, partnerships, and other entities cannot avail themselves of the privilege (the “collective entity” doctrine), but a sole proprietor may.

[B] “Compelled”

The [Fifth Amendment](#) is violated when the government compels a person, by physical or mental force, to provide incriminating oral or documentary testimonial evidence, *e.g.*, forced confessions. [See Chapter 10, Confessions.]

[C] “Criminal Case”

One may invoke the privilege against self-incrimination in *any civil or criminal* proceeding, whether formal or informal – *e.g.*, grand jury proceedings, trials, administrative hearings, police interrogations – where statements could be used to incriminate him in a subsequent criminal proceeding. *Lefkowitz v. Turley*, [414 U.S. 70](#) (1973). The privilege is available only where the possible consequence of the incriminating statement is criminal prosecution; it may not be invoked to shield against personal disgrace, loss of employment, or civil confinement.

[D] “Witness Against Himself”

[1] Testimonial Evidence

A person is deemed a “witness against himself” when he provides incriminating *testimonial or communicative* evidence. Evidence is of a testimonial or communicative nature if it expresses, either directly or indirectly, a factual assertion or one’s thoughts about the commission of a crime. *Doe v. United States*, [487 U.S. 201](#) (1988). The communication can be verbal, such as an oral confession, or non-verbal, such as nodding or shaking one’s head or making other gestures that communicate thoughts or facts.

Under some circumstances, an *incorrect answer* to an otherwise non-incriminating statement may also be deemed testimonial. In *Pennsylvania v. Muniz*, [496 U.S. 582](#)

(1990), a drunk driving case, the Court held that an incorrect answer regarding the date of the suspect's sixth birthday was testimonial as it *supported the factual inference that the defendant's mental faculties were impaired*. (The Court distinguished the incorrect answer, which reflected his mental processes, from the slurred nature of his words in general, which were deemed to be physical evidence.)

The privilege generally applies to *documentary evidence* as well if the documents incriminate the person compelled to produce them. However, as the privilege against self-incrimination is personal, it may not be asserted by a third-party (*e.g.*, a suspect's accountant) who is compelled to produce documents that incriminate another.

[2] Physical Evidence

The [Fifth Amendment](#) *does not preclude* the government from compelling a person to provide *real or physical evidence*. *Schmerber v. California*, [384 U.S. 757](#) (1966) (upholding compulsory taking of a blood sample in order to test for alcohol after the defendant was arrested for driving under the influence).

Speech does not always constitute testimonial evidence and *may be deemed physical* evidence, for example:

- a suspect in a lineup compelled to speak the words allegedly spoken by the perpetrator of the crime under investigation for the purpose of voice recognition.
- a compelled writing sample used to analyze the handwriting itself, not the content.
- slurred speech, suggestive of intoxication.

Other conduct producing evidence that is deemed physical rather than communicative, and therefore, to which the privilege does not apply, includes:

- putting on clothing to see if it fits.
- standing in a lineup.
- moving one's eyes or walking on a straight line as part of a sobriety test.
- giving blood after being arrested for driving under the influence of alcohol.

§ 8.02 Immunity

If a judge determines that a witness has legitimately asserted the privilege against self-incrimination regarding a given matter, the prosecution cannot compel the witness to testify as to that matter unless the government obtains an immunity order. An immunity order requires the witness to testify while providing him with at least as much protection as the privilege itself.

Two forms of immunity may be granted to a witness. "*Transactional*" immunity protects a witness from prosecution for any offense that is the subject of the questioning. "*Use*" immunity permits prosecution of the witness regarding the matter on which he is questioned but precludes admission of the compelled testimony at his criminal trial.

§ 8.03 Exceptions to the Privilege Against Self-Incrimination

The privilege against self-incrimination applies to situations where the statements could be used in a criminal proceeding. Thus, testimonial evidence, even if incriminating may be compelled in a variety of non-criminal contexts.

[A] Required-Records Doctrine

Under the “required-records” doctrine, a party may be compelled to produce documents that it is required by law to maintain. The doctrine applies where the statutory record-keeping requirement is:

- (1) imposed in an essentially non-criminal and regulatory area;
- (2) directed at the public at large, not at a select group inherently suspect of criminal activities; and
- (3) rationally related to the regulatory purpose.

See, e.g., Shapiro v. United States, [335 U.S. 1](#) (1948) (upholding the constitutionality of federal regulations issued under the Emergency Price Control Act, which required certain licensed businesses to maintain records of their business activities and to make them available for inspection by the government upon request); *California v. Byers*, [402 U.S. 424](#) (1971) (upholding a state hit-and-run statute that required drivers involved in a vehicular accident to stop at the scene and report name and address).

[B] Object of Regulatory Interest

The ability to invoke the privilege against self-incrimination is limited when a person *assumes control over items or persons* that are the *legitimate object of the government’s non-criminal regulatory authority*. In *Baltimore City Department of Social Services v. Bouknight*, [493 U.S. 549](#) (1990), the Supreme Court ruled that a mother who had previously lost custody of her child because of suspected child abuse, but was permitted temporary custody of the child subject to various court conditions, could not assert the privilege against self-incrimination to resist compliance with a subsequent court order that she produce the child or otherwise reveal his whereabouts. Because the child’s care and safety had become an object of the state’s regulatory concern, the mother, upon accepting temporary custody of the child, became subject “to the routine operation of the regulatory system” and thus was required to comply with its requirements.

Chapter 9 CUSTODIAL INTERROGATION

§ 9.01 *Miranda v. Arizona*

The landmark case of *Miranda v. Arizona*, [384 U.S. 436](#) (1966), resulted from the consolidation of four cases on appeal. In each case, the suspect was taken into custody, questioned in a police interrogation room in which the suspect was alone with the interrogators, and never informed of his privilege against self-incrimination.

Miranda held that any statement, whether exculpatory or inculpatory, obtained as the result of ***custodial interrogation*** could not be used against the suspect in a criminal trial unless the police provided ***procedural safeguards*** effective to secure the suspect's privilege against compulsory self-incrimination. "Custodial interrogation" is defined in *Miranda* as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

§ 9.02 "Custody"

A person is deemed to be in custody if he is ***deprived of his freedom of action "in any significant way."*** "Custody" requires the existence of coercive conditions that would cause a reasonable person to believe, under all the circumstances surrounding the interrogation, that he is not free to go.

Not all coercive environments equate to "custody." For example, a police interrogation room may be deemed a coercive environment but the totality of the circumstances may indicate that a person is not in custody – *e.g.*, he came to the police station voluntarily, was informed prior to questioning that he was not under arrest, and he was free to leave the police station at any time. See *Oregon v. Mathiason*, [429 U.S. 492](#) (1971); *California v. Beheler*, [463 U.S. 1121](#) (1983).

Brief detention by the police likewise does not necessarily put one in custody, for example, brief questioning during a routine traffic stop or roadblock. *Berkemer v. McCarty*, [468 U.S. 420](#) (1984).

§ 9.03 "Interrogation"

For purposes of *Miranda* [[384 U.S. 436](#)], "interrogation" refers to ***express questioning or its "functional equivalent," i.e.***, "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are ***reasonably likely to elicit an incriminating response*** from the suspect." *Rhode Island v. Innis*, [446 U.S. 291](#) (1980). For example, if the police know the person in custody may be susceptible to certain forms of persuasion, any statements or actions designed to play upon such susceptibilities may be deemed the functional equivalent of interrogation.

In *Innis*, a murder suspect was being transported to the police station when the police commented that they hoped that the murder weapon, which had not yet been located, would not be found by any children from a nearby school for the handicapped. In response, the suspect, who had previously requested a lawyer, revealed the location of the gun. The Court held that the comments were not the functional equivalent of interrogation because it found:

- (1) the comments were brief;
- (2) the comments were not particularly evocative;
- (3) the suspect was not disoriented or upset when the comments were made;
- (4) there was no evidence that the police should have known that the suspect would be susceptible to an appeal to his conscience.

§ 9.04 Procedural Safeguards: The “*Miranda* Warnings”

[A] Content of *Miranda* Warnings

The Court in *Miranda* [[384 U.S. 436](#)] noted that Congress and the states are free to develop procedural safeguards for protecting a suspect’s Fifth Amendment rights during custodial interrogation. However, unless they are “fully as effective” as those described in *Miranda*, the police must apprise the suspect issue, prior to custodial interrogation, that:

- (1) the suspect has a right to remain silent;
- (2) anything said can and will be used against the suspect in court;
- (3) the suspect has the right to consult with a lawyer and to have his lawyer present during interrogation;
- (4) if the suspect is indigent a lawyer will be appointed to represent him.

[B] Right to Remain Silent

Miranda [[384 U.S. 436](#)] states that, once warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease. The police must honor a suspect’s right to silence after he asserts the privilege but are not necessarily precluded from attempting to interrogate the suspect under different circumstances. *See Michigan v. Mosley*, [423 U.S. 96](#) (1975) (holding that the police did not violate the defendant’s Fifth Amendment rights when the interrogation ceased immediately upon request; two hours elapsed; the subsequent questioning was by a different officer, in a different location, for a different crime; and *Miranda* warnings were restated).

[C] Right to Counsel During Interrogations

[1] Fifth Amendment Right

When a suspect in custody invokes his right under *Miranda* [[384 U.S. 436](#)] to consult with an attorney, the police must cease the interrogation until the suspect’s attorney is present unless the suspect initiates further “communication, exchanges, or conversations”

with the police. *Edwards v. Arizona*, [451 U.S. 477](#) (1981). This rule is intended “to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights” and ***applies to all interrogation***, including questioning about crimes other than the one for which the suspect is in custody. However, the *Edwards* rule does not apply unless a suspect ***unambiguously*** asserts his right to counsel. *Davis v. United States*, [512 U.S. 452](#) (1994).

Furthermore, once a suspect in custody invokes his *Miranda* [[384 U.S. 436](#)] right to counsel, the police may not re-initiate interrogation ***at any time thereafter unless counsel is present***. *Minnick v. Mississippi*, [498 U.S. 146](#) (1990).

Where the suspect initiates communications with the police in the absence of counsel, the police may recommence interrogation upon obtaining a valid waiver of his Fifth Amendment rights. A suspect ***initiates communications, exchanges or conversations*** by any comment or inquiry that indicates his desire to engage in a discussion ***relating directly or indirectly to the investigation***. Comments or inquiries “relating to routine incidents of the custodial relationship,” such as a request for water or to use a telephone, do not qualify as “communications, exchanges, or conversations” and thus do not properly trigger further police interrogation. *Oregon v. Bradshaw*, 462 U.S. 1039 (1983).

[2] Sixth Amendment Right

The right to counsel guaranteed as a result of *Miranda v. Arizona* [[384 U.S. 436](#)] falls within the protections of the [Fifth Amendment](#) and is available to a suspect upon being taken into custody. This right differs in various respects from the right to counsel in the [Sixth Amendment](#), which, with the exception of the ruling in *Escobedo v. Illinois*, [378 U.S. 478](#) (1964) (a pre-*Miranda* decision), has been held to attach only upon commencement of criminal proceedings, e.g., upon filing of an indictment. [See Chapter 11, Sixth Amendment Right to Counsel: Interrogation.]

§ 9.05 Waiver of *Miranda* Rights

[A] Elements of Valid Waiver

Miranda [[384 U.S. 436](#)] states that a valid waiver of Fifth Amendment rights during interrogation “could” be found when, after the reading of *Miranda* rights, a suspect ***expressly states*** a willingness to make a statement, without the presence of an attorney, “followed closely” by such statement. The validity of the waiver must be based on an assessment of “the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” ” *Edwards v. Arizona*, [451 U.S. at 482](#) (quoting *Johnson v. Zerbst*, [304 U.S. 458, 464](#) (1938)).

[B] Voluntary, Knowing, and Intelligent Waiver

In order to be valid, a waiver must have been given “voluntarily, knowingly, and intelligently.” *Colorado v. Connelly*, [479 U.S. 157](#) (1986). A voluntary waiver is “the product of a free and deliberate choice rather than intimidation, coercion, or deception.” A knowing and intelligent waiver is made with “full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *Moran v. Burbine*, [475 U.S. 412](#) (1986). A waiver cannot be deemed “knowing and intelligent” unless the police issued proper *Miranda* [[384 U.S. 436](#)] warnings.

[C] Express and Implied Waiver

A valid waiver may not be presumed simply from the suspect’s silence following reading of the *Miranda* [[384 U.S. 436](#)] warnings or from the fact that he confesses. Nevertheless, an express statement of waiver is not invariably necessary. *North Carolina v. Butler*, [441 U.S. 369](#) (1979). In some cases, waiver may be clearly inferred from the suspect’s words and actions that follow *Miranda* warnings, although the Supreme Court has given little guidance on when such circumstances exist.

§ 9.06 Inapplicability of *Miranda*

[A] Interrogation by Undercover Police

Miranda [[384 U.S. 436](#)] warnings are not required if the suspect being questioned is unaware that the interrogator is a police officer. *Illinois v. Perkins*, [496 U.S. 292](#) (1990) (an undercover police agent, posing as a criminal, was positioned in the defendant’s cellblock and engaged the defendant in a conversation designed to elicit details of the crime for which he was suspected; the Court held that such statements, although the result of interrogation while in custody, and in the absence of *Miranda* warnings, were admissible).

[B] Physical Evidence

Since the privilege against compulsory self-incrimination applies only to testimonial or communicative evidence, *Miranda* [[384 U.S. 436](#)] warnings are not required in order for the police to compel the production of physical or real evidence, such as a blood, breath, or handwriting sample. [See Chapter 8, Privilege Against Self-Incrimination.]

[C] Exigent Circumstances

A public safety exception to *Miranda* [[384 U.S. 436](#)] allows the police to interrogate a suspect prior to *Miranda* warnings if an exigency exists that requires immediate police action to ensure public safety, *e.g.*, to locate a loaded weapon in a public place. The questions asked prior to issuance of the warnings must be directed at the exigent circumstances only. *New York v. Quarles*, [467 U.S. 649](#) (1984) (observing that the defendant, who had just attacked a woman and then fled into a grocery store, had an

empty shoulder holster, an officer validly asked the defendant, without issuing *Miranda* warnings, where the gun was).

[D] Routine Booking Questions

Miranda [384 U.S. 436] warnings need not be issued prior to asking a suspect in custody routine booking questions, such as name, address, date of birth, and other biographical data necessary to complete the booking process. *Pennsylvania v. Muniz*, [496 U.S. 582](#) (1990).

§ 9.07 Exclusionary Rule Under *Miranda*

[A] Impeachment Exception

A statement obtained in violation of *Miranda* [384 U.S. 436] may be used to impeach a defendant at trial. *Harris v. New York*, [401 U.S. 222](#) (1971).

[B] Fruit-of-the-Poisonous-Tree Doctrine

The Supreme Court has interpreted *Miranda* [384 U.S. 436] to *not support the “fruit-of-the-poisonous-tree” doctrine*. *Michigan v. Tucker*, [417 U.S. 433](#) (1974) (the government may call a witness to testify at trial, even if that witness’s identity became known as a result of a statement by defendant secured in violation of *Miranda*); *Oregon v. Elstad*, [470 U.S. 298](#) (1985) (the government may introduce a defendant’s own voluntary, post-*Miranda*, admissions, even if they were obtained as a result of an earlier *Miranda* violation).

However, *Tucker* [[417 U.S. 433](#)] and *Elstad* [[470 U.S. 298](#)] were based on the premise that *Miranda* [384 U.S. 436] was a “prophylactic” but not a constitutional rule. Subsequently, the Court in *Dickerson v. United States*, [530 U.S. 428](#) (2000), departed from the reasoning in *Tucker* and stated that *Miranda* was in fact a constitutional decision. Nevertheless, the Court has not thus far reversed its position on the inapplicability of the fruit-of-the-poisonous-tree doctrine to statements obtained in violation of *Miranda*.

Chapter 10 CONFESSIONS

§ 10.01 Voluntary Confessions

A confession that is freely and voluntarily made, following proper *Miranda* [[384 U.S. 436](#)] warnings, is admissible against the defendant at a criminal trial. The voluntariness of a confession is to be assessed from the totality of all the circumstances, taking into account both the characteristics of the accused and the details of the interrogation.

§ 10.02 Involuntary Confessions

A confession that results from police coercion violates the Fifth Amendment privilege against compulsory self-incrimination. The following factors may negate the voluntariness of a confession.

[A] Actual or Threatened Physical Force

A confession obtained by threatened or actual use of violence is inadmissible. Confessions have also been invalidated when the police have “warned” a suspect that, unless he confesses, he may be the victim of mob violence or deadly attacks from fellow prisoners.

[B] Deprivation

Confessions have been suppressed in cases in which the police deprived a suspect of food, water, or sleep, for an extended period of time.

[C] Psychological Pressures

Among the relevant factors that determine whether undue psychological pressure was imposed on a suspect are:

- length of custodial detention.
- whether the interrogation was prolonged.
- whether the questioning occurred in the daytime or at night.
- whether the interrogation is conducted incommunicado.
- the personal characteristics of the suspect (*e.g.*, age, intelligence, level of education, psychological makeup, and prior experience with the police).

[D] Promises of Leniency

A confession is not necessarily a product of coercion where the police expressly or implicitly promise leniency in exchange for the suspect’s cooperation. *Arizona v. Fulminante*, [499 U.S. 279](#) (1991) (repudiating *Bram v. United States*, [168 U.S. 532](#)

(1897), which held that a confession was involuntary if it was obtained by any promise for leniency, “however slight”).

Lower courts have determined that some types of promises of leniency will render a confession involuntary, such as assurances that some of the charges will be dropped or that the defendant will receive a reduction in punishment. However, standing alone, courts rarely invalidate a confession based on a mere promise by the police to bring the defendant’s cooperation to the prosecutor’s attention, or promise that a prosecutor will discuss leniency in exchange for a confession, without in fact making any assurances as to results.

[E] Threat of Harsh Legal Treatment

A confession procured by a threat of especially harsh treatment – directed at the suspect himself or another – may be invalid. *E.g.*, *Rogers v. Richmond*, [365 U.S. 534](#) (1961) (suppressing a confession as involuntary because it was secured in response to a wrongful police threat to take the suspect’s wife into custody).

Some lower courts have ruled that a confession is involuntary if the police threaten to inform the prosecutor of a suspect’s refusal to cooperate, since this is a threat to penalize the suspect for asserting his privilege against compulsory self-incrimination.

[F] Deception

Deception about the strength of the case against the suspect – *e.g.*, if the police falsely inform a suspect that an accomplice has already confessed – without more, generally will not invalidate a confession, although it may be a factor weighed in an assessment of the voluntariness of the confession.

§ 10.03 Exclusionary Rule

[A] Impeachment

A coerced confession is inadmissible at the defendant’s criminal trial for *all* purposes, including impeachment.

[B] Fruit-of-the-Poisonous-Tree Doctrine

The Supreme Court has not expressly addressed whether the fruit-of-the-poisonous-tree doctrine applies to coerced confessions, but it is generally assumed that the doctrine does apply in such circumstances.

Chapter 11 SIXTH AMENDMENT RIGHT TO COUNSEL: INTERROGATION

§ 11.01 Text of Sixth Amendment

The [Sixth Amendment](#) reads in relevant part: “In all criminal *prosecutions*, the accused shall . . . have the Assistance of counsel for his defence.”

§ 11.02 When the Right Attaches

The Sixth Amendment right to counsel exists for “criminal prosecutions.” Thus, the right attaches only *upon commencement of adversary judicial proceedings*, such as preliminary hearing, indictment, information, or arraignment. *Brewer v. Williams*, [430 U.S. 387](#) (1977).

§ 11.03 “Deliberate Elicitation”

The [Sixth Amendment](#) has been interpreted to prohibit the government from *deliberately eliciting* incriminating information from an accused, in the absence of defense counsel, once adversary judicial criminal proceedings have commenced. *Massiah v. United States*, [377 U.S. 201](#) (1964).

An investigatory technique constitutes *elicitation* if it is “the equivalent of direct police interrogation.” *Kuhlmann v. Wilson*, [477 U.S. 436](#) (1986). *Deliberate* elicitation occurs when the government through its overt or covert police agent:

- (1) *acts with the purpose* of eliciting incriminating information from the accused regarding the pending charges, without regard to the likelihood that the elicitation will be successful; or
- (2) *creates an opportunity* for the accused to make incriminating statements about the pending charges.

[A] Police Acts With Purpose

Examples of purposeful police conduct that may elicit incriminating statements from the accused include:

- an officer formally interrogates the accused.
- an undercover agent engages the accused in a conversation about the criminal activity.
- an officer makes statements that are designed to play on the conscience of the accused in order to induce incriminating remarks.

[B] Police Create an Opportunity for Incriminating Statements

Deliberate elicitation may be found where the government *creates a situation likely to induce* the defendant to make incriminating statements. For example, in *United States v.*

Henry, [47 U.S. 264](#) (1980), the FBI placed an informant – who was to be paid on a contingent basis – in the defendant’s jail cell after he had been indicted. The FBI advised the informant “to be alert to any statement” the defendant made, but not to initiate any conversations with the defendant or ask him questions. Nevertheless, the informant engaged the defendant in conversation, during which he made incriminating statements that the government sought to introduce at his trial. Focusing on several factors, including that the paid informant had an incentive to elicit information from the defendant, the Court found that the government had created an opportunity for the accused to incriminate himself, in the absence of counsel, thereby violating his Sixth Amendment right.

The government may be found to have unlawfully created an opportunity for the accused to incriminate himself in violation of the [Sixth Amendment](#) *even if the encounter with an informant or undercover agent is initiated by the accused* himself. In *Maine v. Moulton*, [474 U.S. 159](#) (1985), subsequent to the defendant’s indictment, the police installed a recording device on an informant’s telephone. The defendant, unaware of such action, telephoned the informant three times, during which he discussed the criminal charges against them. The Supreme Court again held that the defendant’s Sixth Amendment right to counsel was violated by the government’s creation of an opportunity for defendant to incriminate himself, irregardless of the fact that the defendant initiated the conversations.

However, if a government agent *does no more than listen*, without proactively inducing the accused to make incriminating statements – such as by placing an undercover agent or informant in an accused’s jail cell and merely reporting the accused’s unsolicited incriminating statements – such action does not constitute deliberate elicitation.

§ 11.04 “Offense-Specific” Nature of the Right

The [Sixth Amendment](#) is offense-specific, *i.e.*, the interrogation that is the subject of the Sixth Amendment inquiry *must relate to the crime for which criminal proceedings have commenced*. *McNeil v. Wisconsin*, [501 U.S. 171](#) (1991). The Sixth Amendment right to counsel does not attach to other crimes for which the accused may be under investigation but which are unrelated to the pending prosecution.

For purposes of determining whether the [Sixth Amendment](#) covers a given crime, *Texas v. Cobb*, [532 U.S. 162](#) (2001), clarified that:

- (1) the Sixth Amendment does not necessarily extend to offenses that are “factually related” to those for which the accused has been formally charged;
- (2) the term “offense” is “not necessarily limited to the four corners of a charging instrument”;
- (3) “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is *whether each provision requires proof of a fact which the other does not.*”

Blockburger v. United States, [284 U.S. 299](#) (1932) (the test applied for double jeopardy purposes, extended to the Sixth Amendment context by *Cobb*).

§ 11.05 Waiver of the Right to Counsel

[A] When the Accused Requests Counsel

Once the Sixth Amendment right to counsel attaches, and *the accused requests counsel*, the government *may not initiate conversation* with the accused relating to the crime at hand in the absence of counsel, even if the accused waives the right in response to the police elicitation. However, *if the accused initiates conversation* with the police, and waives his right to counsel, interrogation in the absence of counsel may proceed. *Michigan v. Jackson*, [475 U.S. 625](#) (1986) (defendant was appointed counsel whom he had not yet met when the police contacted the defendant, read him his *Miranda* [[384 U.S. 436](#)] rights, obtained a waiver, and questioned him, even though the defendant had asked for his lawyer several times; the Court held that the waiver was invalid because the police initiated the conversation after the defendant had requested counsel).

[B] When the Accused Does Not Request Counsel

[1] Before Counsel is Appointed or Hired

In the absence of a request for counsel after the right attaches, the *police are permitted to seek from the accused a waiver* of his right to counsel. *Patterson v. Illinois*, [487 U.S. 285](#) (1988) (upholding the admissibility of the post-indictment statements made after issuance of *Miranda* [[384 U.S. 436](#)] warnings and procurement of a waiver of the right to counsel, where at the time of the post-indictment questioning, the defendant had not yet retained, or accepted by appointment, a lawyer to represent him).

[2] After Counsel is Appointed or Hired

The Supreme Court has not directly addressed the issue of whether a waiver is valid where counsel has been appointed but the accused has not actually requested to meet with his lawyer. However, in a footnote in *Patterson* [[487 U.S. 285](#)], the Court hinted that once counsel has been appointed or hired, the police may not seek a waiver of the right to counsel from the defendant until he has had the opportunity to meet with counsel (stating that it was “a matter of some significance” that the defendant, whose waiver of right to counsel was found valid, had not yet retained or been appointed counsel). A footnote in *Cobb* [[532 U.S. 162](#)], however, calls this position into question (stating “there is no ‘background principle’ of our Sixth Amendment jurisprudence establishing that there may be no contact between a defendant and police without counsel present”), suggesting that a waiver may be valid if the accused does not request assistance of counsel even if counsel has been appointed.

[C] Sufficiency of Waiver

As with waiver of the right to counsel during custodial interrogation, a waiver of the right to counsel prior to post-indictment interrogation must be voluntary and made “knowingly and intelligently.” [See Chapter 9, Custodial Interrogation.]

§ 11.06 Scope of the Sixth Amendment Exclusionary Rule

[A] Impeachment

The Court has addressed whether a statement secured in violation of the [Sixth Amendment](#) may be used for impeachment purposes in only a limited context. If the police initiate conversation with an accused who has requested counsel, in violation of the rule in *Michigan v. Jackson*, incriminating statements may be used for impeachment if the accused subsequently waived the right, despite the fact that the improper police conduct precludes admission of the statements as part of the prosecution’s direct case. *Michigan v. Harvey*, [494 U.S. 344](#) (1990).

[B] Fruit-of-the-Poisonous-Tree Doctrine

The fruit-of-the-poisonous-tree doctrine applies to violations of the Sixth Amendment right to counsel. See *Nix v. Williams*, [467 U.S. 431](#) (1984). [See Chapter 7, Exclusionary Rule.]

§ 11.07 Comparison of Right to Counsel During Interrogations Under Sixth Amendment and *Miranda*

The right to counsel under the [Sixth Amendment](#) and the Fifth Amendment *Miranda* [[384 U.S. 436](#)] decision differ in the following ways:

(1) **Timing** – The Sixth Amendment right applies only after adversary judicial criminal proceedings have been initiated against the accused; the Fifth Amendment right attaches once the defendant is taken into custody.

(2) **Custody** – The Fifth Amendment right does not attach unless the suspect is in custody; the [Sixth Amendment](#) is not so limited, *e.g.*, it applies when the accused has been released from custody on bail or on his own recognizance.

(3) **Nature of offense** – The Sixth Amendment right is offense-specific; the Fifth Amendment right to counsel applies to any and all offenses, once custodial interrogation commences.

(4) **Focus of inquiry** – The Fifth Amendment right to counsel applies when the custodial suspect is “interrogated,” and focuses on the perceptions of the suspect (whether he believes he is in custody); the [Sixth Amendment](#) prohibits “deliberate elicitation,” and focuses on the intentions of the police.

(5) **Questioning by undercover agent or informant** – The Fifth Amendment right to counsel is not invoked when the suspect is questioned by an informant or undercover officer; the [Sixth Amendment](#) applies to deliberate elicitation by overt and covert government agents.

(6) **Fruit-of-the-poisonous-tree doctrine** – The doctrine applies to Sixth Amendment violations; the doctrine does not apply to violations of the Fifth Amendment right to counsel.

(7) **Impeachment** – Statements secured in violation of the Fifth Amendment right may be used for impeachment purposes; statements secured in violation of the Sixth Amendment *Jackson* [[475 U.S. 625](#)] rule may be used for impeachment.

Chapter 12 EYEWITNESS IDENTIFICATION

§ 12.01 Right to Counsel at Line-ups

An accused has a Sixth Amendment *right to have counsel present at any corporeal identification procedure* conducted after the commencement of an adversary judicial criminal proceeding against him. This rule is known as the *Wade-Kirby* doctrine. *United States v. Wade*, [388 U.S. 218](#) (1967) (recognizing that a person is entitled to the assistance of counsel *at all critical stages of a criminal proceeding*, and determining that the pretrial exhibition of a suspect to a witness for identification purposes is a critical stage of the prosecution); *Kirby v. Illinois*, [406 U.S. 682](#) (1972) (the right to counsel does not apply to pre-indictment eyewitness identification).

If counsel is not present at the post-indictment lineup, and the accused has not waived counsel, results of the out-of-court identification are inadmissible. In such cases, the prosecution is furthermore precluded from obtaining an *in-court* identification of the accused by the same witness, unless it proves by clear and convincing evidence that the in-court identification does not constitute fruit-of-the-poisonous-tree evidence. Among the factors that may be considered are:

- the prior opportunity of the witness to observe the alleged criminal act.
- the existence of any discrepancy between any pre-lineup description and the defendant's actual appearance.
- any identification prior to lineup of another person.
- the identification by picture of the defendant prior to the lineup.
- failure to identify the defendant on a prior occasion.
- the lapse of time between the crime and the lineup identification.

Distinguished from in-person line-ups are “*mug shots*.” The [Sixth Amendment](#) does not apply where the police present photographs, including a photograph of the accused, to an eyewitness for possible identification of the perpetrator. Such a display, although it occurs after indictment, is *not a critical stage of the prosecution*. *United States v. Ash*, [413 U.S. 300](#) (1973).

§ 12.02 Reliability of Identification Procedures

Evidence of a *pretrial identification* of the accused must be excluded from trial if, based on the totality of the circumstances, the procedure used to obtain the identification was (1) *unnecessarily suggestive*; and (2) *conducive to mistaken identification*. *Stovall v. Denno*, [388 U.S. 293](#) (1967). This rule applies regardless of whether the identification was corporeal or non-corporeal, occurred before or after formal charges were initiated, and whether or not counsel was present.

Where pretrial eyewitness identification is deemed unnecessarily suggestive and unreliable, the witness is *precluded from making an in-court identification* of the accused unless the prosecution proves that the out-of-court identification procedure did not create “a very substantial likelihood of *irreparable* misidentification.” *Simmons v. United States*, [390 U.S. 377](#) (1968).

[1] Unnecessarily Suggestive

In some cases, the identification procedure may in fact be suggestive – *e.g.*, showing a single suspect to an eyewitness, or presenting the suspect in handcuffs – but under the circumstances, the identification procedure is deemed necessary. In *Stovall*, the Court found “suggestive” the police action of bringing to the hospital a single African-American suspect, who was handcuffed to an officer, for identification by a stabbing victim. Nevertheless, the Court concluded that the procedure was *necessarily* suggestive, as the police were unsure if the victim would survive long enough to view a later line-up.

[B] Conducive to Mistaken Identification

Even if an identification procedure is unnecessarily suggestive, the identification procedure must also have been unreliable in order to exclude the evidence. *Manson v. Brathwaite*, [432 U.S. 98, 114](#) (1977). The relevant factors in determining reliability include:

- the opportunity of the witness to view the perpetrator at the time of the crime.
- the witness’ degree of attention.
- the accuracy of the witness’ prior description of the perpetrator.
- the level of certainty demonstrated by the witness at the confrontation.
- the length of time between the crime and the confrontation.

Chapter 13 ENTRAPMENT

§ 13.01 Nature of Entrapment

Entrapment is *not a constitutional doctrine*. It is a *criminal law defense* to police overreaching, recognized in all states and the federal courts. In general, entrapment occurs when the defendant:

- (1) was induced to commit the crime by a government agent (typically an undercover police officer); and
- (2) would not have otherwise committed such crime.

Proof of entrapment varies according to whether the jurisdiction in which a case is pending applies the “subjective” test (majority approach) or the “objective” test (minority approach advocated by the Model Penal Code).

§ 13.02 Subjective Test

The subjective test focuses on the *defendant’s predisposition, if any, to commit the crime* solicited by the government agent. *Sorrells v. United States*, [287 U.S. 435](#) (1932). A defendant need not be completely law-abiding in order to assert a defense of entrapment; a history of or predisposition to engage in unlawful activity unrelated to the crime at issue does not preclude the defense.

Entrapment requires more than that the government agent provided an opportunity to the defendant to commit the crime, and generally involves repeated and persistent solicitation. *See, e.g., Jacobson v. United States*, [503 U.S. 540](#) (1992) (defendant who had purchased magazines that contained nude photographs of under-age males not depicting any sexual activity prior to the enactment of a federal law prohibiting the receipt of such materials, and who subsequently succumbed to more than two years of government solicitation to purchase child pornography, was not deemed to be predisposed to commit such crime).

Predisposition may be proved by demonstrating the *defendant’s ready complaisance to commit the crime*, with evidence of, for example:

- the defendant’s non-hesitancy to commit the crime.
- the defendant’s ready knowledge of how to commit the crime.
- the defendant’s comments prior to the commission of the crime that demonstrate his propensity to commit the crime.

Predisposition may also be proved by reference to the *defendant’s character in the community* prior to the time the government approached him, *e.g.*, evidence (which is otherwise generally inadmissible) of the defendant’s bad reputation in the community and/or his prior criminal record, including arrests and convictions for related offenses.

In jurisdictions applying the subjective test, the issue of whether the defendant was entrapped is deemed a question of fact and is generally *submitted to the jury*.

§ 13.03 Objective Test

The objective standard *focuses on police conduct* rather than the predisposition of the defendant. Under the objective test, the court considers the likely impact of the police solicitation on a *hypothetical innocent person*, not the actual defendant. The “hypothetical person” standard may take into account some of the characteristics of the actual defendant.

Model Penal Code § 2.13(2) provides that the entrapment defense should be *submitted to a judge* rather than to the jury.

Chapter 14 RIGHT TO COUNSEL: PRETRIAL, TRIAL AND POST-CONVICTION PROCEEDINGS

§ 14.01 Pretrial Proceedings

Under the [Sixth Amendment](#), a defendant's right to counsel attaches upon the commencement of an adversarial criminal proceeding and may be invoked at any "critical stage." Thus, prior to trial, a defendant is entitled to the assistance of counsel at:

- (1) *post-indictment line-ups* [See Chapter 12, Eyewitness Identification.]
- (2) *post-indictment interrogation* [See Chapter 11, Sixth Amendment Right to Counsel: Interrogation.]
- (3) *psychiatric examinations* of the defendant to determine competency [See Chapter 18, Pretrial and Trial Issues.]
- (4) *arraignments* [See Chapter 15, Charging the Defendant.]
- (5) *preliminary hearings* [See Chapter 15, Charging the Defendant.]
- (6) *bail and detention hearings* [See Chapter 16, Pretrial Release or Detention.]
- (7) *plea hearings* [See Chapter 17, Plea Bargaining and Guilty Pleas.]

If a defendant is *denied his right to counsel at a pretrial proceeding*, any trial conviction is not necessarily subject to reversal if the prosecution demonstrates beyond a reasonable doubt that the Sixth Amendment violation constitutes *harmless error*, *i.e.*, if the same verdict would have been rendered regardless of such constitutional violation. *Chapman v. California*, [386 U.S. 18](#) (1967).

§ 14.02 Trial Proceedings

[A] Appointment of Counsel to Indigents

The state must appoint counsel to an indigent who is *charged with a felony*. *Gideon v. Wainwright*, [372 U.S. 335](#) (1963). While this requirement *does not extend to misdemeanor cases* under the [Sixth Amendment](#), "*no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial,*" absent a knowing and intelligent waiver of the right to counsel. *Argersinger v. Hamlin*, [407 U.S. 25](#) (1972). Thus, a defendant charged with a misdemeanor which carries an optional jail sentence is not guaranteed assistance of counsel at state expense; however, if counsel is not provided, the judge is precluded from sentencing any term of imprisonment upon a finding of guilt. Nor may the court impose a suspended prison sentence under such circumstances. *Alabama v. Shelton*, [535 U.S. 654](#) (2002).

Denial of the Sixth Amendment *right to counsel at trial* results in automatic *reversal of any conviction*. *Gideon v. Wainwright* [[372 U.S. 335](#)].

[B] Right of Self-Representation

[1] Waiver of Counsel

Implicit in the [Sixth Amendment](#) is the right of a defendant to voluntarily and knowingly waive his right to the assistance of counsel and to represent himself at trial, provided the court deems him mentally competent to do so. *Faretta v. California*, [422 U.S. 806](#) (1975). The court must inform the defendant seeking to waive counsel “of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’ ”

[2] Standby Counsel

The right to self-representation is *not violated by the appointment of standby counsel*, even if the defendant objects. The role of standby counsel is to assist the defendant if and when he seeks help and to assume control of the defense if the defendant can no longer represent himself.

Mere occasional unsolicited assistance by the standby counsel does not violate the [Sixth Amendment](#) *as long as the defendant retains control* over his defense. The right of self-representation is not violated unless standby counsel:

- *substantially interferes* with the defendant’s significant tactical decisions.
- *assumes control* of the examination of witnesses.
- speaks for the defendant *on material issues against his wishes*.
- otherwise *destroys the jury’s perception that the defendant is representing himself*.

McKaskle v. Wiggins, [465 U.S. 168](#) (1984) (upholding a conviction in which standby counsel provided unsolicited, and at times even unwanted, assistance).

[3] Inadequate Self-Representation

A defendant who chooses self-representation cannot thereafter assert a claim of ineffective assistance of counsel.

[4] Wrongful Denial of the Right of Self-Representation

If a court wrongfully denies a defendant the right to represent himself at trial, or if the right is violated by standby counsel, any subsequent *conviction must be reversed*.

[C] Ineffective Assistance of Counsel

[1] Requirement for Effective Representation

Implicit in the right to counsel is that such counsel, whether retained or court-appointed, must render effective representation. According to standards issued by the American Bar Association, “effective representation” requires defense counsel to:

- (1) exercise professional judgment, within the bounds of the law, solely for the benefit of the defendant and free of any conflicts of interest.
- (2) interview the defendant early in their relationship.
- (3) keep the defendant informed of important developments in the case.
- (4) consult with the defendant on important decisions.
- (5) promptly and comprehensively investigate the circumstances of the case.
- (6) apply legal skill and knowledge to render the trial a reliable adversarial process.

[2] *Strickland* Test for Ineffective Representation

In *Strickland v. Washington*, [466 U.S. 668](#) (1984), the Supreme Court established a two-prong test for determining when legal representation in a criminal trial is ineffective. The test requires a showing that:

- (1) the *representation was deficient*; and
- (2) such deficiency *prejudiced the defendant*.

[a] Deficiency of Representation

While *Strickland* did not establish explicit guidelines for effective representation, the Court stated that representation is deficient when the “errors [were] so serious that *counsel was not functioning as the ‘counsel’* guaranteed . . . by the Sixth Amendment.”

Cases alleging ineffective representation generally fall into one of three categories:

- (1) failure to perform ordinary tasks;
- (2) falling asleep in court; or
- (3) ignorance of the relevant law.

[i] Failure to Perform Ordinary Tasks

Examples of omissions that, under given circumstances, may qualify as deficient representation, include:

- failure to develop a meaningful defense strategy.
- failure to interview witnesses.
- failure to request discovery.
- failure to visit the crime scene.
- absence from the courtroom during critical portions of the trial.
- failure to make appropriate evidentiary objections.
- failure to timely file a notice of appeal.

However, less-than-optimal performance does not necessarily render representation inadequate, as long as the nature and conduct of the representation is *based on reasonable professional judgment*. See, e.g., *Burger v. Kemp*, [483 U.S. 776](#) (1987) (finding that defense counsel’s decision to not fully investigate the defendant’s

background and not offer mitigating evidence at two capital sentencing hearings was supported by reasonable professional judgment, in that his interviews and studies of reports indicated that an explanation of the defendant's background would not have minimized the risk of the death penalty).

[ii] Sleeping in Court

It is widely accepted that proof that defense counsel frequently slept during trial or significant pretrial hearings constitutes deficient representation.

[iii] Ignorance of Relevant Law

Deficiency may be proved where defense counsel's ignorance or misunderstanding of relevant law *affects trial strategy to the detriment of the defendant*. E.g., *Kimmmelman v. Morrison*, [477 U.S. 365](#) (1986) (defense counsel's failure to request discovery and consequently move to suppress evidence obtained in violation of the [Fourth Amendment](#), based on his erroneous belief that the prosecution was required on his own initiative to turn over all incriminating evidence in its possession, was held to constitute deficient representation); *Lockhart v. Fretwell*, [506 U.S. 364](#) (1993) (defense counsel failed to object to the introduction of certain evidence at the sentencing phase of the trial when it had already been introduced during the guilt phase of the trial, apparently because he was unaware of the relevant law which would have precluded such duplicate evidence).

[b] Prejudice

Once a defendant demonstrates that representation was deficient, the second prong of the *Strickland* test requires proof that such deficiency was prejudicial to the defendant's case. To prove prejudice, the defendant must show that there is a *reasonable probability* that, but for counsel's errors, the *outcome of the trial would have been different*, e.g., that the defendant would not have been convicted or would have received a lesser sentence. "Reasonable probability" suggests more than that the error had "some effect" on the outcome, but not that it is "more likely than not" that counsel's deficient representation affected the outcome.

Prejudice is *presumed* in cases involving:

- (1) actual or constructive denial of the assistance of counsel such as when the lawyer repeatedly fell asleep during trial;
- (2) certain forms of state interference with counsel's assistance; and
- (3) attorney conflict of interest.

[3] Conflicts of Interest

[a] Pretrial Avoidance of Conflicts

If an attorney representing co-defendants makes a timely motion for appointment of separate counsel based on a potential conflict of interest, the trial judge ***must either grant the motion or at least conduct a hearing*** on the matter to ascertain whether appointment of separate counsel is warranted. Failure of the judge to do so requires automatic ***reversal of any conviction***. *Holloway v. Arkansas*, [435 U.S. 475](#) (1978).

[b] Disqualification of Counsel

A trial court has the authority to disqualify defense counsel, even over a defendant's objection, if it concludes that there is significant potential of a conflict of interest. *Wheat v. United States*, [486 U.S. 153](#) (1988).

[c] Appeal Based on Conflict of Interest

In order to overturn a conviction on the basis of a conflict of interest, the defendant must demonstrate that:

- (1) an ***actual conflict of interest existed***; and
- (2) the conflict ***adversely affected the lawyer's performance***. The defendant need not show actual prejudice – *i.e.*, that the outcome of the trial would have been different – only that the conflict “adversely affected” the lawyer’s performance.

§ 14.03 Post-Conviction Proceedings

The Sixth Amendment right to counsel applies to ***sentencing hearings***. *Mempa v. Rhay*, [389 U.S. 128](#) (1967).

The ***Sixth Amendment*** ***does not itself extend to criminal appeals***. (In fact, the federal Constitution does not even provide a right to appeal convictions, although every state provides at least one appeal of right in criminal cases, and grants courts discretion regarding subsequent appeals.)

However, as appellate procedures are subject to the standards of the ***Fourteenth Amendment equal protection and due process clauses***, an indigent defendant seeking to appeal his conviction must be provided counsel for the ***first statutory appeal of right***. *Douglas v. California*, [372 U.S. 353](#) (1963).

The Fourteenth Amendment has been held to ***not require the appointment of counsel*** to assist indigent appellants for:

- ***discretionary*** state appeals.
- applications for review in the United States Supreme Court.
- state ***habeas corpus*** proceedings.
- post-sentencing ***probation hearings***.
- post-sentencing ***parole revocation hearings***.

Ross v. Moffitt, [417 U.S. 600](#) (1974); *Pennsylvania v. Finley*, [481 U.S. 551](#) (1987); *Gagnon v. Scarpelli*, [411 U.S. 778](#) (1973).

Chapter 15 CHARGING THE DEFENDANT

§ 15.01 Complaint

After a suspect is arrested and booked, a complaint is prepared by the police or a prosecutor and is filed with the court. A complaint is “a written statement of the essential facts constituting the offense charged.” [Fed. R. Crim. P. 3](#). The complaint serves as the *official charging document prior to the issuance of an information or indictment*.

§ 15.02 Probable Cause (*Gerstein*) Hearing

When the police arrest a suspect without an arrest warrant, a *prompt judicial determination of probable cause* must ordinarily be made in order to continue to detain the defendant where a “*significant pretrial restraint on liberty*” is involved. *Gerstein v. Pugh*, [420 U.S. 103](#) (1975). A *Gerstein* hearing that is held more than 48 hours after the defendant’s arrest is presumptively unreasonable. *Riverside County v. McLaughlin*, [500 U.S. 44](#) (1991). In indictment jurisdictions, if a grand jury previously returned an indictment, a *Gerstein* hearing is unnecessary.

A *Gerstein* [[420 U.S. 103](#)] hearing is equivalent to a pre-arrest warrant hearing, at which probable cause must be demonstrated in order to be granted a warrant. It is *nonadversarial* in nature. The hearing may be conducted in the defendant’s absence, and the probable cause determination may be based on hearsay testimony.

§ 15.03 Initial Court Appearance

A defendant must be brought before a judicial officer for a hearing “without unnecessary delay,” [Fed. R. Crim. P. 5\(a\)](#), *usually within 24 hours of the arrest*, except on weekends. Such hearing is variously called the “initial arraignment,” “arraignment on a warrant,” “arraignment on a complaint,” or the “initial appearance.”

At the initial appearance:

- (1) the defendant receives formal notice of the charges against him.
- (2) relevant constitutional rights are explained to the defendant.
- (3) a date is set for a preliminary hearing.
- (4) counsel is appointed if the defendant is indigent.
- (5) a *Gerstein* [[420 U.S. 103](#)] probable cause determination may be made at such time if the defendant was arrested without a warrant.
- (6) the magistrate determines whether the defendant should be set free on his own recognizance, released on bail, or detained pending further proceedings. [*See* Chapter 16, Pretrial Release or Detention.]

§ 15.04 Preliminary (Bindover) Hearing

In most jurisdictions, a preliminary hearing is held within two weeks after the initial appearance before the magistrate, unless the defendant waives the hearing. [Fed. R. Crim. P. 5\(c\)](#). The primary purpose of a preliminary hearing is to determine whether there is ***probable cause to believe that the defendant committed a specified criminal offense***. [Fed. R. Crim. P. 5.1\(a\)](#). Like the *Gerstein* [420 U.S. 103] hearing, a preliminary hearing is not required if a grand jury previously returned an indictment.

Unlike a *Gerstein* [420 U.S. 103] hearing, the ***preliminary hearing is adversarial*** in nature. Defense counsel may be present, and the prosecutor and the defendant may call witnesses on their behalf and cross-examine adverse witnesses. Many jurisdictions permit the introduction of hearsay and evidence obtained in an unconstitutional manner at the preliminary hearing. [Fed. R. Crim. P. 5.1\(a\)](#).

[A] Information Jurisdictions

If the magistrate in an ***information jurisdiction*** – *i.e.*, a state in which an ***indictment by a grand jury is not required*** – determines that there is sufficient evidence to bind over the defendant for trial, the prosecutor files an information. An information states the charges against the defendant and the essential facts relating to the charges and ***replaces the complaint as the formal charging document***.

If the magistrate in an information jurisdiction does *not* find sufficient evidence to bind over the defendant, the complaint is dismissed and the defendant is discharged. If the prosecutor wishes to proceed with the dismissed case:

- (1) he may file a new complaint, in which case the prosecution begins anew;
 - (2) in some states, he may appeal the magistrate's dismissal to the trial court;
- and/or
- (3) in some circumstances, he may seek an indictment from a grand jury.

In an ***indictment jurisdiction*** – states in which the defendant ordinarily ***cannot be brought to trial unless indicted by a grand jury*** – the preliminary hearing functions as little more than an adversarial *Gerstein*-type hearing. Indeed, the ***magistrate's probable cause determination may be superseded by the grand jury***; if the grand jury does not indict the defendant, he must be released, despite a finding by the magistrate that probable cause exists to believe that the defendant committed the offense.

§ 15.05 Grand Jury Proceeding

In indictment jurisdictions, a defendant may not be tried for a serious offense unless he is indicted by a grand jury or waives the right to a grand jury hearing. A grand jury proceeding differs from a preliminary proceeding in that:

- (1) the ***defendant is not permitted to be present*** during the grand jury proceedings, except if and when he is called as a witness.
- (2) the defendant (as well as all other witnesses) ***may not have counsel present*** while he testifies before the grand jury.

(3) *no judge is present* during the proceedings, and thus, *rules of evidence* – e.g., those excluding hearsay and evidence obtained in violation of the Constitution – *do not apply*.

(4) the *prosecutor is not required to disclose exculpatory evidence* to the grand jurors.

If a majority of grand jurors believe that the prosecutor presented sufficient evidence on which a trial may proceed, the grand jury issues an indictment, a document that states the charges and the relevant facts relating to them. If the jury does not indict the defendant (a “no-bill”), the complaint is dismissed and the defendant is discharged.

§ 15.06 Arraignment

Upon the filing of an indictment or information, the defendant is arraigned. Defense counsel may be present at the arraignment. At the arraignment, the defendant is provided with a copy of the indictment or information, after which he enters one of the following pleas to the offenses charged:

- “not guilty”
- “guilty”
- “*nolo contendere*”
- “not guilty by reason of insanity” (available in some states)

Chapter 16 PRETRIAL RELEASE OR DETENTION

§ 16.01 Initial Court Appearance

At a defendant's initial court appearance (which usually occurs within 24 hours after arrest), the magistrate or judge determines whether the defendant may be released pending trial. The magistrate may:

(1) release the defendant "*on recognizance*" if the magistrate is confident that the defendant will appear as required at all criminal proceedings.

(2) *attach conditions to the defendant's release*, such as placing him in the custody of a designated individual or requiring the deposit of bail, in order to better ensure the defendant will appear as required.

(3) *order the continued confinement* of the defendant pending trial ("preventive detention") if the magistrate determines that no conditions will reasonably ensure the defendant's appearance as required or that his release will jeopardize the safety of others.

In federal criminal cases, a defendant is entitled to representation by counsel at the bail determination, and indigents are appointed counsel for such purpose. [Fed. R. Crim. P. 44\(a\)](#). Many state court systems, however, do not provide counsel to indigents for bail proceedings.

§ 16.02 Bail

[A] Amount of Bail

The [Eighth Amendment](#), as well as all states, by constitution or statute, *prohibits the setting of "excessive" bail*. Bail is excessive if it is set at an amount higher than is deemed necessary to ensure the defendant's appearance at trial.

In determining the appropriate amount of bail in a given case, the magistrate is to consider:

- the nature and circumstances of the offense charged.
- the weight of the evidence against the defendant.
- the defendant's character.
- the financial ability of the defendant to meet the bail requirements.

The Constitution does not entitle an indigent to be released *without* bail if he cannot afford to meet any financial conditions. *Stack v. Boyle*, [342 U.S. 1](#) (1951).

[B] Federal Bail Reform Act

Under the Federal Bail Reform Act of 1984, [18 U.S.C. §§ 3141–3150](#), the magistrate is *required to release the defendant* on his own recognizance "or upon execution of an

unsecured appearance bond in an amount specified by the court,” unless the magistrate concludes that *more restrictive conditions are necessary* to reasonably ensure that the defendant will not flee the jurisdiction and/or endanger others while released pending trial.

The magistrate may not set bail in an amount that is beyond the means of the defendant and therefore results in pretrial detention. [18 U.S.C. § 3142](#)(c)(2). If a judge determines that the defendant should be detained pending trial, he is required to follow the detention provisions set out in the Act.

§ 16.03 Preventive Detention

[A] Detention Hearing

Under the Federal Bail Reform Act, [18 U.S.C. § 3142](#)(f)(1), the magistrate must hold a detention hearing on the motion of the prosecutor if the defendant is charged with:

- a crime of violence.
- any offense for which the maximum sentence is life imprisonment or death.
- a drug offense for which the maximum term of imprisonment is ten years or more.
- any other felony committed by a person previously convicted of two or more of the above offenses.

A hearing is also required on a motion of the prosecutor or on the judge’s own motion in cases that involve an allegation of:

- a serious risk of flight.
- obstruction of justice.
- intimidation of a prospective witness or juror.

At the detention hearing, which ordinarily must be held at the defendant’s first appearance before the magistrate, the defendant is entitled by statute to be represented by counsel, to testify in his own behalf, to present witnesses, and to cross-examine witnesses called by the prosecutor. Rules concerning the admissibility of evidence at criminal trials do not apply at the hearing, thus allowing the introduction of hearsay and evidence obtained in violation of the Constitution.

The prosecutor or defendant may immediately appeal the magistrate’s order in the detention hearing. [18 U.S.C. § 3145](#).

[B] Determination of Release or Detention

[1] Relevant Factors

In order to determine whether any condition(s) will reasonably ensure the appearance of the defendant and the safety of others, the magistrate must consider:

- the nature of the offense charged.
- the weight of the evidence against the defendant.
- the defendant's physical and mental condition.
- the defendant's ties to family and the community.
- whether, at the time of the current arrest, the defendant was already on probation or parole or on pretrial release from another offense.

[18 U.S.C. § 3142\(g\)](#)

[2] Statutory Presumptions

The Federal Bail Reform Act of 1984 provides for two rebuttable presumptions in detention hearings.

The defendant is *presumed to be too dangerous to be released* if the prosecutor proves:

- (1) the defendant was previously been convicted of one of the enumerated offenses that justifies a detention hearing;
- (2) that the offense for which the defendant was convicted was committed while he was on release pending trial for another crime; and
- (3) five years have not elapsed since the later of the date of the defendant's prior conviction or his release from prison.

It may also be *presumed that no conditions of release will reasonably ensure that the defendant will not flee or commit a crime*, if the magistrate determines that there is probable cause to believe that the current charge involves an *enumerated serious drug offense or an the use or possession of firearms*. [18 U.S.C. § 3142\(e\)](#).

Chapter 17
PLEA BARGAINING AND GUILTY PLEAS

§ 17.01 Plea Bargaining

[A] Types of Plea Agreements

[1] Charge Bargaining

There are two types of “charge” bargaining:

(1) *dismissal agreement* – a defendant who is charged with multiple offenses pleads guilty to one or more charges, in exchange for which the prosecutor agrees to drop the other charges.

(2) *charge-reduction agreement* – the defendant and prosecutor agree on a guilty plea to a lesser degree of the original charge.

[2] Sentence Bargaining

Sentencing bargaining also takes one of two forms:

(1) *sentencing recommendation agreement* – in exchange for a guilty plea to a given charge, the prosecutor agrees to recommend to the judge a sentence agreed upon by the defendant, or alternatively, to not oppose the defendant’s request for a particular sentence;

(2) *sentencing agreement* – the prosecutor agrees to a specified sentence in exchange for the guilty plea.

[B] Disclosure of Agreement to Court

[Federal Rule of Criminal Procedure 11\(e\)\(2\)](#), followed by most states, requires the disclosure of any plea bargain to the trial court when the defendant pleads guilty.

[C] Acceptance of Plea Agreement by Trial Court

A judge is not required to accept a plea agreement. If the judge rejects the plea agreement, the defendant must be given the opportunity to withdraw the plea, and must be informed that if he does not withdraw it, “the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.” [Fed. R. Crim. P. 11\(e\)\(4\)](#).

With respect to a guilty plea based on a sentencing-recommendation agreement, the judge must inform the defendant that if the court does not accept the sentencing recommendation, the defendant is not entitled to withdraw the plea.

[D] Revocation and Breach of Agreement by Prosecutor

The prosecutor may revoke an offer, even after the defendant accepts it, *prior to the entry of the plea* by the court. *Mabry v. Johnson*, [467 U.S. 504](#) (1984). However, the prosecutor may not breach the plea bargain once the court accepts it if the guilty plea rests in significant part on the prosecutor's promise. *Santobello v. New York*, [404 U.S. 257](#) (1971) (defendant pleaded guilty based on prosecutor's agreement to not make a sentencing recommendation to the trial judge; months later at the sentencing hearing, in violation of the plea agreement, a different prosecutor sought the maximum sentence, which the judge imposed). If the prosecutor violates his agreement, the court may order specific enforcement of the agreement or allow the defendant to withdraw the plea.

The Supreme Court has suggested that defense counsel should seek to have all aspects of a deal expressly and clearly set out, *United States v. Benchimol*, [471 U.S. 453](#) (1985), and in especially complicated or unusual cases, include an express provision mandating judicial construction of a plea agreement, in the event that the parties dispute the meaning of a provision. *Ricketts v. Adamson*, [483 U.S. 1](#) (1987).

[E] Hard Bargaining by Prosecution

A prosecutor does not engage in "prosecutorial vindictiveness" simply by driving a hard bargain in the plea negotiation process, such as threatening to charge the defendant with a more serious charge if he does not plead guilty. *Bordenkircher v. Hayes*, [434 U.S. 357](#) (1978).

[F] Withdrawal of Plea by Defendant

Once a guilty plea is entered by the court but before sentencing, a *defendant may not withdraw the plea* unless he demonstrates a "fair and just reason" for doing so, such as that the plea was coerced. *United States v. Hyde*, [520 U.S. 670](#) (1997).

[G] Evidence of Guilty Plea and Statements Made During Negotiations

In federal criminal trials, [Federal Rule of Criminal Procedure 11\(e\)\(6\)](#) *excludes* from any civil or criminal proceeding:

- evidence that the defendant entered a plea of guilty that was later withdrawn.
- statements made by the defendant to the prosecutor during plea negotiations.
- statements made by the defendant to the judge during plea proceedings.

However, the defendant can knowingly and voluntarily waive the exclusionary provisions. *United States v. Mezzanatto*, [513 U.S. 196](#) (1995).

§ 17.02 Guilty Pleas

[A] Assistance of Counsel

A defendant who intends to plead guilty *must be represented by counsel* or must validly waive the right to counsel at the pleading stage.

[B] Competency to Plead Guilty

A defendant must be mentally competent in order to validly plead guilty or waive his right to counsel. The competency standard for pleading guilty or waiving the right to counsel is the same as that applied for determining competency to stand trial, *i.e.*, the defendant must possess “sufficient present ability to consult with his lawyer with a *reasonable degree of rational understanding*” and “a *rational as well as factual understanding of the proceedings* against him.” *Godinez v. Moran*, [509 U.S. 389](#) (1993).

[C] Voluntary and Knowing Plea

A guilty plea is valid only if it is made voluntarily and knowingly.

[1] Voluntary Waiver of Rights

A federal trial court may not accept a guilty plea until it determines that the plea is voluntary, *i.e.*, it must not be the “result of force or threats or of promises apart from a plea agreement.” [Fed. R. Crim. P. 11](#)(d). Rule 11 requires the judge to determine the voluntariness of the plea “by addressing the defendant personally in open court.” Nevertheless, under Rule 11, any “variance from the procedures . . . which does not affect substantial rights” constitutes *harmless error*. [Fed. R. Crim. P. 11](#)(h). This rule supersedes the holding in *McCarthy v. United States*, [394 U.S. 459](#) (1969), which held that a guilty plea must be set aside if the district court failed to address the defendant in open court in order to determine the voluntariness of the plea.

[2] Knowing Waiver of Rights

A guilty plea is invalid if the defendant is unaware of:

- (1) the nature of the charges to which he is pleading;
- (2) the penal consequences of the plea; and
- (3) the nature of the rights he is waiving by pleading guilty.

However, a plea is not invalid merely because the defendant or his counsel incorrectly assessed the legal or factual circumstances surrounding the case. [Fed. R. Crim. P. 11](#)(c).

[a] Nature of the Charges

The defendant must be informed of and *understand the “critical elements”* (e.g., mental state) – but not necessarily all elements – of the crime to which he is pleading guilty. *Henderson v. Morgan*, [426 U.S. 637](#) (1976) (defendant, who possessed substantially below-average intelligence, pleaded guilty to intent-to-kill murder, even though he told the court that he “meant no harm” to the victim; the plea was held invalid because the trial judge determined that neither the defense attorney nor the prosecutor explained to the defendant that intent was a critical element of the crime).

[b] Penal Consequences of the Plea

[Federal Rule of Criminal Procedure 11](#)(c) requires the judge to inform the defendant of any mandatory minimum sentence provided by law, and the maximum penalty for the offense, including any pertinent parole provisions. The judge must also inform the defendant that he is “required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances.”

Nevertheless, the prevailing view is that the failure of a court to inform a defendant of the direct penal consequences of the plea, even if such failure violates a statute or procedural rule, does not by itself constitute a due process violation.

[c] Nature of the Rights Being Waived

The judge must inform the defendant that by pleading guilty, he waives the privilege against self-incrimination, the right to trial by jury, and the right to confront one’s accusers. *Boykin v. Alabama*, [395 U.S. 238](#) (1969); [Fed. R. Crim. P. 11](#)(c).

Regarding the waiver of the privilege against self-incrimination, if the court intends to question the defendant under oath during the plea proceeding, it must inform the defendant that his answers can later be used against him in a prosecution for perjury. In contrast, however, the defendant’s truthful statements to the judge during the plea proceeding may not be used against him at any subsequent sentencing hearing in that case. *Mitchell v. United States*, [526 U.S. 314](#) (1999).

[d] Incorrect Legal Advice

An otherwise valid plea is *not vulnerable to collateral attack* simply because it was based on incorrect legal advice, if the advice was based on “then existing law as to possible penalties.” *United States v. Jackson*, [390 U.S. 570](#) (1968).

However, if the defendant entered into a plea agreement based on advice of counsel whose *representation was ineffective*, the plea may be challenged. In order to vacate a guilty plea on the ground of ineffective representation, the defendant must prove that the

representation was constitutionally deficient and that such deficiency was prejudicial. [See Chapter 14, Right to Counsel: Pretrial, Trial and Post-Conviction Proceedings.]

[D] Factual Basis of the Plea

In general, a judge is *not constitutionally required* to determine whether there is a factual basis for a defendant's guilty plea. However, when a defendant *affirmatively asserts his innocence* during the plea proceeding, the trial judge must determine whether there is a factual basis for the plea. *North Carolina v. Alford*, [400 U.S. 25](#) (1970). If the record "contains strong evidence of actual guilt," a judge may accept a guilty plea from a defendant despite his assertion of innocence at the plea proceeding.

Although not constitutionally mandated, [Federal Rule of Criminal Procedure 11\(f\)](#) requires federal criminal courts to determine whether a factual basis for the plea exists. The rule *does not require the trial judge to believe that the defendant is in fact guilty* as long as a factual basis for the plea exists.

[E] Forfeiture of Prior Constitutional Claims

A defendant who pleads guilty to a criminal charge in state court ordinarily is barred from raising a claim in federal court based on a constitutional violation that occurred *prior to the guilty plea*, even if such claim might have barred a conviction if the defendant had proceeded to trial on the criminal charge.

Nevertheless, a defendant who pleads guilty does not forfeit the following constitutional claims:

- a procedural defect in the guilty plea procedure itself.
- the plea was not voluntarily or intelligently made.
- ineffective assistance of counsel.
- prosecutorial vindictiveness in the charging process.
- double jeopardy.

§ 17.03 Conditional Pleas (*Nolo Contendre*)

The alternative plea of *nolo contendere*, available in federal court and some states, allows a defendant to conditionally plead guilty in order to reserve the right, "on appeal from the judgment, to review of the adverse determination of any specified pretrial motion." [Fed. R. Crim. P. 11\(a\)\(2\)](#). If the defendant prevails on appeal, he may withdraw the plea. If he does not prevail, the plea stands.

All of the provisions of [Federal Rule of Criminal Procedure 11](#) pertaining to guilty pleas apply to pleas of *nolo contendere* as well, except for the "factual basis" requirement under Rule 11(f).

Chapter 18 PRETRIAL AND TRIAL ISSUES

This chapter covers the following issues:

- Discovery
- Competency to Stand Trial
- Right to a Speedy Trial
- Jury Trial
- Right to Confront Witnesses and Present a Defense
- Joint Trials
- Sentencing

§ 18.01 Discovery

[A] Exculpatory Evidence

In preparation for trial, the prosecution has a duty to:

- **disclose exculpatory evidence** in its possession to the defendant, *Brady v. Maryland*, [373 U.S. 83](#) (1963).
- **disclose any deals made by the prosecution with a witness**, *Giglio v. United States*, [405 U.S.150](#) (1972).
- **ascertain any exculpatory evidence known to other government agents** and to assess the cumulative effect of all exculpatory evidence in deciding whether to disclose the evidence to the defendant, *Kyles v. Whitley*, [514 U.S. 419](#) (1995).

Failure to disclose exculpatory evidence violates the due process clause. Where the prosecution fails to disclose exculpatory evidence, a conviction must be overturned if “there is a **reasonable probability** that, had the evidence been disclosed to the defense, the **result of the proceeding would have been different.**” *United States v. Bagley*, [473 U.S. 667](#) (1985).

Absent bad faith on the part of the police, **failure to preserve** potentially exculpatory evidence does not constitute a due process violation. *Arizona v. Youngblood*, [488 U.S. 51](#) (1988) (failure to test semen taken from a sexual assault victim and to refrigerate his clothing in order to preserve semen on it did not require reversal of conviction because no police bad faith was shown).

[B] Government Duty to Disclose Information Upon Defense Request

Upon a defendant's request, [Federal Rule of Criminal Procedure 16](#) requires the government to disclose the following evidence within its possession, custody or control, and known to exist through due diligence:

- (1) the substance of any *oral statement made by the defendant*, before or after arrest, in response to interrogation by a person the defendant knew was a government agent;
- (2) any relevant *written or recorded statement by defendant*;
- (3) defendant's *prior criminal record*;
- (4) any material *documents and objects* that the government intends to in its case-in-chief, or was obtained from or belongs to the defendant;
- (5) reports resulting from any *physical or mental examinations* and tests;
- (6) written summary of any *expert testimony* that the government intends to use in its case-in-chief.

Under federal procedure, if the defendant requests the government to produce documents and tangible evidence, reports of examinations and tests, or information about expert witnesses, the defense must make a *reciprocal disclosure*. [Fed. R. Crim. P. 16\(b\)\(1\)](#).

[C] Defendant's Obligation to Disclose Information

The prosecution may be entitled by statute or procedural rule to obtain information from the defendant prior to trial, *e.g.*, the names of alibi witnesses. *See, e.g.*, [Fed. R. Crim. P. 12.1](#). In such cases, the defense must be entitled to *reciprocal discovery* from the prosecution pertaining to relevant rebuttal evidence. *Wardius v. Oregon*, [412 U.S. 470](#) (1973).

§ 18.02 Competency to Stand Trial

[A] Incompetency Defined

Prosecution of a defendant who lacks competency to stand trial violates the due process clause. *Medina v. California*, [505 U.S. 437](#) (1992). Competency to stand trial is constitutionally required because a defendant must be able to assist his attorney in a meaningful defense, *e.g.*, to discuss strategy, explain his version of the facts, and provide the names of potential witnesses, as well as to confront accusers at trial.

A person is incompetent if, *during the criminal proceedings*, he lacks:

- (1) capacity to consult with counsel “with a reasonable degree of rational understanding”; or
 - (2) “a rational as well as factual understanding of the proceedings” against him.
- Dusky v. United States*, [362 U.S. 402](#) (1960). Incompetency may be the result of a physical handicap, *e.g.*, inability to speak, or a temporary or permanent mental disability, *e.g.*, mental retardation, amnesia, mental illness.

[B] Procedures for Determining Competency

The issue of competency to stand trial may be raised by the prosecutor, the defense, or the trial judge. The defendant's competency must be investigated, even over the

defendant's objection, if the trial judge believes that the defendant may be incompetent. *Pate v. Robinson*, [383 U.S. 375](#) (1966).

When the defendant's competency is raised, the defendant must submit to a psychiatric examination, and if the results are in dispute, a hearing must be held at which the parties may present evidence on the matter of competency. [18 U.S.C. § 4241](#). Upon a ruling of incompetency, the defendant is committed to an appropriate facility for a reasonable period of time (up to four months under federal law) in order to determine whether there is a substantial probability that he will attain capacity to stand trial in the foreseeable future. *Jackson v. Indiana*, [406 U.S. 715](#) (1972). The defendant may be held for an additional reasonable period until the defendant attains competency, if it is determined that he is likely to so improve. [18 U.S.C. § 4241\(d\)\(2\)](#). If it is not so determined, the defendant is to be committed according to civil commitment procedures.

§ 18.03 Right to a Speedy Trial

The [Sixth Amendment](#) guarantees an accused the right to a speedy trial. The right attaches only after one has been formally accused of the offense, *i.e.*, upon indictment, information, or custodial arrest.

A charge must be dismissed if a court finds that the defendant's right to speedy trial has been violated, *Strunk v. United States*, [412 U.S. 434](#) (1973), and such ***dismissal bars all future prosecutions*** of the offense. As set out in *Barker v. Wingo*, [407 U.S. 514](#) (1972), the factors relevant to whether the right to a speedy trial has been violated include:

(1) ***Length of delay*** – Delay must be of sufficient length to potentially prejudice the accused; some statutes set specific time limits for initiation of trial, *see, e.g.*, Federal Speedy Trial Act, [18 U.S.C. § 3161](#).

(2) ***Reason for delay*** – Evidence that the prosecutor deliberately attempted to delay trial is weighed heavily in the analysis, unless there is a justifiable reason for the delay, such as a missing witness or illness of a party. If the delay is willfully caused by the defendant, he is deemed to have waived the right to a speedy trial.

(3) ***Defendant's assertion or non-assertion of right*** – The defendant need not assert the right prior to trial but failure to do so may receive considerable weight in the court's analysis of the speedy trial question.

(4) ***Prejudice to defendant*** – *e.g.*, loss of evidence, fading memory of witnesses, prolonged incarceration, etc.

§ 18.04 Jury Trials

[A] Right to Trial by Jury

The right to a jury trial ***applies only to "non-petty" offenses***, generally deemed to be offenses punishable by imprisonment for more than six months. *Baldwin v. New York*, [399 U.S. 66](#) (1970). Offenses for which the maximum term of imprisonment authorized by law is six months or less may also be deemed "non-petty" if additional available

statutory penalties (including fines) “are so severe that they clearly reflect a legislative determination that the offense in question is a ‘serious’ one.” *Blanton v. City of North Las Vegas*, [489 U.S. 538, 543](#) (1989).

[B] Required Number of Jurors

A jury composed of as few as six persons is constitutional. *Williams v. Florida*, [399 U.S. 78](#) (1970). Twelve jurors are required in federal criminal trials, although fewer may be permissible upon stipulation by the parties or when the court finds it necessary to excuse a juror for cause after the trial begins. [Fed. R. Crim. P. 23](#)(a). Many states likewise require a twelve-person jury in criminal trials.

[C] Number of Jurors Needed to Acquit or Convict

State laws permitting non-unanimous verdicts are permissible, as long as the vote to convict represents a “substantial majority” of the jurors, *Johnson v. Louisiana*, [406 U.S. 356](#) (1972), but in federal criminal trials, a verdict to convict or acquit must be unanimous. [Fed. R. Crim. P. 31](#)(a).

§ 18.05 Right to Confront Accusers and to Present a Defense

[A] Face-to-Face Confrontation

“In all criminal prosecutions, the accused shall enjoy the right . . . to be **confronted with the witnesses against him.**” This right applies to trials but not pretrial or sentencing proceedings. *Williams v. New York*, [337 U.S. 241](#) (1949).

The confrontation clause entitles the defendant to be **physically present** in the courtroom during the trial. *Snyder v. Massachusetts*, [291 U.S. 97](#) (1934). [Federal Rule of Criminal Procedure 43](#) requires a federal criminal defendant’s presence at every trial stage including empanelment of the jury and the reading of the verdict. The defendant **waives the right to be present** in the courtroom, however, **if he voluntarily absents himself** from the courtroom during proceedings, *Taylor v. United States*, [414 U.S. 17](#) (1973), or **behaves in a disorderly manner** in the courtroom, *Illinois v. Allen*, [397 U.S. 337](#) (1970). See also [Fed. R. Crim. P. 43](#)(c).

The accused is entitled to a **face-to-face confrontation** with an opposing witness. Such right may be denied, however, when the prevention of the confrontation serves an important public purpose, and the witness’s testimony is otherwise shown to be reliable. For example, **if the trial court finds that a child victim of alleged sexual abuse would be traumatized** from having to testify in front of the alleged abuser, the court may allow the child victim to testify via telephone hook-up or behind a one-way glass or other such protective measure. *E.g., Maryland v. Craig*, [497 U.S. 836](#) (1990). However, the trial court may not merely rely on a statutory presumption that a witness needs protection

from face-to-face confrontation without a determination as to the susceptibility of the individual witness. *E.g.*, *Coy v. Iowa*, [487 U.S.1012](#) (1988).

[B] Hearsay Evidence [Note: After this section was written, the Supreme Court decided *Crawford v. Washington*, [541 U.S. 36](#) (2004), differentiating between "testimonial" and "nontestimonial" hearsay and holding that the Confrontation Clause bars the admission of testimonial hearsay unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant.]

Introduction of hearsay passes constitutional analysis where:

- (1) the declarant of the hearsay statement testifies at trial, affording the defendant the opportunity to cross-examine the declarant;
- (2) a hearsay exception applies;
- (3) the statement is otherwise found to be trustworthy, based on the totality of circumstances. *Idaho v. Wright*, [497 U.S. 805](#) (1990).

If the hearsay consists of statements made at a **prior judicial proceeding**, the statement may be admitted if the declarant is unavailable to testify at the current trial and the statement carries with it sufficient indicia of reliability. *United States v. Inadi*, [475 U.S. 387](#) (1986). The prosecution has the burden of showing that the witness is unavailable for trial and must make a good faith effort to secure his presence; mere reliance on the witness's incarceration is insufficient as the prosecution must attempt to secure his presence at trial. *Barber v. Page*, [390 U.S. 719](#) (1968).

[C] Confession by Co-Defendant

In a joint trial of co-defendants, when the prosecution introduces an admission or confession made by one defendant that implicates another defendant, and the declarant opts to not testify at trial, the trial court must sever the trials or order a deletion of references to the other defendant. *Bruton v. United States*, [391 U.S. 123](#) (1968). When the statement is redacted, it is not sufficient merely to insert a blank or other substitution for the name of the defendant; **the redaction should not indicate the defendant's involvement in any manner**. Compare *Richardson v. Marsh*, [481 U.S. 200](#) (1987) (after redaction, the co-defendant's confession contained no indication of defendant's involvement) with *Gray v. Maryland*, [523 U.S. 185](#) (1998) (redacted statement that "me, deleted, deleted, and a few other guys killed the victim" clearly referred to the defendant's involvement).

Severance or redaction is not required if the declarant testifies at trial because the defendant is given the opportunity to cross-examine the co-defendant. *Nelson v. O'Neil*, [402 U.S. 622](#) (1971). The rule also does not apply if the confession is offered for a limited purpose other than to prove guilt. *Tennessee v. Street*, [471 U.S. 409](#) (1985).

[D] Right to Present a Defense

The [Sixth Amendment](#) grants to the accused the right to *compulsory process for obtaining witnesses in his favor*, which includes the rights to *subpoena witnesses* and to present a defense. The defendant must be permitted to introduce crucial evidence in his defense that has substantial assurances of trustworthiness, even if the evidence is otherwise inadmissible under local rules of evidence. *Chambers v. Mississippi*, [410 U.S. 284](#) (1973).

§ 18.06 Joint Trials

Generally co-defendants may be charged in the same indictment or information, and tried jointly. [Fed. R. Crim. P. 8](#). Furthermore, defendants charged under separate indictments may be jointly tried if the offenses and defendants could have been charged in a single indictment. [Fed. R. Crim. P. 13](#).

If a defendant believes that he will be prejudiced by joinder of his case with that of a co-defendant, he may move for separate trials (severance). [Fed. R. Crim. P. 14](#). A defendant may appeal the decision to conduct a joint trial, but the decision is subject to the harmless error rule. *United States v. Lane*, [474 U.S. 438](#) (1986).

In the interests of judicial efficiency, the Supreme Court has stated that severance should be granted only if “there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *Zafiro v. United States*, [506 U.S. 534](#) (1993).

§ 18.07 Sentencing

[A] Eighth Amendment Limits on Punishment

Implicit in the prohibition against cruel and unusual punishment contained in the [Eighth Amendment](#) is that punishment not be grossly disproportional to the crime committed. *Weems v. United States*, [217 U.S. 349](#) (1910).

[1] Death Penalty

The death penalty “does not invariably violate the Constitution.” *Gregg v. Georgia*, [428 U.S. 153](#) (1976) (addressing capital punishment imposed for murder convictions). However, the death penalty has been determined to be grossly disproportional to the crime of rape of an adult woman. *Coker v. Georgia*, [433 U.S. 584](#) (1977).

[2] Terms of Imprisonment

Disproportionate prison sentences for petty offenses may be permissible *if the statute provides for parole*. Compare *Rummel v. Estelle*, [445 U.S. 263](#) (1980) (life sentence for a petty nonviolent crime imposed pursuant to the state’s habitual offender law was upheld where the defendant would be eligible for parole) with *Solem v. Helm*, [463 U.S. 277](#)

(1983) (life imprisonment *without possibility of parole*, imposed pursuant to the habitual offender law, upon conviction of fraudulently passing a check for \$100, was deemed to violate the [Eighth Amendment](#)).

Even in the absence of parole, a seemingly disproportionate punishment might be permissible for a *serious offense*. *Harmelin v. Michigan*, [501 U.S. 957](#) (1991) (life sentence without parole for conviction of possession of 672 grams of cocaine, which was the defendant's first conviction, did not violate the [Eighth Amendment](#)).

[B] Judicial Vindictiveness

If a defendant successfully appeals his conviction, upon retrial and a subsequent conviction, the trial judge may not impose a greater sentence in order to punish the defendant for successfully appealing the conviction. In the absence of judicial vindictiveness, however, the trial court is authorized to impose a greater sentence, up to the maximum permitted by law, upon retrial and re-conviction. *North Carolina v. Pearce*, [395 U.S. 711](#) (1969).

Chapter 19 HABEAS CORPUS

§ 19.01 Nature of Habeas Corpus

A habeas corpus proceeding is not a direct appeal but rather a *collateral attack of a conviction* by which the defendant challenges the lawfulness of his detention. Habeas corpus is a *civil remedy* that mandates the release from custody of an individual being *held in violation of constitutional or federal law*. *Preiser v. Rodriguez*, [411 U.S. 475](#) (1973).

§ 19.02 Standing to Petition for Habeas Corpus

Standing to bring a habeas corpus petition requires that at the time of such petition the *defendant is in "custody,"* which has been broadly construed to include probation, parole, release on bail, as well as the continued collateral consequences of a criminal sentence, *e.g.*, loss of rights to vote and to hold public office. *Lane v. Williams*, [455 U.S. 624](#) (1982).

§ 19.03 Petitions in Federal Court

[A] State Prisoners

Where state law provides for habeas corpus relief, state prisoners may petition for federal relief only upon *exhausting all available state remedies*. The federal petition will be dismissed if the petitioner did not previously exhaust all state remedies. *Rose v. Lundy*, [455 U.S. 509](#) (1982).

A state prisoner will be denied federal relief if he *fails to comply with state procedural rules governing the assertion of federal constitutional claims*, *Wainwright v. Sykes*, [433 U.S. 72](#) (1977), unless he can show cause for noncompliance and demonstrate that he suffered actual prejudice. *Francis v. Henderson*, [425 U.S. 536](#) (1976). Such cause can be shown if either the factual or legal basis for a claim was not reasonably available to the defense at the time the claim should have been raised. *Amadeo v. Zant*, [486 U.S. 214](#) (1988).

A state prisoner *cannot relitigate Fourth Amendment claims* at a federal habeas corpus proceeding, *Stone v. Powell*, [428 U.S. 465](#) (1976), but *can relitigate*:

- claims regarding sufficiency of evidence used to convict.
- claims of racial discrimination in the grand jury proceeding.
- Sixth Amendment claims of ineffective assistance of counsel.
- *Miranda* [[384 U.S. 436](#)] violations.

[B] Federal Prisoners

Federal prisoners seeking a writ of habeas corpus based on trial errors or grand jury racial discrimination must show cause for failing to object to the errors and demonstrate actual prejudice from such errors. *United States v. Frady*, [456 U.S. 152](#) (1982). If the petition is based on a claim of innocence, the federal prisoner generally must show that, but for the error, it is more likely than not that the jury would have found him not guilty. *Schlup v. Delo*, [513 U.S. 298](#) (1995).