



# Constitutional Law Issues in Impaired Driving Cases

January 2021

National Traffic Law Center

# Constitutional Law Issues in Impaired Driving Cases

The National Traffic Law Center is a program of the National District Attorneys Association. This document was prepared under Cooperative Agreement Number 693JJ91950010 from the U.S. Department of Transportation, National Highway Traffic Safety Administration. Points of view or opinions in this document are those of the authors and do not necessarily represent the official position or policies of the Department of Transportation, NHTSA, or the National District Attorneys Association.



**National  
Traffic Law  
Center**

# National Traffic Law Center

The National District Attorneys Association's National Traffic Law Center (NTLC) is a resource designed to benefit prosecutors, law enforcement, judges, and criminal justice professionals. The mission of NTLC is to improve the quality of justice in traffic safety adjudications by increasing the awareness of highway safety issues through the compilation, creation and dissemination of legal and technical information and by providing training and reference services.

When prosecutors deal with challenges to the use of breath test instruments, blood tests, horizontal gaze nystagmus, crash reconstruction, and other evidence, the NTLC can assist with technical and case law research. Likewise, when faced with inquiries from traffic safety professionals about getting impaired drivers off the road, the NTLC can provide research concerning the effectiveness of administrative license revocation, ignition interlock systems, sobriety checkpoints and much more.

The NTLC has a clearinghouse of resources including case law, research studies, training materials, trial documents, and a directory of expert professionals who work in the fields of crash reconstruction, toxicology, drug recognition, and many others. The information catalogued by the Center covers a wide range of topics with emphasis on impaired driving and vehicular homicide issues.

NTLC is a program of the National District Attorneys Association. NDAA's mission is to be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people.

For additional information, contact NDAA or NTLC, 1400 Crystal Drive, Suite 330, Arlington, Virginia 22202, (phone) 703-549-9222, (fax) 703-836-3195, [www.ndaa.org](http://www.ndaa.org).



## National Traffic Law Center

# Acknowledgments

This *Constitutional Issues in Impaired Driving Cases* monograph would not have been possible without the support and funding of the National Highway Traffic Safety Administration and the dedicated efforts of the following professionals at the National Traffic Law Center:

**Joanne E. Thomka**, Director

**M. Kimberly Brown**, Senior Attorney

**Erin Inman**, Staff Attorney

This guide was the result of a collaborative process that drew on the knowledge, expertise, and patience of many dedicated traffic safety professionals, including the following Traffic Safety Resource Prosecutors:

**Ike Avery**, North Carolina, North Carolina Conference of District Attorneys

**Beth Barnes**, Arizona, The Office of the Phoenix City Prosecutor

**Tom Lockridge**, Kentucky, Unified Prosecutorial System in Kentucky

**Jason Samuels**, Georgia, Prosecuting Attorneys Council of Georgia

**Kenneth Stecker**, Michigan, Prosecuting Attorneys Association of Michigan

# Table of Contents

<b>INTRODUCTION</b> .....	<b>1</b>
<b>FOURTH AMENDMENT</b> .....	<b>3</b>
Fourth Amendment Analysis: The Five-Step Process .....	3
Step 1: Does the Fourth Amendment Apply? .....	3
Step 2: Is There a Fourth Amendment Violation? .....	4
Step 3: Is There a Warrant Exception? .....	4
Step 4: Is Any Evidence Subject to Suppression? .....	4
Step 5: Does the Exclusionary Rule Apply? .....	4
Does the Fourth Amendment Apply? .....	5
Expectation of Privacy .....	5
Plain View/Plain Feel .....	5
Standing .....	7
Search or Seizure? .....	7
State Action? .....	8
Is There a Violation? Was the State Action Reasonable? .....	9
Pre-Stop Issues (Conducted Before the Physical Stop of the Vehicle) .....	9
Suspect Not Seized Until Application of Physical Force or Submission to a Show of Authority .....	12
Pretextual Stops .....	13
Non-Custodial Questioning .....	15
Stops/Seizures Not Requiring Reasonable Articulable Suspicion .....	16
Dog Sniffs .....	17
Length/Duration of the Stop .....	18
Stops/Seizures Requiring Reasonable Articulable Suspicion .....	19
Questioning Driver/Passengers at Traffic Stops .....	22
Ordering Driver/Passengers Out OF Vehicle During Traffic Stop .....	23
Frisking Driver/Passengers .....	24
Compelled Chemical Testing: Blood/Breath/Urine/Saliva .....	25
Probable Cause for Arrest and the Objective Standard .....	26
Is There a Warrant Exception? .....	27
Community Caretaking .....	27
Incident to Arrest .....	28
Cell Phone Searches and Search Incident to Arrest .....	31
Exigency .....	32
Automobile Exception .....	33
Inventory Search .....	36
Consent .....	37
Is Any Evidence Subject to Suppression? .....	38

## TABLE OF CONTENTS

Does the Exclusionary Rule Apply? . . . . .	38
Good Faith Exception . . . . .	38
Inevitable Discovery . . . . .	39
Independent Source Doctrine . . . . .	40
Abandonment . . . . .	40
<b>FIFTH AMENDMENT . . . . .</b>	<b>42</b>
Right to Counsel . . . . .	42
Provision of <i>Miranda</i> Rights . . . . .	43
In Custody . . . . .	43
Police Interrogation/Invocation of Right . . . . .	45
Knowledge of Suspect’s Invocation of Counsel Imputed to Other Officers . . . . .	48
Judicial Proceeding—Invocation of Right to Counsel . . . . .	48
Protection Against Compelled Self-Incrimination . . . . .	49
Field Sobriety Tests, Chemical Tests, and Observations of Officers . . . . .	49
Crash Reports . . . . .	51
Use of Compelled Statements . . . . .	52
Double Jeopardy . . . . .	52
Severed DUI Charges/Lesser Included Offenses . . . . .	52
Civil Sanctions as Result of Conviction . . . . .	53
Driver’s License Revocation and Due Process . . . . .	54
Vehicle Forfeiture . . . . .	55
<b>SIXTH AMENDMENT . . . . .</b>	<b>56</b>
Right to Counsel . . . . .	56
When Does Right to Counsel Attach? . . . . .	56
Right to Counsel is Offense Specific . . . . .	57
Police-Initiated Interrogation after Counsel Appointed . . . . .	57
Right to Confront Witnesses . . . . .	59
Admissibility of Out of Court Statements . . . . .	59
Unavailable Witness . . . . .	59
Prior Testimony Subject to Cross-Examination . . . . .	59
Evidence Not for Purposes of Proving the Truth . . . . .	60
Defendant’s Evidence . . . . .	60
Testimonial Evidence . . . . .	61
Confrontation Clause—Testimonial Evidence . . . . .	61
Examples of Testimonial Evidence . . . . .	61
Non-Testimonial Evidence—Primary Purpose Test . . . . .	64
Examples of Non-Testimonial Evidence . . . . .	65
Dying Declarations . . . . .	66
Forfeiture by Wrongdoing . . . . .	66
Face-to-Face Confrontation . . . . .	67
Two-Way Video Testimony . . . . .	68
Notice & Demand—Waiver . . . . .	68

## TABLE OF CONTENTS

Speedy Trial . . . . .	68
Assessing a Claim of Denial of Speedy Trial . . . . .	69
Speedy Trial Applies Only to Guilty/Innocence and Not Sentencing or After Dismissal . . . . .	69
Overcrowded Courts—Trying Other Older Cases . . . . .	69
Delays by Defense . . . . .	70
Prejudice to Defendant . . . . .	70
Defendant is Not Required to Demand Speedy Trial . . . . .	70
Remedy for Violation of Speedy Trial Rights . . . . .	71
Trial by an Impartial Jury of the State—Cross-Section of Community. . . . .	71
<b>FOURTEENTH AMENDMENT. . . . .</b>	<b>73</b>
Discovery Rules . . . . .	73
Disclosure Obligations . . . . .	75
<b>CONCLUSION . . . . .</b>	<b>79</b>
<b>LIST OF CITED CASES. . . . .</b>	<b>80</b>

# Introduction

Whether alcohol, drugs, or both cause the impairment, impaired driving continues to be a significant public safety problem in the United States. Of the over 36,000 people killed in traffic crashes in 2018, nearly 30 percent were killed in alcohol-impaired driving crashes where at least one driver had a blood alcohol content of .08 g/dL or higher.<sup>1</sup> In 2016, approximately 44 percent of drivers with known drug test results were drug-positive, almost 51 percent of those drivers were positive for two or more drugs, and approximately 41 percent of drug-positive drivers were also positive for alcohol.<sup>2</sup>

Impaired driving cases are often complex and complicated and even more so if a crash is involved. To prove the presence of alcohol or drugs in a driver typically requires a chemical analysis of a driver's blood, breath, or urine and frequently requires forensic scientists to testify about the toxicological results in trial. Collision reconstructionists, engineers, and other specially trained witnesses may also be needed to prove causation in an impaired driving case. In addition, the prosecutors handling impaired driving cases are commonly attorneys with less subject matter and courtroom experience. For these reasons, impaired driving cases frequently result in hard-fought battles in the courtroom and regularly result in trials. When the outcome of a trial is a conviction, defendants sometimes appeal and those appeals occasionally end up in higher courts, at times, the highest court in the land.

In the recent past, the United States Supreme Court (USSC) has issued several opinions directly impacting impaired driving investigations and prosecutions. When pausing to consider the numerous constitutional issues arising in traffic cases, many come to mind. With that, the idea of this monograph was born.

The intent of this monograph is to provide an overview of some of the many constitutional issues impacting traffic cases from the law enforcement officer's observations of a vehicle in motion through a defendant's trial. It is designed to review United States Supreme Court cases that impact the prosecution of impaired driving cases generally, as well as cases that have addressed impaired driving issues specifically. This monograph covers issues, and USSC opinions, involving the Fourth, Fifth, Sixth, and Fourteenth Amendments. It is intended to serve as a resource and is not meant to replace the research required for proper case preparation. It highlights holdings of those cases in a chronological review

---

Impaired driving cases are often complex and complicated and even more so if a crash is involved.

---

<sup>1</sup> *Traffic Safety Facts, State Alcohol-Impaired-Driving Estimates*. Washington, DC: National Highway Traffic Safety Administration, June 2020 (DOT HS 812 917). 2018 is the most recent year for which NHTSA has statistics.

<sup>2</sup> *Drug-Impaired Driving: Marijuana and Opioids Raise Critical Issues for States*. Washington, DC: Governors Highway Safety Association, May 2018.



of the issues from oldest to most recent case to demonstrate how the rule came to be in its present state. It does not present full case analyses but offers a guide to understanding the impact of these cases. Not all cases referenced are factually related to impaired driving but are included because the analysis and holding can apply to impaired driving cases.

As with all USSC case law, prosecutors should be aware of his/her state court decisions that may offer greater protections to an accused than the U.S. Constitution. A prosecutor should also be knowledgeable about his/her state laws and court rules and be familiar with local practices of his/her jurisdiction. For further information, a prosecutor may always consult with his/her state Traffic Safety Resource Prosecutor (TSRP) and/or consult with the attorneys at the National Traffic Law Center (NTLC) ([www.ndaa.org/ntlc](http://www.ndaa.org/ntlc)). A current list of each state's TSRP is also available on the NTLC website on the Traffic Safety Partner Links page.

# Fourth Amendment

The United States Constitution's Fourth Amendment provides, "[t]he 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."

Prosecutors may find that the Fourth Amendment is one of the most common challenges in impaired driving cases. These issues may be raised by the operator or passenger of a vehicle and may contest the search of the vehicle or of the person. The way prosecutors should address those challenges is by first completing an analysis of the applicability of the Fourth Amendment. That process is outlined below.

## Fourth Amendment Analysis: The Five-Step Process

When addressing Fourth Amendment issues, a prosecutor should consider all arguments and theories supporting the admission of the evidence and remember that making arguments (or responding to them) in the lower courts will preserve them on appeal. Even if it appears the state will prevail by using one of the arguments, it is recommended the remainder of the analysis be completed. All arguments should be presented to the court to increase the chances of prevailing on the motion and on appeal.

### STEP 1: DOES THE FOURTH AMENDMENT APPLY?

The first inquiry a prosecutor should consider in a Fourth Amendment analysis is whether the Fourth Amendment even applies. The proponent of a motion to suppress has the burden of establishing personal Fourth Amendment rights were violated. But before addressing whether the actions of the officer violated the Fourth Amendment, a prosecutor should first consider whether the protections of the Fourth Amendment apply by asking the following:

- Does the defendant have an expectation of privacy in the area or item searched that lead to the discovered evidence?
- Was there a search or a seizure as a result of the actions of the officer?
- Was there state action as the Fourth Amendment only applies to Government action?

If the answer to any of these questions is "no," the protections of the Fourth Amendment do not apply, and the evidence should be admissible. It is important to remember standing to challenge the search is not automatic and is personal to the defendant. Standing cannot be asserted vicariously.

### STEP 2: IS THERE A FOURTH AMENDMENT VIOLATION?

The second inquiry to consider in a Fourth Amendment analysis is whether there is an actual violation. In other words, were the actions of the officer/Government reasonable? If the officer's actions were reasonable for Fourth Amendment purposes, then there is no Fourth Amendment violation. The reasonableness of the search or seizure will generally depend on what the officers knew at that time. An after-the-fact analysis will not apply.

Was there a valid warrant? If the officers executed a valid search warrant, there will generally be no Fourth Amendment violation.

### STEP 3: IS THERE A WARRANT EXCEPTION?

If there is no search warrant, the third inquiry in the Fourth Amendment analysis is whether there is an exception to the warrant requirement. A prosecutor needs to determine if the facts provide for a warrant exception. If they do, there is no Fourth Amendment violation.

Examples of exceptions to the search warrant requirement include: Search Incident to Arrest; Consent; Community Caretaking; Exigency; and Inventory Search.

### STEP 4: IS ANY EVIDENCE SUBJECT TO SUPPRESSION?

The fourth inquiry in the Fourth Amendment analysis is whether any evidence is subject to suppression. If there was a Fourth Amendment violation, contemplate what evidence, if any, was obtained from the illegal action of the officer/Government. If no evidence was seized as a result of that action, there is nothing to suppress. Similarly, if the defendant is seeking to suppress evidence that cannot be suppressed (*e.g.*, identification evidence), suppression is inappropriate.

### STEP 5: DOES THE EXCLUSIONARY RULE APPLY?

The final inquiry in the Fourth Amendment analysis is whether the exclusionary rule applies. The exclusionary rule provides that evidence obtained as a result of an illegal search or seizure may not be admissible at trial.

The exclusionary rule is not a right of the defendant. It applies only where it results "in appreciable deterrence" of future Fourth Amendment violations. The benefits of deterrence must outweigh the costs. The exclusionary rule does not apply when officers conduct a search in "objectively reasonable reliance" on a warrant later held invalid, for example. This is often referred to as the "good-faith rule." (This is further discussed at the end of the Fourth Amendment section of this monograph.)

---

If the officer's actions were reasonable for Fourth Amendment purposes, then there is no Fourth Amendment violation.

## Does the Fourth Amendment Apply?

The United States Supreme Court and other courts have addressed and analyzed each of the above steps in cases regarding Fourth Amendment violation challenges. Each is discussed below.

### EXPECTATION OF PRIVACY

- The Fourth Amendment is not implicated unless the search violates a reasonable expectation of privacy. ***Katz v. United States, 389 U.S. 347 (1967)***. In this case, the government electronically listened to Katz as he spoke on a public phone in a phone booth. He was convicted of a law prohibiting bets or wagers by interstate transmission using wire communication. The Court held the government's listening and recording of Katz's conversation violated his expectation of privacy.
- A person is not afforded the protections of the Fourth Amendment unless he/she has a legitimate expectation of privacy in the area or item searched. The rights under the Fourth Amendment are personal and cannot be asserted vicariously. ***Rakas v. Illinois, 439 U.S. 128 (1978)***. The proponent of a motion to suppress has the burden of establishing personal Fourth Amendment rights were violated. (See "Standing," below, for further facts of *Rakas*.)
- Standing to challenge the search is not automatic; an expectation of privacy is required. ***United States v. Salvucci, 448 U.S. 83 (1980)***. Here, the defendants were charged with unlawful possession of stolen mail. The checks that formed the basis for the charges were seized by police when they executed a search warrant on the apartment of the mother of one of the defendants. The defendants tried to suppress the evidence, claiming the affidavit upon which the warrant was issued did not establish probable cause. The Court ruled they could not claim the benefits of the exclusionary rule if their own rights were not violated.

### PLAIN VIEW/PLAIN FEEL

- There is no legitimate expectation of privacy in the interior of a vehicle that may be viewed from the outside by an officer. An officer may seize an item in plain view as long as the officer's access to the item is justified under the Fourth Amendment. "Plain view' is perhaps better understood, therefore, not as an independent 'exception' to the warrant clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be." ***Texas v. Brown, 460 U.S. 730 (1983)***. Shining a flashlight into the car's interior does not transform the incident into a search, nor does shifting position to obtain a better view. *Accord, United States v. Dunn, 480 U.S. 294 (1987)* (use of flashlight).
- "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized

---

The Fourth Amendment is not implicated unless the search violates a reasonable expectation of privacy.

by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context." Prosecutors should keep in mind that the object be "immediately apparent" as contraband. ***Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).**

- An officer may not manipulate or move an item for a better view to determine if it is incriminating without converting the situation into a search requiring probable cause. ***Arizona v. Hicks*, 480 U.S. 321 (1987)** and ***Bond v. United States*, 529 U.S. 334 (2000).**
- Further defining the "plain feel" doctrine, the Supreme Court held that an "agent's physical manipulation of petitioner's bag violated the Fourth Amendment." Bond was a bus passenger bound for Arkansas from California. At an immigration checkpoint in Texas, a U.S. immigration agent walked through the passenger space of the bus and squeezed the soft luggage in the overhead luggage racks. The agent felt a "brick-like" object in Bond's bag. Bond gave the agent permission to open the bag. A brick of methamphetamine was inside. Bond complained the "squeeze" of his bag was unlawful under the Fourth Amendment. The Supreme Court agreed. Although Bond had stored his bag in an area where other passengers may touch it, he did not forfeit his expectation that others would not squeeze or manipulate it in "an exploratory manner." ***Bond v. United States*, 529 U.S. 334 (2000).**
- Visual aids (A visual aid is anything that assists an observer to see what cannot be seen with the naked eye.)
  - As a general rule, using visual aids to see an item in plain view does not transform the contact into a search. There are, however, exceptions such as the use of thermal-imaging equipment. ***United States v. Kyllo*, 533 U.S. 27 (2001).** Here, officers suspected Kyllo of growing marijuana in his home and used a thermal imaging tool to measure the infrared radiation (*i.e.*, heat not visible to the naked eye) emanating from his home, consistent with high-intensity lamps required for the grow. The information obtained, in addition to other information, was used to obtain a search warrant on Kyllo's home. The search revealed over 100 marijuana plants inside. Here, the Court ruled that the use of a device not generally available to the public to explore details of a private home that would otherwise remain private is a search and presumptively unreasonable without a warrant.
  - Taking aerial photographs of an industrial plant with a precision aerial mapping camera is not a search prohibited by the Fourth Amendment. ***Dow Chemical Company v. United States*, 476 U.S. 227 (1986).**
  - Aerial observation alone is not a search. ***California v. Ciraolo*, 476 U.S. 207 (1986).**

## STANDING

- A person seeking to exclude evidence resulting from a search or seizure that was in violation of the Fourth Amendment must show that he/she is the victim of that violation. In *Rakas*, defendants on trial for armed robbery moved to suppress a shotgun and shells (which they claimed were not theirs) found in a car (which they did not own). The Supreme Court held the evidence had been properly admitted, as the defendants did not have standing under the Fourth Amendment to challenge the search. The Court wrote that “(a) person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person’s premises or property has not had any of his Fourth Amendment rights violated.” ***Rakas v. Illinois*, 439 U.S. 128 (1978)**.
- The protections of the Fourth Amendment are meant for people, not places. “[T]o claim Fourth Amendment protection, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable.” ***Minnesota v. Carter*, 525 U.S. 83, 88 (1998)**. In *Carter*, a police officer peered through the closed window blinds of an apartment and saw the defendants bagging cocaine. The defendants had never been to the apartment before, stayed for only a short time, and had come there for the sole purpose of packaging drugs. While an overnight house guest may seek the protection of the Fourth Amendment, that protection was not available here as these defendants had no legitimate expectation of privacy in the apartment. The Court also noted that the expectation of privacy in commercial spaces is less than the expectation a person has in their own home.
- A car passenger has standing to challenge a search of a car when the initial stop is unwarranted. *Brendlin*, a parolee, was a passenger in a car stopped without sufficient legal justification by California police officers. The officers then searched the car and discovered drugs. Although the car was not his and he did not claim that he had a privacy expectation, *Brendlin* challenged the search (and the drugs) as the fruit of a Fourth Amendment violation: the improper stop. The Court found that *Brendlin*, along with the driver, had been improperly “seized” within the meaning of the Fourth Amendment, that *Brendlin* had standing to challenge his own detention, and that the search that followed was tainted by that violation. ***Brendlin v. California*, 551 U.S. 249 (2007)**.

---

The protections of the Fourth Amendment are meant for people, not places.

## SEARCH OR SEIZURE?

- “Obviously, not all personal intercourse between policemen and citizens involves ‘seizures’ of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” ***Terry v. Ohio*, 392 U.S. 1, 19, n.16 (1968)**. In this case, a plain clothes officer observed *Terry* and another individual engage in activity outside a store described by the officer as “casing” the establishment for a “stick up.” The officer approached the men, identified himself to them, and asked for their names. Based on his experience, the

officer also feared they would be armed with weapons. The officer proceeded to pat down the outer clothing in an effort to determine if they were armed. The officer felt what he described as a gun under Terry's jacket and reached in to get it. "...where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous ... he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Id.* at 31. In this case, the weapon seized by the officer was properly admissible against Terry.

- If there was no "search" or "seizure," no justification is needed under the Fourth Amendment. ***United States v. Drayton, 536 U.S. 194, 200 (2002)***. Under the Fourth Amendment, police may randomly approach individuals to ask questions and to request consent to search, provided a reasonable person would understand he/she is free to refuse. In general, officers are not required to inform individuals of their right not to cooperate and to refuse consent to searches. Officers may ask to frisk a person without reasonable suspicion but may not coerce the suspect to give consent or conduct the frisk against their will without reasonable suspicion of criminal activity.

Even when they have no basis for suspecting a particular individual of criminal activity, officers may make inquiries, ask for identification, and request consent to search luggage as long as they are not coercive. "Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. *Id.*

In *Drayton*, there was no seizure when three plain clothes police officers boarded a bus and questioned passengers. When one officer asked to check defendant's luggage, defendant agreed. The officer asked to frisk defendant, defendant agreed, and the officer found drugs. The officer gave the passengers no reason to believe they had to answer questions, he spoke in a polite voice, did not brandish a weapon, and left the aisle free so individuals could exit.



### STATE ACTION?

- The Fourth Amendment is wholly inapplicable "... to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with participation and knowledge of any governmental official." ***Burdeau v. McDowell, 256 U.S. 465 (1921)***; ***Walter v. United States, 447 U.S. 649, 656 (1980)***.

In *McDowell*, his employer seized property belonging to McDowell after McDowell was released from his employment. At a later date, the employer turned some of the property over to law enforcement. The property's seizure by a private entity did not involve the violation of a right by the state and appropriately served as the basis for criminal charges.

In *Walter*, law enforcement lawfully came into possession of boxes containing illegal movies from the third party to whom the boxes were delivered. Although in lawful possession, law enforcement's search of the contents was unreasonable in the absence of a warrant.

### Is There a Violation? Was the State Action Reasonable?

- The Fourth Amendment protects citizens from unreasonable searches and seizures. When police officers execute a valid search warrant, there will generally be no Fourth Amendment violation.
- If the officer's actions were reasonable for Fourth Amendment purposes, then there is no Fourth Amendment violation. The reasonableness of the search or seizure will generally depend on what the officers knew at that time. An after-the-fact analysis will not apply. ***Illinois v. Rodriguez, 497 U.S. 177 (1990)***. Here, police were investigating an assault on a woman. The woman identified Rodriguez as the suspect, advised he was asleep in "our" apartment, and then led police to the apartment and unlocked the door with her key. Police entered and observed drug paraphernalia and suspected drugs in plain view. Rodriguez was arrested and charged with possession of the drugs. Although it turned out the co-tenant moved out of the apartment and therefore did not have the authority to consent to the search, at the time, it was not unreasonable for the police to believe she did have authority to consent to the search.

### PRE-STOP ISSUES (CONDUCTED BEFORE THE PHYSICAL STOP OF THE VEHICLE)

#### Registration Check

- "States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." ***Delaware v. Prouse, 440 U.S. 648, 658 (1979)***. Here, patrolman in marked police car stopped Prouse and seized marijuana in plain view. Patrolman testified that prior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity, and that he made the stop only in order to check the driver's license and the car's registration. The patrolman was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks, promulgated by either his department or the State Attorney General. USSC held except where there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either

---

The Fourth Amendment protects citizens from unreasonable searches and seizures. When police officers execute a valid search warrant, there will generally be no Fourth Amendment violation.



the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

- A traffic stop conducted after a police officer runs a vehicle's plate and discovers the registered owner has a revoked license is reasonable under the Fourth Amendment unless the officer has information indicating the owner is not the driver. **Kansas v. Glover**, \_\_\_ U.S. \_\_; 140 S.Ct. 1183 (2020). Here, the officer ran the license plate on vehicle and learned it was owned by Glover and Glover's driver's license was revoked. The USSC held that when officer lacks information negating an inference that the owner is driving the vehicle, an investigative traffic stop made after running a vehicle's license plate and learning that the registered owner's driver's license has been revoked is reasonable under the Fourth Amendment.

### Anonymous Tip/Citizen Informants/Communal Police Knowledge

- In general, information that is obtained from citizens or other law enforcement officers may provide a reasonable basis for a stop. Additionally, an officer can make a stop based on information received from an anonymous tip, as long as there is sufficient corroboration.
- Reasonable basis for a stop and frisk does not have to be based on the officer's personal observation. It may rest on information supplied by another person. An informant's tip may carry sufficient "indicia of reliability" to justify a "forcible" stop even though it may be insufficient to support an arrest or search warrant. Evaluating the reliability of the tip will be case specific. Williams sustained a *Terry* stop and frisk based on a tip given in person by a known informant who had provided information in the past. The Court noted in-person tips are more reliable than anonymous telephone tips. **Adams v. Williams**, 407 U.S. 143 (1972).
- The first opinion to adopt the totality of the circumstances test for analyzing whether an anonymous tip provides probable cause or reasonable suspicion was **Illinois v. Gates**, 462 U.S. 213 (1983). While the informant's veracity, reliability, and basis of knowledge are highly relevant when making this determination, they are not "independent requirements to be rigidly exacted in every case." *Id.* at 230. Corroboration by the police of significant aspects of an informant's predictions imparts reliability to other allegations. A tipster who is proved to tell the truth about some things is more likely to be right about other things, including the assertion of criminal activity.
- "[E]ffective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information." **United States v. Hensley**, 469 U.S. 221, 231 (1985) (citation omitted). Investigatory stop based on another law enforcement agency's "wanted flyer," was constitutional where the distributed flyer was based on articulable facts supporting

---

In general, information that is obtained from citizens or other law enforcement officers may provide a reasonable basis for a stop. Additionally, an officer can make a stop based on information received from an anonymous tip, as long as there is sufficient corroboration.

reasonable suspicion that the suspect had committed an offense, even though those facts were not included in the flyer.

- “[A]n anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity.” ***Alabama v. White*, 496 U.S. 325, 329 (1990)** (emphasis added). Under appropriate circumstances, however, an anonymous tip may display “sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.” *Id.* at 327. An informant’s “veracity, reliability and basis of knowledge,” is relevant in determining whether the informant’s tip establishes reasonable suspicion, but a lesser showing is required to meet the reasonable suspicion standard than would be required for probable cause.

In *White*, an anonymous informant conveyed that a woman would drive from a specific apartment building, at a specific time, to a specific motel in a certain vehicle with a broken right taillight. The informant further indicated the woman would be carrying cocaine. After confirming details such as time, location, and vehicle, the police stopped the car as it neared the motel and found cocaine. The corroboration of these innocent details by the officers made the anonymous tip sufficiently reliable to provide reasonable suspicion of criminal activity. Moreover, by accurately predicting future behavior, the informant demonstrated “inside information—a special familiarity with respondent’s affairs,” and “access to reliable information about that individual’s illegal activities.” *Id.* at 332.

- An anonymous tip must predict future conduct that allows the informant’s reliability to be tested. A stop that relies on an anonymous tip is only justified where the tip is shown to be “reliable in its assertion of illegality, not just in its tendency to identify a determinate person.” ***Florida v. JL*, 529 U.S. 266, 272 (2000)**. In *JL*, an anonymous tipster informed police a young black man at a specific bus stop wearing a plaid shirt was carrying a gun. When the police saw a black man in a plaid shirt, they frisked him and found the weapon. The tip was insufficient because it “provided no predictive information and therefore left the police without means to test the informant’s knowledge or credibility.” *Id.* at 271. 911 calls may have more reliability than conventional anonymous tips because they have provisions for recording, identifying, and tracing callers and the 911 caller’s phone number cannot be blocked; all of which provides protections against making false reports.
- An anonymous tip can, in appropriate cases, exhibit sufficient indicia of reliability to support reasonable suspicion to conduct an investigatory stop. ***Navarette v. California*, 572 U.S. 393 (2014)**. Assuming without deciding an informant’s 911 call reporting a pickup had run her off the road was anonymous; the Court held the tip was sufficiently reliable for purposes of reasonable suspicion for a traffic stop. The anonymous driver described the make and model of the pickup and the truck’s license plate number. The police located the pickup 18 minutes after the 911 call, suggesting the caller’s report was made soon after she was run off the road. She “necessarily claimed eyewitness knowledge of the alleged dangerous driving” by recounting she had been run off the road by the truck and the use of the 911 system provided further assurances of her veracity. *Id.* at 398.

### Flight/Suspicious Activity

- The defendant's nervous, unprovoked flight from law enforcement in a heavy drug crime area constituted reasonable suspicion to stop. The officer was justified in suspecting criminal activity, and, therefore, investigating further. "[H]eadlong flight – whenever it occurs, is the consummate act of evasion: it is not necessarily indicative of wrong doing, but it is certainly suggestive of such." ***Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).**

### SUSPECT NOT SEIZED UNTIL APPLICATION OF PHYSICAL FORCE OR SUBMISSION TO A SHOW OF AUTHORITY

- "We adhere to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards... As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." ***United States v. Mendenhall*, 446 U.S. 544 (1980).**

Noting that for Fourth Amendment purposes a person is seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," the Court provided examples that might suggest a seizure. These include: "the threatening presence" of multiple police officers, an officer's display of a weapon, the physical touching of the individual, or coercive language or tone suggesting compliance with the officer's request is required. The court remarked: "[i]n the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id.* at 555.

- "Chasing" a suspect does not by itself constitute a seizure of that individual. The analysis will always involve the totality of the circumstances. The defendant, who discarded several packs of pills as he ran while the police drove alongside in a marked car, was not seized. The officers did not activate their siren or flashers, display a weapon, command the defendant to stop, attempt to block the defendant's course or control his movement. "While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure" ***Michigan v. Chesternut*, 486 U.S. 567 (1988).**
- Police pursued defendant at high speeds for twenty miles. The fleeing defendant was not "seized" until he crashed into a police roadblock. ***Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).** Here, Brower was driving a stolen vehicle and fleeing from police. Police established a roadblock in an effort to stop him and succeeded when Brower crashed into the roadblock. The USSC determined that was enough to establish a "seizure" within the meaning of the Fourth Amendment.

- Even if police make a show of authority, a defendant is not seized if he flees. When Hodari D. saw police officers, he ran and threw drugs before an officer tackled and handcuffed him. Because he was not “seized” until he was tackled, the officer properly seized the cocaine he threw when running. The discarded cocaine was “not the fruit of a seizure” and was accordingly admissible. ***California v. Hodari D.*, 499 U.S. 621, 629 (1991).**
- When evaluating Fourth Amendment issues, it is important to remember an individual is not seized for purposes of the Fourth Amendment until there has been an application of physical force or a show of authority. If there is only a show of authority by the police, with no physical force, then no seizure occurs until the suspect submits to that show of authority. ***Brendlin v. California*, 551 U.S. 249 (2007).**

For example, for traffic enforcement purposes in general, even if the officer has activated overhead lights, the suspect is not seized, and Fourth Amendment protections do not apply until the suspect reacts to the lights and submits to the show of authority with an action such as pulling over. A fleeing person (or even an unobservant one) has not been seized.

“A person is seized by the police and thus entitled to challenge the government’s action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restricts his freedom of movement.” *Id.* at 254. “A police officer may make a seizure by show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned.” *Id.*

- An officer’s act of identifying himself as a police officer does not constitute a seizure. ***Florida v. Royer*, 460 U.S. 491 (1983); *Brendlin*, *supra.*; *Mendenhall*, *supra.***

## PRETEXTUAL STOPS

- “Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’ within the meaning of [the Fourth Amendment].” ***Whren v. United States*, 517 U.S. 806, 809–10 (1996).** Here, plainclothes police officers were patrolling a high drug area when they observed a truck (driven by Whren’s co-defendant) waiting at a stop sign at an intersection for an unusually long time, then suddenly turn without signaling and speed away at an unreasonable speed. The officers stopped the truck to advise the driver of the violations. On approach of the truck, the officers observed Whren holding plastic bags of cocaine in his hands. *Id.* at 808.

*Whren* eliminated the pretext stop defense and held the officer’s “subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” *Id.* at 813. “[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.” *Id.* The reasonableness of traffic stops for Fourth Amendment purposes does not

---

When evaluating Fourth Amendment issues, it is important to remember an individual is not seized for purposes of the Fourth Amendment until there has been an application of physical force or a show of authority.

depend on the actual motivations of the officers involved. “[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer’s action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.” *Id.* (citation omitted).

- The rule in *Whren* has been extended to arrest decisions. The officer’s stop and arrest of the defendant for speeding, driving without his registration and insurance, carrying a weapon, and having improperly tinted windshield was proper even though the officer was interested in searching for narcotics. ***Arkansas v. Sullivan, 532 U.S. 769 (2001).***

Simply because an officer may have ulterior motives for conducting a traffic stop, arrest, and search, the existence of those ulterior motives will not invalidate the search provided the officer’s actions are supported by probable cause. An Arkansas officer stopped Sullivan for speeding. The officer reported that Sullivan was in possession of a weapon—a rusty roofing hammer—and that Sullivan was unable to provide his car’s registration. Before the stop, the officer had been made aware of “intelligence on (Sullivan) regarding narcotics.” Sullivan was arrested for the traffic, registration and weapon offenses, and drugs were found during a subsequent search of his car. Sullivan sought to suppress the drug evidence on the grounds the police action that otherwise justified the search was merely a pretext to justify the search. The Supreme Court ruled that “a traffic violation arrest . . . (w)ill not be rendered invalid by the fact that it was a mere pretext for a narcotic search.” *Id.*

- Evidence seized as a result of a traffic stop is not rendered inadmissible due to the subjective and stated reasons of the officer who made the stop. ***Devenpeck v. Alford, 543 U.S. 146 (2004).*** “Our cases make clear that an arresting officer’s state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause.” *Id.* at 153. The Court noted a legal standard that relied on the subjective motivations of an officer to determine the constitutionality of a stop or arrest would lead to inconsistent results, in situations with the same set of facts, depending on the experience and motivations of the officer involved. The Court found it preferable to rely on a rule that views the facts objectively. Here, *Devenpeck* tape recorded the conversation he had with police at the traffic stop on suspicion of his impersonating a police officer. *Devenpeck* filed a civil rights complaint against police relating to his arrest for violating the state’s Privacy Act. The USSC said that arrest of the driver for impersonating an officer or obstruction of justice could be supported by probable cause, notwithstanding fact that such offenses were not closely related to offense stated by officers as reason for arrest.



## NON-CUSTODIAL QUESTIONING

- Officers may ask to see an individual's identification without reasonable suspicion. The defendant was not seized when officers, who were not in uniform and did not brandish a weapon, identified themselves as officers and requested to see her airline ticket and identification in a public place while asking a few questions. It does not matter that the defendant was not told she could refuse to cooperate. ***United States v. Mendenhall*, 446 U.S. 544 (1980)**.
- While officers do not violate the Fourth Amendment by merely approaching a person in public and asking if he is willing to answer questions or by using the voluntary answers to those questions at trial, the individual may decline and leave the area. ***Florida v. Royer*, 460 U.S. 491 (1983)**.
- Under the Fourth Amendment, police may randomly approach individuals to ask questions and to request consent to search, provided a reasonable person would understand he/she is free to refuse. In general, officers are not required to inform individuals of their right not to cooperate and to refuse consent to searches. Officers may ask to frisk a person without reasonable suspicion but may not coerce the suspect to give consent or conduct the frisk against their will without reasonable suspicion of criminal activity. ***United States v. Drayton*, 536 U.S. 194 (2002)**.

Even when they have no basis for suspecting a particular individual, officers may make inquiries, ask for identification, and request consent to search luggage as long as they are not coercive. "Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *Id.* at 200.

In *Drayton*, there was no seizure when three plain-clothes police officers boarded a bus and questioned passengers. When one officer asked to check defendant's luggage, defendant agreed. The officer asked to frisk defendant, defendant agreed, and the officer found drugs. The officer gave the passengers no reason to believe they had to answer questions, he spoke in a polite voice, did not brandish a weapon, and left the aisle free so individuals could exit.

- ***Florida v. Bostick*, 501 U.S. 429 (1991)**; *Florida v. Royer*, *supra.*; and *United States v. Drayton*, *supra.* each indicate officers may ask for consent to search items such as luggage.

---

"Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen."

## STOPS/SEIZURES NOT REQUIRING REASONABLE ARTICULABLE SUSPICION

### Roadblock/Sobriety Checkpoint

- In *Prouse*, the Supreme Court invalidated a discretionary, suspicionless stop whose only purpose was to spot check the driver's license and vehicle registration. ***Delaware v. Prouse*, 440 U.S. 648 (1979)**. The Court recognized, however, that the government's "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." *Id.* at 658. The Court indicated "[q]uestioning of all oncoming traffic at roadblock-type stops" may be a constitutional means of serving this interest. *Id.* at 663. Here, police stopped Prouse for the sole reason of checking his license; police neither observed any traffic or equipment violations nor any suspicious activity. Further, police were not acting pursuant to any standards or guidelines issued by the department.
- Established an often-cited balancing test for evaluating these types of Fourth Amendment issues: "[1] the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the severity of the interference with individual liberty." ***Brown v. Texas*, 443 U.S. 47, 51 (1979)**. Here, the defendant was convicted for failing to identify himself to police upon request after police observed him walk away from another man in an alley. Although this event occurred in an area with a high incidence of drug crime, police did not suspect Brown of any misconduct or that he was armed. Without any reasonable suspicion to believe Brown engaged in criminal conduct, he could not be punished for refusing to identify himself.
- ***Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990)** is the seminal opinion for impaired driving checkpoints. The *Sitz* Court upheld the constitutionality of a Michigan sobriety checkpoint that stopped all vehicles. Drivers who exhibited symptoms of impairment were diverted for a license and registration check and, if necessary, further sobriety tests. If probable cause was developed, an arrest was made. All other drivers were immediately sent on their way.

The Court noted while a Fourth Amendment seizure occurs when a vehicle is stopped briefly at a sobriety checkpoint, the intrusion for constitutional purposes, is slight. It found under the *Brown v. Texas*, balancing test, *supra.*, the balance of the government's interest in preventing impaired driving, the degree to which checkpoints advance that important interest, and the minimal amount of intrusion upon the individuals who are briefly stopped, weighs in favor of DWI checkpoints.

- If the primary purpose of the checkpoint is general crime deterrence, it will usually be held unconstitutional. ***City of Indianapolis v. Edmond*, 531 U.S. 32 (2000)**. Checkpoint whose primary purpose was narcotics detection and thus characterized as a program "to uncover evidence of ordinary criminal

wrongdoing,” violated the Fourth Amendment. *Id.* at 42. *Edmond* approved the sobriety checkpoint in *Sitz* because it was brief and “clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue. The gravity of the drunk driving problem and the magnitude of the State’s interest in getting drunk drivers off the road weighed heavily in our determination that the program was constitutional.” *Id.* at 39.

- Because roadblocks and sobriety checkpoints do not require individualized suspicion, their use is limited to special circumstances where the government has a legally justifiable basis for their use such as policing the border or ensuring roadway safety. ***Illinois v. Lidster, 540 U.S. 419 (2004)***. The Fourth Amendment rights of a driver who was arrested for DWI at a checkpoint which was used to systematically stop all vehicles to ask for voluntary cooperation and information to help solve a recent fatal vehicular crime were not violated. The brief stop interfered minimally with the defendant’s Fourth Amendment liberties and it advanced the strong law enforcement need to investigate a fatal hit-and-run. The checkpoint’s principal goal was not to investigate the vehicle’s occupants for a crime, but to ask for information about a crime. “The police expected the information elicited to help them apprehend, not the vehicle’s occupants, but other individuals.” *Id.* at 423. Brief checkpoints such as these are not presumptively unconstitutional and will be judged on their individual reasonableness.

---

Police may not extend the length of a traffic stop merely to conduct a dog sniff.

## DOG SNIFFS

- Walking a drug-detection dog around the exterior of a car does not turn a seizure into a search. ***City of Indianapolis v. Edmond, 531 U.S. 32 (2000)***. “[A]n exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics . . . and is ‘much less intrusive than a typical search.’” *Id.* at 40 (quoting *United States v. Place, 462 U.S. 696, 707 (1983)*.) Here, police set up narcotics checkpoints to deter drug crime. Walking a narcotics detection dog around a stopped vehicle does not turn the seizure into a search. In this case, the Court objected to the nature of the checkpoint, however, as there was no severe drug problem in the area and the checkpoint could not be rationalized in terms of highway safety or keeping impaired drivers off the road.
- Walking a dog around a vehicle lawfully stopped for speeding while waiting for driver license information does not violate the Fourth Amendment where the dog sniff does not extend the length of detention. An alert by a reliable dog provides probable cause to search. ***Illinois v. Caballes, 543 U.S. 405 (2005)***.
- Police may not extend the length of a traffic stop merely to conduct a dog sniff. ***Rodriguez v. United States, 575 U.S. 348 (2015)***.



## LENGTH/DURATION OF THE STOP

- An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. ***Florida v. Royer*, 460 U.S. 491 (1983)**.
- A canine unit can be used to sniff for drugs during a valid traffic stop as long as it does not extend the length of the stop. ***Illinois v. Caballes*, 543 U.S. 405 (2005)**. The Court stated that a seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. Here, the defendant was stopped for speeding. A second police officer who heard the radio transmission of the stop responded to the scene with his drug detection dog. While the first officer wrote a speeding citation for the defendant, the second officer walked the dog around the car. The dog alerted on the trunk, a search revealed marijuana, and the defendant was arrested for it. The entire incident lasted for less than ten minutes. The Court concluded that "a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." *Id.* at 410.
- A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene and inform the driver and passengers they are free to leave. An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as the inquiries do not measurably extend the stop's duration. ***Arizona v. Johnson*, 555 U.S. 323 (2009)**.
- The traffic stop's tolerable duration is determined by the seizure's 'mission,' which is to address the traffic violation that warranted the stop and to attend to related safety concerns. Authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. ***Rodriguez v. United States*, 575 U.S. 348 (2015)**. Here, the officer stopped Rodriguez for a valid traffic violation. Once the traffic citation was resolved, and without individualized suspicion, the officer asked Rodriguez for permission to walk his drug canine around the vehicle to check for drugs; Rodriguez refused. The officer detained Rodriguez until a second police unit arrived and then walked his dog around the vehicle. The dog alerted to the presence of drugs in Rodriguez's car approximately 7–8 minutes after the traffic warning was issued. Rodriguez was arrested, charged, and convicted for the drugs.

The *Rodriguez* Court spelled out the parameters for traffic stop investigations, the tasks that are permitted, and the limits to the duration when a narcotics dog is being utilized. The Fourth Amendment may tolerate certain unrelated investigations that do not lengthen the roadside detention.

Beyond determining whether to issue a traffic ticket, an officer's mission during a traffic stop typically includes "...checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* at 355, citing *Delaware v. Prouse*, 440 U.S. 648 (1979). The Court acknowledged that these checks "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Id.* at 355.

"If an officer can complete traffic-based inquiries expeditiously, then that is the amount of 'time reasonably required to complete [the stop's] mission.' *Caballes*, 543 U.S., at 407...As we said in *Caballes* and reiterate today, a traffic stop 'prolonged beyond' that point is 'unlawful.' *Ibid.* The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket... but whether conducting the sniff 'prolongs'—*i.e.*, adds time to—"the stop'..." *Id.* at 357.

### STOPS/SEIZURES REQUIRING REASONABLE ARTICULABLE SUSPICION

- In general, courts have found that officers may stop and detain a vehicle if they have reasonable suspicion the law has been violated.
- ***Terry v. Ohio*, 392 U.S. 1 (1968)** set forth the reasonable articulable suspicion standard. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. Under this approach, courts examine "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 20. Courts are to evaluate the reasonableness of a particular search or seizure in light of the particular circumstances available to the officer at the time, using an objective standard. "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* at 21–22. The Court adopted the reasonable man test and noted "in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 28.
- "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." ***Adams v. Williams*, 407 U.S. 143, 146 (1972).**
- Stopping a vehicle and detaining its occupants is a "seizure" under the Fourth Amendment. An officer must have reasonable articulable suspicion that the law has been violated to make a traffic stop. States have a "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles [and] that licensing, registration, and vehicle inspection requirements are being

---

An officer must have reasonable articulable suspicion that the law has been violated to make a traffic stop.

observed.” *Delaware v. Prouse*, 440 U.S. 648, 648 (1979). None-the-less, officers may not randomly stop vehicles to check if the driver is licensed or if the vehicle is registered.

- The Fourth Amendment allows brief investigatory traffic stops when officers “have a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417–18 (1981). This “particularized suspicion” is based on a consideration of the totality of the circumstances” and “does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact-finders are permitted to do the same—and so are law enforcement officers.” *Id.* at 418. Here, there was a sufficient basis—including, among other information, matching footprints and observed vehicle traffic—for the officers to suspect Cortez of smuggling aliens into this country across the border from Mexico.
- “[I]f there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order to identify him, to question him briefly, or to detain him briefly while attempting to obtain additional information.” *Hayes v. Florida*, 470 U.S. 811, 816 (1985). Here, the defendant was the primary suspect in a burglary-rape. The defendant, however, was arrested without probable cause, taken to the police station without his consent, and detained without any judicial authorization. The investigative detention violated the Fourth Amendment and his fingerprints were, therefore, inadmissible fruits of an illegal detention.
- The level of objective justification required for a stop “is considerably less than proof of wrongdoing by a preponderance of the evidence.” *United States v. Sokolow*, 490 U.S. 1, 7 (1989). It is likewise less than probable cause. These determinations deal with probabilities that means a series of innocent facts can, when taken together, amount to reasonable suspicion.



When effectuating a stop, law enforcement is not required to use the least “intrusive means available to verify or dispel their suspicions.” The court limited any such suggestion made in *Florida v. Royer* to the length of the investigative stop, not to the availability of a less intrusive means to verify the officer’s suspicions before the stop. “The reasonableness of the officer’s decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques. Such a rule would unduly hamper the police’s ability to make swift, on-the-spot decisions... and it would require courts to “indulge in ‘unrealistic second-guessing.’” *Id.* at 11 (quoting *Montoya de Hernandez*, 473 U.S. at 542 (1985) (citation omitted)).

### (a) Officer Not Required to Rule Out Innocent Explanations for the Observed Behavior

- Test that evaluated the individual factors supporting a stop in a piecemeal manner and gave those factors with innocent explanations no weight is rejected because such a test does not consider the totality of the circumstances. [*Accord, Kansas v. Glover*, \_\_\_ U.S. \_\_\_, 140 S.Ct. 1183 (2020).] A traffic stop was conducted after an officer ran a vehicle's plate and discovered the registered owner had a revoked license ruled reasonable under the Fourth Amendment. The fact that someone other than the registered owner of the vehicle may have been driving did not invalidate the stop. *United States v. Arvizu*, 534 U.S. 266 (2002).
- The fact that there may be an innocent explanation for the driving behavior does not negate reasonable suspicion. "[W]e have consistently recognized that reasonable suspicion "need not rule out the possibility of innocent conduct." ***Navarette v. California*, 572 U.S. 393, 403 (2014)** (quoting *United States v. Arvizu*, 534 U.S. 266, 277 (2002)).

### (b) Reasonable Mistake of Fact or Law

- Reasonable articulable suspicion for a traffic stop can be predicated on an officer's reasonable factual mistake. Likewise, a search or seizure, including a traffic stop, may be based on a reasonable mistake of law. The reasonableness of both types of mistakes will be evaluated objectively. The subjective understanding of the officer will not be considered. ***Heien v. North Carolina*, 574 U.S. 54 (2014)**. In this case, the officer initiated a traffic stop on a vehicle with only one brake light out, believing it was a violation of the state traffic code. During the course of the traffic stop, the officer became suspicious of the defendant based on his actions and responses to questions. The officer obtained consent to search the vehicle and discovered drugs. The state traffic code actually only required one working brake light. The USSC held that the mistake of law was reasonable and, therefore, reasonable suspicion existed to justify the stop under the Fourth Amendment.

### (c) Reasonable, Articulable Suspicion for Impaired Driving and Other Traffic Offenses

- The violation of a traffic law alone provides grounds for an officer to stop a vehicle. (Officer justified in stopping a vehicle after it turned without signaling and sped off at an "unreasonable speed".) ***Whren v. United States*, 517 U.S. 806 (1996)**.
- A 911 caller's account of being run off the road provided reasonable suspicion of DWI. ***Navarette v. California*, 572 U.S. 393 (2014)**. The fact that there may be an innocent explanation for the driving behavior does not negate reasonable suspicion of DWI; neither officers nor courts need to rule out the possibility of innocent conduct when determining reasonable suspicion. Likewise, the fact that an officer did not witness additional suspicious driving conduct after the

---

Reasonable articulable suspicion for a traffic stop can be predicated on an officer's reasonable factual mistake. Likewise, a search or seizure, including a traffic stop, may be based on a reasonable mistake of law.

defendant's car was located did not refute reasonable suspicion of impaired driving. "It is hardly surprising that the appearance of a marked police car would inspire more careful driving for a time." *Id.* at 404. An officer who already possesses reasonable suspicion is not required to follow and monitor a vehicle at length merely to personally perceive suspicious driving. This is especially true when impaired driving is suspected because "allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences." *Id.* at 405.<sup>3</sup>

## QUESTIONING DRIVER/PASSENGERS AT TRAFFIC STOPS

- It should be noted that some states might have state constitutions or case law that deviates from the general rules regarding questioning drivers and passengers at traffic stops. A prosecutor should always check the law within his/her state and consult with the state TSRP if this issue arises.
- The Supreme Court acknowledges that a typical traffic stop is a "seizure" of the driver and the passengers in the vehicle because, in most states, it is a crime to either ignore a signal to stop one's car, or to drive away without permission. ***Berkemer v. McCarty*, 468 U.S. 420 (1984)**. The *Berkemer* case held that Fourth Amendment seizure is limited by the purpose of the stop and the resulting detention is quite brief, citing *Delaware v. Prouse*, 440 U.S. 648 (1979). The Court discussed the differences between the circumstances of a case like *Miranda v. Arizona*, 384 U.S. 436 (1966) and those circumstances that are happening in a typical roadside detention. The roadside stop is presumptively temporary and brief and the expectation of the motorist is that the seizure will be a few minutes and any questioning that the motorist will be subjected to will be quite different from a prolonged stationhouse interrogation that will last as

---

It should be noted that some states might have state constitutions or case law that deviates from the general rules regarding questioning drivers and passengers at traffic stops. A prosecutor should always check the law within his/her state and consult with the state TSRP if this issue arises.

<sup>3</sup> ***Navarette v. California*, 572 U.S. 393 (2014)** included the following useful string cite and comments in which the Court cited with approval the NHTSA publication *The Visual Detection of DWI Motorists* (March 2010). "[W]e can appropriately recognize certain driving behaviors as sound indicia of drunk driving. See, e.g., *People v. Wells*, 38 Cal.4th 1078, 1081, 45 Cal.Rptr.3d 8, 136 P.3d 810, 811 (2006) ("weaving all over the roadway"); *State v. Prendergast*, 103 Hawai'i 451, 452-453, 83 P.3d 714, 715-716 (2004) ("cross[ing] over the center line" on a highway and "almost caus[ing] several head-on collisions"); *State v. Golotta*, 178 N.J. 205, 209, 837 A.2d 359, 361 (2003) (driving "all over the road" and "weaving back and forth"); *State v. Walshire*, 634 N.W.2d 625, 626 (Iowa 2001) ("driving in the median"). Indeed, the accumulated experience of thousands of officers suggests that these sorts of erratic behaviors are strongly correlated with drunk driving. See Nat. Highway Traffic Safety Admin., *The Visual Detection of DWI Motorists* 4-5 (Mar. 2010), online at <http://nhtsa.gov/staticfiles/nti/pdf/808677.pdf> (as visited Apr. 18, 2014, and available in Clerk of Court's case file). Of course, not all traffic infractions imply intoxication. Unconfirmed reports of driving without a seatbelt or slightly over the speed limit, for example, are so tenuously connected to drunk driving that a stop on those grounds alone would be constitutionally suspect. But a reliable tip alleging the dangerous behaviors discussed above generally would justify a traffic stop on suspicion of drunk driving." *Navarette*, at 402.

long as it takes for the investigator to get what they need. Secondly, because the roadside questioning takes place in public and passersby can prevent unscrupulous police officers from taking advantage of the motorist and is typically managed by only one or two officers, the atmosphere is much less “police dominant” than the type of interrogation at issue in *Miranda*.

The *Berkemer* Court explained that a traffic stop is more analogous to a “*Terry* stop,” under *Terry v. Ohio*, 392 U.S.1 (1968) than a formal arrest. The stop and inquiry must be “reasonably related in scope to the justification for the initiation.” *Terry, supra*. “Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions. But the detainee is not obliged to respond. And, unless the detainee’s answers provide the officer with probable cause to arrest him, he must then be released.” *Berkemer*, at 440. The Court made clear that safeguards prescribed by *Miranda* became applicable as soon as a suspect’s freedom of action is curtailed to a degree associated with a formal arrest. If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him “in custody” for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda* (citing *Oregon v. Mathiason*, 429 U.S. 492 (1977)).

The officer in *Berkemer* made the decision that he would be arresting the subject as soon as the driver got out of the car, but he didn’t tell the suspect. “A policeman’s unarticulated plan has no bearing on the question whether the suspect was “in custody” at a particular time; the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation... We conclude, in short, that respondent was not taken into custody for the purposes of *Miranda* until Williams arrested him. Consequently, the statements respondent made prior to that point were admissible against him.” *Berkemer*, at 442.

- The USSC again cited *Berkemer* while stating that the “temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop, does not constitute *Miranda* custody.” ***Maryland v. Shatzer*, 559 U.S. 98, 113 (2010)** (citation omitted).

## ORDERING DRIVER/PASSENGERS OUT OF VEHICLE DURING TRAFFIC STOP

- The USSC was asked to settle the narrow issue of whether the order by an officer to the lawfully detained driver to get out of the car was allowable under the Fourth Amendment. The Court considered the balance between the legitimate concern for officer safety and the individual’s right to personal security free from arbitrary interference by law officers. The USSC ruled that once the vehicle was lawfully detained, the police may order the driver to get out of the vehicle without violating the Fourth Amendment’s proscription of unreasonable searches and seizures. The Court noted that the direction by law enforcement for the driver to step out of the car and to a safe place is not

a “serious intrusion upon the sanctity of the person,” and hardly rises to the level of a “petty indignity.” Citing *Terry v. Ohio*, 392 U.S. 1 (1968). The Court said, what is at most “a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer’s safety.” ***Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977).**

- The USSC took up the issue of whether the rule established in *Mimms*, that a police officer may as a matter of course order the driver of a lawfully stopped car to exit the vehicle, extends to passengers as well. The Court held that “danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. While there is not the same basis for ordering passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal. We therefore hold that an officer making a traffic stop may order the passengers to get out of the car pending completion of the stop.” ***Maryland v. Wilson*, 519 U.S. 408, 414–15 (1997).**

### FRISKING DRIVER/PASSENGERS

- The Court addressed the circumstances justifying a pat down search or frisk of the driver in a valid traffic stop. In *Mimms*, the officer asked the driver to step out of the car to show his driver’s license and ownership documents. When the suspect emerged, the officer noticed a bulge under his sports coat and performed a pat down search for the officer’s safety. The bulge was a loaded .38 handgun and the defendant was arrested for carrying a concealed deadly weapon. The passenger in the vehicle was also frisked and he was carrying a concealed .32 caliber revolver. The court discussed the objective standard set forth in *Terry v. Ohio*, 392 U.S. 1 (1968). The test is whether “the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate.” The Court held that the “bulge in the jacket permitted the officer to conclude that *Mimms* was armed and thus posed a serious and present danger to the safety of the officer. In these circumstances, any man of reasonable caution would likely have conducted the pat down.” ***Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977).**
- The Court noted that they had ruled in *Brendlin v. California*, 551 U.S. 249 (2007) that for the duration of a traffic stop a police officer effectively seizes “everyone in the vehicle,” the driver and all passengers. The *Johnson* Court opined that when the police make a lawful investigatory stop, it is lawful for the police to detain an automobile and its occupants pending inquiry into the vehicular violation. “The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity. To justify a pat down of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.” ***Arizona v. Johnson*, 555 U.S. 323, 327 (2009).**

---

The test is whether “the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate.”

### COMPELLED CHEMICAL TESTING: BLOOD/BREATH/URINE/SALIVA

- Schmerber was arrested following a car crash. Investigating officers noted evidence that Schmerber, the driver, was intoxicated. Having been injured in the crash, he was taken to a local hospital where an officer, acting without a search warrant, directed an attending physician to draw a sample of Schmerber's blood for testing. Over the defendant's objection (which he asserted was made on the advice of an attorney), a blood sample was drawn. The Court held that this warrantless search did not violate the Fourth Amendment. First, the method of collection was reasonable. Second, the dissipation of alcohol in the body threatened "the destruction of evidence" making an application for a search warrant impractical. As such, the *Schmerber* case was interpreted to stand for the proposition that a *per se* exigent circumstances exception exists in all impaired driving cases due principally to the natural and rapid dissipation of alcohol in the body. ***Schmerber v. California*, 384 U.S. 757 (1966)**.
- The Due Process clause does not require police officers to preserve breath samples in order to introduce the results of breath-alcohol tests at the trials of suspected impaired drivers. ***California v. Trombetta*, 467 U.S. 479 (1984)**.
- Health care professionals at the Medical Center of the University of South Carolina, a state medical facility whose employees were state actors, sought to address a public health problem and began testing expectant mothers for evidence of cocaine use. Positive tests were reported to local police and prosecutions followed. Local law enforcement officials had consulted with the medical center in drafting policies for the operation of the initiative. The patients were not informed that a positive drug result would be reported to authorities, and the patients did not give their consent for the reports to be made. When challenged that each instance amounted to an unauthorized, warrantless search in violation of the Fourth Amendment, the state sought to defend the program as falling within the definition of "special needs." The Supreme Court disagreed. Finding a Fourth Amendment violation, the Court held that when state hospital employees "undertake to obtain such evidence *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require." ***Ferguson v. City of Charleston*, 532 U.S. 67, 84-5 (2001)** (Italics in the original).
- The Supreme Court returned to, and curtailed, the Fourth Amendment exigent circumstances exception as it had been generally applied to warrantless searches in impaired driving cases since *Schmerber* (discussed above). The Court found that "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it





did in *Schmerber*, it does not do so categorically.” Therefore, rather than a *per se* exigency in all impaired driving cases, courts are now required to evaluate the facts of each case individually to determine whether, based on a totality of the circumstances, an exigency existed. ***Missouri v. McNeely*, 569 U.S. 141 (2013)**.

- The collection and analysis of an arrestee’s DNA by use of a cheek, or buccal, swab is similar to photographing and fingerprinting and is a reasonable step in the police booking process and does not violate the Fourth Amendment. The collection of the swab serves a legitimate police interest as an accurate method to identify persons taken into custody and is a minimal violation of the suspect’s privacy expectation. ***Maryland v. King*, 569 U.S. 435 (2013)**.
- The Fourth Amendment allows a state to compel a warrantless breath test as a search incident to a lawful arrest for impaired driving suspects. ***Birchfield v. North Dakota*, 579 U.S. \_\_\_, 136 S. Ct. 2160 (2016)**.
- An “exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application.” ***Mitchell v. Wisconsin*, 588 U.S. \_\_\_, 139 S. Ct. 2525, 2537 (2019)**. Both conditions may also be satisfied when an impaired driving suspect is unconscious at the time of the testing. *Id.*

### PROBABLE CAUSE FOR ARREST AND THE OBJECTIVE STANDARD

- The United States Supreme Court defines “probable cause” for arrest as, “[a]t the time of arrest, the officer has within his knowledge reasonably trustworthy facts and circumstances sufficient to warrant a reasonably prudent person to believe that the suspect has committed or is committing a crime.” ***Beck v. Ohio*, 370 U.S. 89 (1964)**.
- There was no probable cause to arrest until Royer’s bags were opened, but the fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying Royer’s custody by proving probable cause. ***Florida v. Royer*, 460 U.S. 491 (1983)**. (See further discussion of *Royer* under “Consent” below.)
- The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. ***Ornelas v. United States*, 517 U.S. 690 (1996)**.
- Similarly, the Court utilizes an objective standard related to whether the suspect is in custody pursuant to Fifth Amendment analysis. The Court declared that its “decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officer or the person being questioned.” ***Stansbury v. California*, 511 U.S. 318, 323 (1994)**.

---

The Fourth Amendment allows a state to compel a warrantless breath test as a search incident to a lawful arrest for impaired driving suspects.

- This probable cause standard is to be applied as an objective test. This means the facts and circumstances are to be evaluated on a reasonable person standard rather than based what the officer actually thought. This is spelled out by the Court in ***Devenpeck v. Alford*, 543 U.S. 146 (2004)** when the Court stated that its “cases make it clear that an arresting officer’s state of mind is irrelevant to the existence of probable cause. . . . That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, ‘the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer’s action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.’ [citations omitted] [T]he Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, whatever the subjective intent. . . [E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.” *Id.* at 153 (citation omitted).

## Is There a Warrant Exception?<sup>4</sup>

### COMMUNITY CARETAKING

- The community caretaking functions of law enforcement officers describe the work performed by them which is separate and apart from the detection, investigation, or acquisition of evidence relating to a crime. For example, an officer’s duty to investigate a vehicle crash in which there is no claim of liability.
- Warrantless searches may be deemed reasonable in circumstances where the police believe it necessary for the safety of the public. The Court noted officers frequently “engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” ***Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)**. In *Cady*, an impaired driver crashed his car. Police assumed custody of the car because the driver was impaired (and then hospitalized) and leaving the crashed car on the highway posed a hazard to other travelers. The impaired driver identified himself as a police officer. The USSC held it was reasonable for the police to search the driver’s car trunk for the service weapon in order to protect the public and prevent the gun from falling into improper hands.

---

“[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.”

<sup>4</sup> The exceptions contained in this list are not exhaustive. Other types include, for example, statutory exceptions. A prosecutor should be familiar with the statutes of his/her jurisdiction and what is allowed.

## INCIDENT TO ARREST

- The Supreme Court analyzed the history of the search incident to arrest exception to the warrant requirement and firmly stated the rule. “When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” ***Chimel v. California*, 395 U.S. 752, 763 (1969).**

But the *Chimel* Court recognized the limits of the exception. “There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The ‘adherence to judicial processes’ mandated by the Fourth Amendment requires no less.” *Id.* at 763. In addition, the USSC held that a warrantless search incident to a lawful arrest is not without limits. Police generally may only search the suspect’s person or the area “from which he might have obtained either a weapon or something that could have been used as evidence against him.” *Id.* at 768.

- The Court considered the argument that the officer must have some reason to be fearful of the suspect in order to justify the search incident to arrest. The Court was not inclined “to qualify the breadth of the general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes. It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification.” ***United States v. Robinson*, 414 U.S. 218, 234 (1973).**
- The defendant admitted ownership of drugs found in his companion’s purse and the defendant was searched before formally being placed under arrest. “Petitioner also contends that the search of his person that uncovered the money and the knife was illegal. Like the Supreme Court of Kentucky, we have no difficulty upholding this search as incident to petitioner’s formal arrest.

Once petitioner admitted ownership of the sizable quantity of drugs found in Cox's purse, the police clearly had probable cause to place petitioner under arrest. Where formal arrest followed quickly on the heels of the challenged search of petitioner's person and where the fruits of the search were not necessary to the support for probable cause for petitioner's arrest, it was not particularly important to the legality of the search that the search preceded the arrest rather than vice versa." **Rawlings v. Kentucky, 448 U.S. 98, 111 (1980).**

- **New York v. Belton, 453 U.S. 454 (1981)** provides clarification to the rule expressed in *Chimel v. California, supra.*, when the area to be searched is the interior of a vehicle. When the occupant of an automobile is lawfully arrested, officers may conduct a warrantless search of the entire passenger compartment of the vehicle, as well as any containers found in the passenger compartment, as a search incident to a lawful arrest. This warrant exception applies even when the arrestee has been removed from the car and can no longer reach into it. **Arizona v. Gant, 556 U.S. 332 (2009)** (discussed *infra*).
- The search warrant exception available in *Belton*, however, is not available when an officer elects to issue a traffic citation to a driver rather than making a formal arrest. Knowles was stopped for speeding. Although Iowa law authorized arrests for such offenses, the investigating officer issued Knowles a traffic citation. The officer next conducted a full search of the interior of Knowles's car and discovered drugs. The officer admitted that he had neither probable cause nor the defendant's consent for the search. The Supreme Court held that the search was not justified as the concerns for officer safety were less pressing in cases not involving formal arrest and that once the citation was issued, there was no further evidence to gather concerning the offense. **Knowles v. Iowa, 525 U.S. 113 (1998).**
- The Fourth Amendment does not prohibit police officers making formal arrests for otherwise minor offenses. Atwater was arrested by an officer in Largo Vista, Texas, for seatbelt and child restraint violations. She plead no contest, paid a \$50 fine, and sued the City of Largo Vista alleging the arrest itself was a violation of her Fourth Amendment right to free from unreasonable seizure. The Supreme Court, declining to read such a restriction into the Fourth Amendment, rejected her claim. **Atwater v. City of Lago Vista, 532 U.S. 318 (2001).**
- In **Arizona v. Gant, 556 U.S. 332 (2009)**, the Supreme Court took a new look at the rule allowing for a search incident to arrest of the vehicle of a recently arrested person after the person has been taken into custody. Police were investigating a drug house when they met Gant. After leaving the house, a police record check revealed Gant's driver's license was suspended and he had an outstanding arrest warrant. When police returned to the home later in the day, they observed Gant drive into the driveway. They arrested Gant, placed him in cuffs, and placed him into a police car. After Gant was secured away, police searched Gant's car and found a gun and drugs. The court denied his motion challenging the search and the jury convicted him of the charges. His conviction was reversed on appeal and the government appealed to the USSC.

---

The Fourth Amendment does not prohibit police officers making formal arrests for otherwise minor offenses.

The Court went back forty years to *Chimel* to begin the analysis. “In *Chimel*, we held that a search incident to arrest may only include “the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” *Ibid.* That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. See *ibid.* (noting that searches incident to arrest are reasonable “in order to remove any weapons [the arrestee] might seek to use” and “in order to prevent [the] concealment or destruction” of evidence (emphasis added)). If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.” *Id.* at 339 (citation omitted).

The Court discussed the circumstances of *Gant*’s arrest and the likelihood that the suspect could reach evidence in his car. “Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in *Belton*, which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched *Gant*’s car. Under those circumstances, *Gant* clearly was not within reaching distance of his car at the time of the search.” *Id.* at 344. The court analyzed the second prong of the test and noted that “*Gant* was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of *Gant*’s car. . . . Because police could not reasonably have believed either that *Gant* could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.” *Id.* (citation omitted).

The *Gant* holding is as follows: “Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee’s vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.” *Id.* at 351.

The Supreme Court restricted the rule expressed in *New York v. Belton* (above). Under *Gant*, a warrantless search of a vehicle interior is not authorized as a search incident to a lawful arrest unless (1) the defendant is so close to the vehicle that they could access the interior, or (2) there is sound reason to believe “evidence relevant to the crime of arrest might be found in the vehicle.” ***Arizona v. Gant*, 556 U.S. 332, 343 (2009).**

---

Under *Gant*, a warrantless search of a vehicle interior is not authorized as a search incident to a lawful arrest unless (1) the defendant is so close to the vehicle that they could access the interior, or (2) there is sound reason to believe “evidence relevant to the crime of arrest might be found in the vehicle.”

- The Fourth Amendment allows a state to compel a warrantless breath test as a search incident to a lawful arrest for impaired driving suspects. ***Birchfield v. North Dakota*, 579 U.S. \_\_, 136 S. Ct. 2160 (2016)**. *Birchfield* involved three separate impaired driving cases. In each case, the defendant was "...searched or told that they were required to submit to a search after being placed under arrest..." *Id.* at 2174. Blood tests, being more invasive, do not fall within the search incident to arrest exception the Fourth Amendment warrant requirement. For a blood sample to be properly obtained, the state must either secure a search warrant or show that a different exception to the warrant requirement exists.

### CELL PHONE SEARCHES AND SEARCH INCIDENT TO ARREST

- Under the search incident to arrest exception, interest in protecting police officers' safety did not justify dispensing with warrant requirement before officers could search digital data on arrestee's cell phone. ***Riley v. California*, 573 U.S. 373, 387-8 (2014)**.<sup>5</sup> Interest in preventing destruction of evidence also did not justify dispensing with warrant requirement before officers could search digital data on arrestee's cell phone. *Id.* at 388-91. Riley was stopped for a traffic violation and was eventually arrested for weapons offenses. As part of the search of Riley incident to his arrest, police seized his cell phone. Officers then searched the phone without a warrant and observed information connected to gang activity. Riley was then charged in connection with a shooting with a sentence enhancement based on his gang involvement. His motion to suppress was denied and he was convicted.

Analyzing *Chimel, supra.*, *Robinson, supra.*, and *Gant, supra.*, to reach its decision in *Riley*, the USSC declined to extend the permissibility of the search incident to arrest exception to the warrant requirement when the area to be searched is a suspect's cell phone. When balancing the interests of the suspect's privacy against the promotion of the government interest, the Court ruled that cell phones of today possess a storage capacity not contemplated a short time ago. Today's phones can therefore contain far too much private information to allow the government's interest to outweigh the individual's privacy interest. The seized cell phone poses no danger to the officer to justify the warrantless search and the danger of destruction of evidence on the phone is minimal, considering the protections that can be taken to protect it.

---

USSC declined to extend the permissibility of the search incident to arrest exception to the warrant requirement when the area to be searched is a suspect's cell phone.

<sup>5</sup> Riley's case was joined with another, ***United States v. Wurie***. Wurie's case involved the seizure of his cell phone after being arrested for a street drug sale. Police searched his phone without a warrant and discovered messages that led police to identify Wurie's home. Police obtained a search warrant for his home, searched it, and discovered drugs, a firearm and ammunition, and cash. He was charged with drug and weapon offenses. His motion to suppress was denied and he was convicted.

## EXIGENCY

- Schmerber was arrested following a car crash. Investigating officers noted evidence that Schmerber, the driver, was intoxicated. Having been injured in the crash, he was taken to a local hospital where an officer, acting without a search warrant, directed an attending physician to draw a sample of Schmerber's blood for testing. Over the defendant's objection (which he asserted was made on the advice of an attorney), a blood sample was drawn. The Court held that this warrantless search did not violate the Fourth Amendment. First, the method of collection was reasonable. Second, the dissipation of alcohol in the body threatened "the destruction of evidence" making an application for a search warrant impractical. *Schmerber* had been read to stand for the proposition that a *per se* exigent circumstances exception exists in all impaired driving cases due principally to the natural and rapid dissipation of alcohol in the body. ***Schmerber v. California*, 384 U.S. 757 (1966)**.
- Police in ***Brigham City v. Stuart*, 547 U.S. 398 (2006)** responded to a home after receiving a call about a loud party. Once at the home, officers observed juveniles in the backyard drinking alcohol. From outside, officers observed a fight taking place in the kitchen. They observed a juvenile punch an adult who then spit blood into the sink. Officers entered the home and made arrests for disorderly conduct and contributing to the delinquency of minors. The defendants sought to suppress all evidence obtained after the officers entered the house because they did not have a warrant. The USSC held the officers' actions were reasonable, regardless of their motives for entering the home as long as their actions objectively justified the entry. In other words, the analysis omitted any inquiry into the motives of law enforcement for situations where objectively exigent circumstances existed.
- The exigency exception may still be available even though it was the police who created the emergency. Police chased a drug suspect into an apartment complex. The suspect entered an apartment, but the officers were not sure which apartment. The officers smelled marijuana at the door of one of the units, knocked loudly, and announced that they were the police. The officers then heard movement inside the apartment and, fearing evidence would be destroyed, immediately entered. King, who had been smoking marijuana inside the apartment, challenged Kentucky's justification of the entry as an exigency as the officers themselves had created the emergency by knocking on the door. The Supreme Court ruled the entry was justified. "Our cases have repeatedly rejected' a subjective approach, asking only whether 'the circumstances, viewed objectively, justify the action.' [citations omitted] Indeed, we have never held, outside the limited contexts such as an inventory search or administrative inspection, that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment." ***Kentucky v. King*, 563 U.S. 452, 464 (2011)** (citations omitted).



- The natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Therefore, rather than a *per se* exigency in all impaired driving cases, courts are now required to evaluate the facts of each case individually to determine whether, based on a totality of the circumstances, an exigency existed. ***Missouri v. McNeely*, 569 U.S. 141 (2013).**
- Exigent circumstances may exist when an impaired driving suspect is so intoxicated (as Mitchell was) that he cannot be given a breath test. *Mitchell*, a plurality opinion, held that “exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application.” The Court found that both conditions are satisfied when an impaired driving suspect is unconscious. Alcohol concentration begins dissipating shortly after drinking stops. The warrantless blood draw was therefore authorized under the Fourth Amendment. ***Mitchell v. Wisconsin*, 588 U.S. \_\_\_, 139 S. Ct. 2525, 2538 (2019).**

## AUTOMOBILE EXCEPTION

- Some states recognize the Automobile Exception to the warrant requirement. A prosecutor should verify that the exception is valid under his/her State Constitution.
- ***Carroll v. United States*, 267 U.S. 132 (1925)** is the fountainhead case for what is often referred to as the “automobile exception.” The Court noted a “necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.” *Id.* at 153. In other words, cars were treated differently because they are cars—the fact that they can be driven out of a jurisdiction authorized a search without the delay attendant to securing a warrant. This decision was not an invitation for officers to search every vehicle on the road, however, as the Court required that officers be prepared to articulate the probable cause giving rise to their suspicion that suspected contraband would be found in the vehicle searched.
- “Probable cause exists where ‘the facts and circumstances within their (the officers’) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” ***Brinegar v. United States*, 338 U.S. 160, 175–6 (1948)** (citation omitted).
- The exception to the warrant requirement established in *Carroll* applies only to searches of vehicles that are supported by probable cause. In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained. The court emphasized that the probable cause determination must be based on objective facts that could justify issuance of a warrant and not merely on the

---

Some states recognize the Automobile Exception to the warrant requirement. A prosecutor should verify that the exception is valid under his/her State Constitution.



subjective good faith of the officers. The *Ross* Court made clear that the scope of the search of an automobile is not defined by the nature of the container in which the contraband is secreted, rather it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. The *Ross* Court held that if “probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” ***United States v. Ross*, 456 U.S. 798, 825 (1982)**.

The Supreme Court reminded everyone that the “automobile exception” dates back to the prohibition days on the 1920s, having been established in *Carroll v. United States*. The Court held in *Ross* that “...the exception to the warrant requirement established in *Carroll*—the scope of which we consider in this case—applies only to searches of vehicles that are supported by probable cause. In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.” *Id.* at 809. The court emphasized: “The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause.” *Id.* at 823.

The *Ross* Court made clear that the scope of the search of an automobile is not defined by the nature of the container in which the contraband is secreted, rather it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. The *Ross* Court held that if “probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” *Id.* at 825.

- The justification provided by the automobile exception continues to authorize the search of a vehicle after the police have impounded the vehicle and have it within their control. The warrantless search of an automobile, which was impounded and in police custody, conducted approximately eight hours after concededly valid initial search conducted at time of defendant’s arrest, was proper; justification of the initial warrantless search did not vanish once the car had been immobilized. ***Florida v. Meyers*, 466 U.S. 380 (1984)** and ***Michigan v. Thomas*, 458 U.S. 259 (1982)**.
- The ‘automobile exception’ has no separate exigency requirement. The court reasserted that a warrantless search of a vehicle is authorized under the Fourth Amendment “if based on facts that would justify the issuance of a warrant, *even though a warrant has not been actually obtained.*” ***Maryland v. Dyson*, 527 U.S. 465, 466–7 (1999)** (Emphasis added in *Dyson*).
- The Court was asked to consider whether the ownership of certain containers in a vehicle would limit the scope of the search. In ***Wyoming v. Houghton*, 526 U.S. 295 (1999)**, the police had stopped a vehicle and found a syringe on the driver. They asked the passengers to step out of the vehicle while they searched the car and the officers located a purse in the back seat belonging to Houghton. She complained that the officers should have known that the purse did not belong to the driver and, therefore, probable cause to search the

vehicle should not extend to a search of her purse. The Court found that when there is “probable cause to search for contraband in a car, it is reasonable for police officers... to examine packages and containers without a showing of individualized probable cause for each one. A passenger’s personal belongings, just like the driver’s belongings or containers attached to the car like a glove compartment, are “in” the car, and the officer has probable cause to search for contraband in the car. The Court held “. . .that police officers with probable cause to search a car may inspect passengers’ belongings found in the car that are capable of concealing the object of the search.” *Id.* at 307.

### GPS Device and Automobile Exception

- “The Fourth Amendment provides in relevant part that ‘[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.’ It is beyond dispute that a vehicle is an ‘effect’ as that term is used in the Amendment. . . We hold that the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’” ***United States v. Jones, 565 U.S. 400, 404 (2012)*** (citation omitted). Here, police suspected Jones of narcotics trafficking. Police obtained a search warrant to place a GPS device on the car registered to Jones’s wife but the police placed the GPS device outside of the parameters authorized by the search warrant. Police tracked the information for 28 days and the information obtained was used at trial in which Jones was convicted of the charged offenses. The USSC held the installation and use of the GPS device constituted a search within the meaning of the Fourth Amendment. “The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been a ‘search’ within the meaning of the Fourth Amendment when it was adopted.” *Id.* at 404–405. “This Court has to date not deviated from the understanding that mere visual observation does not constitute a search. . . It may be that achieving the same result through electronic means, without accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.” *Id.* at 412.

### Rental Car Searches and Automobile Exception

- “. . .it is by now well established that a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it.” ***Byrd v. United States, 138 S.Ct. 1518, 1527 (2018)***. “Though new, the fact pattern here continues a well-travelled path in this Court’s Fourth Amendment jurisprudence. Those cases support the proposition, and the Court now holds, that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy.” *Id.* at 1531.

## INVENTORY SEARCH

- The routine inventory of a car impounded by police in harmony with their “community caretaking” duties is permissible to (1) protect the property of the owner, (2) to protect the police from disputes concerning missing or damaged property, and (3) to protect the police from a dangerous circumstance. When police are following standard procedures, an inventory of an impounded vehicle is not unreasonable and any evidence discovered during the inventory is not excluded under the Fourth Amendment. ***South Dakota v. Opperman*, 428 U.S. 364 (1976)**.
- An inventory search performed pursuant to established departmental policy is valid and as long as not conducted in bad faith or for the sole purpose of investigation. ***Colorado v. Bertine*, 479 U.S. 367 (1987)**. Bertine was arrested for impaired driving and taken into custody. An officer, acting in accordance with local police procedures, inventoried Bertine’s vehicle’s contents. The officer opened a closed backpack and discovered drugs and a large amount of cash. Inventory searches serve governmental interests in protecting an owner’s property while it is in police custody, insuring against claims of lost, stolen, or vandalized property, guarding the police from danger.
- Both the impoundment and any search must comply with established departmental procedures. During the search, officers may open closed containers, if agency policy covers such containers. ***Florida v. Wells*, 495 U.S. 1 (1990)**. Wells was stopped for speeding but arrested for impaired driving. He gave police permission to open the trunk of his impounded car. Once impounded, an inventory search of the car produced two marijuana cigarette butts in the ashtray and a locked suitcase in the trunk. The suitcase was opened and revealed a considerable amount of marijuana. “The policy or practice governing inventory searches should be designed to produce an inventory.” *Id.* at 4. Policies of opening all containers or of opening no containers is permissible, but it is also permissible to allow opening of closed containers whose contents police cannot determine based on an examination of the closed container’s exterior.
- Simply because an officer may have ulterior motives for conducting a traffic stop, arrest, and search, the existence of those ulterior motives will not invalidate the search provided the officer’s actions are supported by probable cause. ***Arkansas v. Sullivan*, 532 U.S. 769 (2001)**. An Arkansas officer stopped Sullivan for speeding. The officer reported that Sullivan was in possession of a weapon—a rusty roofing hammer—and that Sullivan was unable to provide his car’s registration. Before the stop, the officer had been made aware of “intelligence on (Sullivan) regarding narcotics.” Sullivan was arrested for the traffic, registration, and weapon offenses, and drugs were found during a subsequent search of his car. Sullivan sought to suppress the drug evidence on the grounds the police action that otherwise justified the search was merely a pretext to justify the search. The Supreme Court ruled that “...a traffic violation arrest ...[w]ill not be rendered invalid by the fact that it was a mere pretext for a narcotics search.” *Id.* at 772 (citations omitted).

---

Inventory searches serve governmental interests in protecting an owner’s property while it is in police custody, insuring against claims of lost, stolen, or vandalized property, guarding the police from danger.

## CONSENT

- A person may consent to a search that would be otherwise prohibited by the Fourth Amendment. In those situations, the burden is on the prosecution to demonstrate that the consent was given voluntarily, without duress or coercion. Bustamonte was one of several passengers in a car that was stopped by police officers for an equipment violation. One of the other occupants, when asked by police, gave permission for the police to search the car. Inside, the police discovered stolen checks and identified Bustamonte as the suspect. Bustamonte complained that the evidence should have been excluded as the person granting permission to search had not been informed by the officer that he had the right to refuse. The Supreme Court rejected Bustamonte's argument, holding "...that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." ***Schneckloth v. Bustamonte*, 412 U.S. 218, 248–9 (1973)**.
- Prosecutors should be mindful that Fourth Amendment violations may taint evidence later collected under what would otherwise be lawful circumstances—including through the consent of the defendant. In ***Brown v. Illinois*, 422 U.S. 590 (1975)**, the defendant was arrested by Illinois police officers, without a warrant and without probable cause, and was questioned, twice, about a murder of an acquaintance. Brown was read *Miranda* warnings before each interview and admitted aiding in the murder. The USSC ruled that the initial Fourth Amendment violation—Brown's unlawful arrest—was not cured by the reading of *Miranda*. The Court's ruling was narrow, it offered that there may have been other factors showing that Brown's confession was truly voluntary, but the reading of *Miranda*, by itself, was not sufficient to show the confession to be voluntary in the wake of an illegal arrest.
- U.S. Postal Inspectors arrested Watson without a warrant for possession of stolen mail (Post Office Inspectors had been authorized by Congress to make warrantless arrests). Watson was read *Miranda* and was asked for consent to search his car, which he granted. The search revealed stolen credit cards. The USSC found that Watson's arrest was lawful and his being in custody did not alone demonstrate that his consent to the search was involuntary. ***United States v. Watson*, 423 U.S. 411 (1976)**.
- Royer was detained at the Miami International Airport by narcotics officers who believed he fit the general profile of a drug courier. The officers took Royer's ID and plane ticket and asked him to accompany them to a private room. Once there, they asked for Royer's consent to search his luggage. Royer handed the keys to the officers who opened his bag and found drugs. The USSC found that Royer's prolonged detention was not supported by sufficient probable cause,

---

A person may consent to a search that would be otherwise prohibited by the Fourth Amendment. In those situations, the burden is on the prosecution to demonstrate that the consent was given voluntarily, without duress or coercion.

was illegal, and that, therefore, “the consent was tainted by the illegality and ineffective to justify the search.” *Florida v. Royer*, 460 U.S. 491, 507–8 (1983).

- An officer, who earlier had overheard Jimeno arranging a drug deal on a public phone, stopped Jimeno and his wife for a red-light violation. The officer told Jimeno that he suspected he was in possession of drugs and asked for permission to search the car, which Jimeno granted. The officer found a folded paper bag on the floorboard, open it, and discovered cocaine. Jimeno complained that he had only given consent to search the car, not containers inside the car, and that the officer should have asked for his specific permission to search the bag. The USSC disagreed and held that the scope of consent is determined by “objective reasonableness.” Addressing the facts of the case, the Court wrote “[t]he question before us, then, is whether it is reasonable for an officer to consider a suspect’s general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car. We think that it is.” *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). Jimeno would have been free to limit the scope of his consent, but since he did not the search was authorized under the Fourth Amendment.

### Is Any Evidence Subject to Suppression?

- If the defendant is seeking to suppress evidence that cannot be suppressed (e.g., identification evidence) suppression is inappropriate. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

### Does the Exclusionary Rule Apply?<sup>6</sup>

- Evidence obtained as a result of an illegal search or seizure may not be admissible at trial pursuant to the exclusionary rule. *Weeks v. United States*, 232 U.S. 383 (1914) and *Mapp v. Ohio*, 367 U.S. 643 (1961).
- Suppression of evidence, however, should be the rare exception, not something that is automatically imposed. “Suppression of evidence has always been our last resort, not our first impulse.” *Utah v. Strieff*, 136 S.Ct. 2056, 2061 (2016).

### GOOD FAITH EXCEPTION

- The exclusionary rule is not a right of the defendant. It applies only where it results “in appreciable deterrence” of future Fourth Amendment violations. *United States v. Leon*, 468 U.S. 897, 909 (1984) (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)). The benefits of deterrence must outweigh the costs.

<sup>6</sup> In addition to the exceptions to the Exclusionary Rule listed here, there may be other reasons evidence is not suppressed. There may be a statutory violation that does not require the exclusion of evidence, for example. Evidence may also be admissible pursuant to the attenuation doctrine.

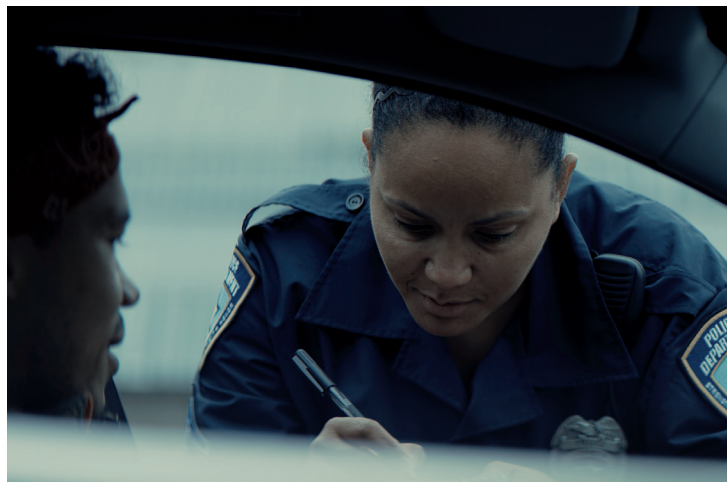
The *Leon* Court ruled the exclusionary rule does not apply when officers conduct a search in “objectively reasonable reliance” on a warrant later held invalid. *Id.* at 922. This is often referred to as the “good-faith rule.”

- The good-faith exception to the exclusionary rule extends to searches conducted in reasonable reliance on subsequently invalidated statutes. ***Illinois v. Krull*, 480 U.S. 340 (1987).**

## INEVITABLE DISCOVERY

- The Supreme Court created the “inevitable discovery” exception to the exclusionary rule following its consideration of the now-famous “Christian burial speech.” If the government can show that the evidence discovered improperly would have been inevitably discovered by legal means, the evidence is not inadmissible due to the original improper discovery. ***Nix v. Williams*, 467 U.S. 431 (1984).**

Here, Williams was arrested for the disappearance of a young girl. Police advised his attorney that Williams would not be questioned during the transport from the town in which he was arrested to the town in which he was charged. During the trip, one of the officers began a conversation with Williams (the above-referenced Christian burial speech) that led to him making incriminating statements and directing police to the location of the girl’s body. At the time, a large-scale search was being conducted with 200 volunteers; the search began prior to his incriminating statements and ended when he led police to the body. His motion to suppress was denied, his statements were admitted at trial, and he was convicted. *Id.* at 435–7.



Williams appealed his conviction. His appeal was denied in state court but his habeas petition in federal court was granted; his conviction was overturned when the court concluded the discovery of the body was a result of the fruit of his statements made in violation of his Sixth Amendment right to counsel. The USSC affirmed this ruling, noting that although the statements were not admissible, the evidence relating to the body’s location may be “...admissible on the theory that the body would have been discovered in any event, even had the incriminating statements not been elicited from Williams.” *Id.* at 437.

During Williams’s second trial, his statements were not admitted, but the evidence of the location and condition of the girl’s body was admitted. The trial court determined the prosecution proved by a preponderance that “...if the search had not been suspended and Williams had not led the police to the victim, her body would have been discovered ‘within a short time’... .” *Id.* at 437–8. Williams was again convicted and again appealed with the case eventually before the USSC.

The USSC analyzed the Exclusionary Rule and the fruit of the poisonous tree in reaching its ruling on inevitable discovery and determining that “[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial.” *Id.* at 446. “Nor would suppression ensure fairness on the theory that it tends to safeguard the adversary system of justice.” *Id.* at 447. On the record presented, the USSC determined “...it is clear that the search parties were approaching the actual location of the body...[and was satisfied]...that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found.” *Id.* at 449–50.

## INDEPENDENT SOURCE DOCTRINE

- The Fourth Amendment does not require suppression of evidence discovered as a result of an illegal search provided that the evidence is later discovered by virtue of a lawful search that is genuinely independent of the unlawful action. ***Murray v. United States, 487 U.S. 533 (1988)***.<sup>7</sup> In this case, police observed Murray and others suspected of illegal drug activities. Observations include Murray and others driving certain vehicles and entering and exiting a warehouse. Ultimately, police stopped and arrested the drivers of the vehicles, the vehicles lawfully seized and searched, and found to contain marijuana. Police entered the warehouse without a warrant and observed packages eventually discovered to contain drugs. Police left the warehouse without disturbing anything and obtained a search warrant. The warrant made no mention of their entry into the warehouse or what they observed in it. Eventually, the search pursuant to the warrant led to the recovery of hundreds of pounds of marijuana. Murray was charged with possession and distribution of illegal drugs. His motion to suppress was denied and he was convicted. *Id.* at 535–7. The USSC ruled that the independent source doctrine applies to “...evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality.” *Id.* at 537. The case was ultimately remanded for further findings at the lower level consistent with the Court’s opinion.

## ABANDONMENT

- Chesternut ran at the sight of a police car and the officers followed him—at one point driving alongside of him. During this time, Chesternut discarded several baggies that the officers believed to be drugs. He was then arrested and a search revealed he had been in possession of heroin and a needle. He was convicted of the drug offense. He argued that the initial following constituted an improper seizure as the officers lacked suspicion he was engaged in criminal activity. The USSC disagreed holding that “[w]ithout more, the police conduct here—a brief acceleration to catch up with respondent, followed by

<sup>7</sup> Murray’s case was consolidated along with *Carter v. United States*. Carter and Murray were co-conspirators in the underlying criminal case.

a short drive alongside him—was not ‘so intimidating’ that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business.” ***Michigan v. Chesternut*, 486 U.S. 567, 576 (1988)** (citation omitted). There was, therefore, no police seizure when he dropped the packets and the Fourth Amendment was not implicated.

- A defendant who abandons property cannot later claim a Fourth Amendment violation when police recover and seize the discarded contraband. The defendant, a juvenile, ran from a public place at the sight of an unmarked police car. An officer chased him on foot, eventually catching him. Before the officer tackled him, the defendant threw down a piece of rock (crack) cocaine. The USSC ruled that since the defendant had not been “seized” until he was apprehended by the officer, and he threw down the drugs before the seizure, the contraband was not the product of an improper seizure. ***California v. Hodari D.*, 499 U.S. 621 (1991)**.



# Fifth Amendment

The United States Constitution's Fifth Amendment provides, "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

## Right to Counsel

***Miranda v. Arizona*, 384 U.S. 436 (1966)** outlines the requirements for the use of a defendant's statement in trial. In its opinion, the Supreme Court fashioned a straightforward rule governing custodial interrogations.

In 1963, Ernesto Miranda was convicted of kidnapping and rape. He confessed to the crimes during a two-hour custodial interrogation and his confession was offered as evidence at his trial. The investigating officers did not make Miranda aware of his rights before he was interviewed and confessed.

The Court expressed concern that the "police dominated atmosphere" of a custodial interrogation brought too much pressure to bear on the will of a suspect and that the voluntariness of any statement made would be doubted unless the suspect had been told he/she was free to refuse to answer questions and had the right to be represented by a lawyer.

The Supreme Court reversed Miranda's conviction. In doing so, the Court gave police and prosecutors a clear rule concerning custodial statements of defendants. Specifically, when tendering a defendant's statement at trial, a prosecutor must show that the defendant was first advised (1) of his right to remain silent, (2) that anything he says can be used against him in court, (3) he has a right to be assisted by an attorney, and (4) he has the right to appointed counsel if he cannot afford to hire his own. The rule is effective when two conditions exist: (1) the defendant is in custody and (2) the defendant is subject to interrogation. If a defendant was interrogated while in custody and was not informed of his rights, the statement is inadmissible at trial. If a defendant waives these rights and agrees to give a statement, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.* at 475. In addition to complying with the directives of *Miranda*, prosecutors must also show that a suspect's statement was otherwise voluntarily made.

*Miranda* requires that a suspect "be warned prior to any questioning . . . that he has the right to the presence of an attorney." *Id.* at 479. This *Miranda* warning addresses the Court's particular concern that "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege [to remain silent] by his interrogators." *Id.* at 469. Responsive to that concern, the Court stated, as "an absolute prerequisite to

interrogation,” that an individual held for questioning “must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.” *Id.* at 471.

### PROVISION OF *MIRANDA* RIGHTS

- Powell was arrested by police. Prior to questioning him, police read to him their standard *Miranda* form, indicating he had the right to talk to a lawyer prior to answering any questions and that he had the right to use any of his rights at any time during the interview. Powell then admitted he owned a gun found in a police search and he was then charged with possessing it. He challenged the use of his statement in court claiming that the rights provided were misleading. “While the warnings prescribed by *Miranda* are invariable, [the Supreme Court] has not dictated the words in which the essential information must be conveyed... In determining whether police warnings were satisfactory, reviewing courts are not required to ‘examine [them] as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably ‘conve[y] to [a suspect] his rights as required by *Miranda*.” ***Florida v. Powell*, 559 U.S. 50, 51 (2010)**.

### IN CUSTODY

- In ***Beckwith v. United States*, 425 U.S. 341 (1976)**, Beckwith was questioned by agents of the Internal Revenue Service (IRS) about irregularities in his tax filings. The interview took place in a private home where Beckwith stayed. Before they questioned him, the IRS agents read a warning to Beckwith outlining some of his rights, but they did not read him the complete *Miranda* warning. Beckwith then made incriminating statements.

The USSC held that since Beckwith was not in custody when being questioned, *Miranda* warnings were not required. The Court affirmed its holding that compulsion is “inherent in custodial surroundings” and that it was the “custodial nature of the interrogation which triggered the necessity for adherence to the specific requirements of the *Miranda* holding.” *Id.* at 346. The fact that Beckwith was the focus of a criminal investigation was not enough to require the *Miranda* warning be read to him. Instead, the issue was whether he had been taken into custody or significantly deprived of his freedom.

- An interview does not become “custodial” for *Miranda* purposes just because it is conducted at a police station. ***Oregon v. Mathiason*, 429 U.S. 492 (1977)**. Here, a police officer suspected that Mathiason, a parolee, had committed a burglary. The officer contacted Mathiason and asked him to meet to “discuss something.” Mathiason agreed and voluntarily went to the police station, which was a short distance from his apartment. Once there, the officer told Mathiason that he was not under arrest, but that he suspected Mathiason had committed the crime. The officer also told him (falsely) that his fingerprints had been found at the scene. Mathiason confessed. He was then read *Miranda* and confessed again. At the end of the interview, he was allowed to leave.

---

An interview does not become “custodial” for *Miranda* purposes just because it is conducted at a police station.

*Miranda* warnings are not required “simply because the questioning takes place in the station house, or because the questioned person is the one the police suspect.” *Id.* at 495. Rather, *Miranda* is required “only where there has been such a restriction on a person’s freedom as to render him ‘in custody.’” *Id.*

- A probationer’s meeting with his probation officer where he was asked questions about an unrelated crime and gave incriminating answers did not, without additional factors being present, qualify as a custodial interrogation necessitating the giving of the *Miranda* warning. ***Minnesota v. Murphy, 465 U.S. 420 (1984)***. Murphy was on probation following his conviction for a sex-related crime. Conditions of his sentence required Murphy to take part in a treatment program for sex offenders, to meet regularly with a probation officer, and to truthfully answer any questions asked by his probation officer. Murphy’s probation supervisor was notified by a counselor that Murphy had stopped attending his treatment and that during one of his treatment sessions he had confessed to committing a rape and murder in 1974. The probation officer met with Murphy, asked him about the 1974 crime, and he confessed. Murphy had not been read a *Miranda* warning.

After his conviction, Murphy asserted that his confession was obtained improperly and should have been excluded from his trial. The USSC disagreed finding that the requirement that Murphy regularly meet with a probation officer and give truthful answers to her questions did not mean that his statements were involuntary or compelled and that the burden was on Murphy in this situation to avail himself of the protection of the Fifth Amendment if he chose. The Court also held that that during the meeting Murphy was not in custody since he had not been formally arrested, no restraint had been placed on his freedom of movement and that, therefore, a *Miranda* warning was not required.

- The Supreme Court held (1) that protections of *Miranda* apply to custodial interrogations without regard to the severity of the criminal offense being investigated and (2) that roadside questioning of a driver during a routine traffic stop does not rise to the level of custodial interrogation contemplated by *Miranda*. ***Berkemer v. McCarty, 468 U.S. 420 (1984)***.

In *Berkemer*, a state trooper stopped McCarty after he saw the car McCarty was driving weave in and out of a highway lane. Once stopped, McCarty was asked to step out of the car, and the trooper noticed he had trouble standing. He was not able to complete field sobriety tests and his speech was slurred. The trooper asked him if he’d been drinking. McCarty admitted he’d had two beers and had smoked marijuana and was subsequently arrested for operating a motor vehicle while under the influence of alcohol and/or drugs, a misdemeanor in Ohio. At the station, he was given a breath test which did not show any alcohol in his system. The trooper resumed the questioning and McCarty made additional statements. At no time did the trooper inform McCarty of his *Miranda* rights.

McCarty moved to exclude his statements for what he argued was a *Miranda* violation. The trial court disagreed, ruled his statements to be admissible, and McCarty entered a no contest plea.

---

Roadside questioning of a driver during a routine traffic stop does not rise to the level of custodial interrogation contemplated by *Miranda*.

Ohio asked the Supreme Court to establish an exception to the *Miranda* rule when the criminal conduct at issue is a misdemeanor traffic offense. The Court declined and held that the protections of the *Miranda* holding apply without regard to the severity of the crime being investigated.

The Court did, however, agree that routine traffic stops are not the types of police–citizen encounters mandating the reading of *Miranda*. First, traffic stops are typically of short duration. While a driver knows they are not free to leave, most understand the interaction will be quickly completed. Second, traffic stops are usually done in public view and not in “police dominated” environments like stationhouses. This lessens the fear the questioning will overbear the suspect’s free will. The Court found that the McCarty’s roadside statements, made before his arrest, were admissible against him, but his statements given at the station, after his arrest, were not.

- Roadside questioning is not “custody.” An officer is not required to inform a suspect of his rights under *Miranda* when questioning at the scene of a roadside stop. Until the suspect is arrested or his freedom of movement is restrained similar to an arrest, *Miranda* warnings need not be given and a waiver of rights is not required. ***Pennsylvania v. Bruder, 488 U.S. 9 (1988).***

## POLICE INTERROGATION/INVOCATION OF RIGHT

- A defendant may implicitly waive the rights encompassed in the *Miranda* warning. While a suspect’s “mere silence” is not enough to amount to a waiver, there are situations where “waiver can be clearly inferred from the actions and words of the person interrogated.” ***North Carolina v. Butler, 441 U.S. 369, 373 (1979).*** The existence, or not, of an implied *Miranda* waiver will turn on the facts of each individual case. Courts, and prosecutors, must therefore carefully consider all of the circumstances surrounding a defendant’s custodial statements where there has not been an express, or written, *Miranda* waiver. Here, law enforcement provided *Miranda* warnings to Butler; he refused to sign a form but agreed to talk with police.
- Nothing in the Fifth or Fourteenth Amendments would prohibit the police from merely listening to a suspect’s voluntary, volunteered statements and using them against him at trial. ***Rhode Island v. Innis, 446 U.S. 291, 300–3 (1980).*** Here, the defendant was arrested for an armed robbery and advised multiple times of his *Miranda* rights. On his way to the police station, two officers in the police vehicle engaged in their own conversation. Hearing the officers’ conversation, the defendant volunteered information about the location of the weapon used in the robbery.
- When a suspect invokes his right to counsel under *Miranda*, interrogation must stop until counsel is present. Interrogation cannot begin again at the initiation of police. ***Edwards v. Arizona, 451 U.S. 477 (1981).*** In this case, Edwards was arrested for murder, robbery, and burglary. He was read the *Miranda* warning which he said he understood. He then made a statement, offering an alibi, and asked to make a deal. The interrogating officer replied that he was not

authorized to negotiate. Edwards then asked for a lawyer and the questioning stopped. The next morning, two different detectives met Edwards at the jail. Edwards told the guard that he didn't want to talk to anyone, but the guard replied that he "had to." The detectives allowed Edwards to listen to the tape-recorded statement of his accomplice which implicated him. The detectives again advised Edwards of his *Miranda* rights and Edwards, still without a lawyer, waived his rights and made an incriminating statement. Edwards was tried, twice, and convicted. His statement was offered at both trials.

Edwards argued his statement should have been suppressed as he had invoked his right to a lawyer. The USSC agreed and reversed his conviction holding "...that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id.* at 485. The Court did point out that if Edwards, and not the detectives, had reinitiated the interrogation the result would have been different as "nothing in the Fifth or Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at trial." *Id.*

- A suspect's waiver of *Miranda* protections must be knowing, intelligent, and voluntary. If a suspect understands the rights outlined in *Miranda*, knows the consequences of waiving those rights, and the police do nothing to coerce a confession, the Constitution does not require police to "supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." ***Moran v. Burbine*, 475 U.S. 412, 423 (1986).**

In this case, Burbine had been arrested for burglary by Cranston, Rhode Island police officers and was being held at their station. He was also suspected of committing a murder in Providence, Rhode Island. A lawyer representing Burbine on the burglary case called the Cranston detectives and advised them she was representing him on the burglary. She was told by the detectives that Burbine would not be questioned that night. She was not told he was also murder suspect nor was Burbine told that he had a lawyer who was trying to reach him.

However, Burbine was questioned that night about the murder by Providence detectives. He was read *Miranda* and signed a written waiver expressly noting that did not want an attorney to represent him and confessed to the murder.

The USSC found that Burbine's waiver was valid. He understood the rights outlined in *Miranda*, he knew the consequences of waiving those rights, the police did nothing to coerce his confession, and the Constitution does not require police to "supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." *Id.* at 422. The Court stated that "(o)nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." *Id.* at 422-3.

- When counsel is requested, interrogation must cease, and officials may not reinstate interrogation without counsel present, whether or not the accused has consulted with his attorney. ***Minnick v. Mississippi*, 498 U.S. 146 (1990)**. In this case, the defendant was arrested for murder. An interrogation by law enforcement ended when he requested a lawyer. He subsequently communicated with an attorney two or three times. Later, the interrogation was reinstated by police after he was told by jail personnel that he could not refuse to talk; he then confessed to the murder. His motion to suppress his statements was denied and he was convicted.

The USSC held that once counsel is requested, questioning must stop and police may not further interrogate a suspect without counsel present. The requirement that counsel be “made available” to the accused refers not to the opportunity to consult with an attorney outside the interrogation room, but to the right to have the attorney present during custodial interrogation, reaffirming the rule of *Edwards v. Arizona*. *Id.* at 153.

The *Edwards* rule is appropriate and necessary, since “[a] single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights and from the coercive pressures that accompany custody and may increase as it is prolonged.” *Id.*

- A suspect’s *Miranda* right to counsel must be invoked “unambiguously.” If the accused makes an “ambiguous or equivocal” statement or no statement, the police are not required to end the interrogation or ask questions to clarify the accused’s intent. ***Davis v. United States*, 512 U.S. 452 (1994)**. In this case, Davis was questioned in connection with a murder. He was provided his *Miranda* rights and initially waived them, agreeing to speak with police. After about 90 minutes into the interview, Davis said, “Maybe I should talk to a lawyer.” Police asked if he was asking for a lawyer, but Davis said he was not. Police took a break in the interview and, upon returning, reminded Davis of his *Miranda* rights. The interview continued for another hour before Davis invoked his right to counsel. He was convicted of murder. Here, the USSC ruled that Davis’s statement about the lawyer was insufficiently clear to invoke the *Edwards* prohibition on further questioning.
- The protections offered by *Miranda*, which the Supreme Court has deemed sufficient to ensure that the police respect the suspect’s desire to have an attorney present the first time police interrogate him, adequately ensure that result when a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects. ***Maryland v. Shatzer*, 559 U.S. 98 (2010)**. Here, a 14-day break in custody provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.
- A suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police. ***Berghuis v. Thompkins*, 560 U.S. 370, 388–9 (2010)**. Here, Thompkins was advised of his *Miranda* rights and questioned

---

Once counsel is requested, questioning must stop and police may not further interrogate a suspect without counsel present.

about a shooting in which one person died. Thompkins did not say he wanted to remain silent, that he did not want to talk with police, or that he wanted an attorney. He mostly said nothing until nearly three hours into the interview, when he knowingly and voluntarily said, “yes,” he prayed to God to forgive him for the shooting.

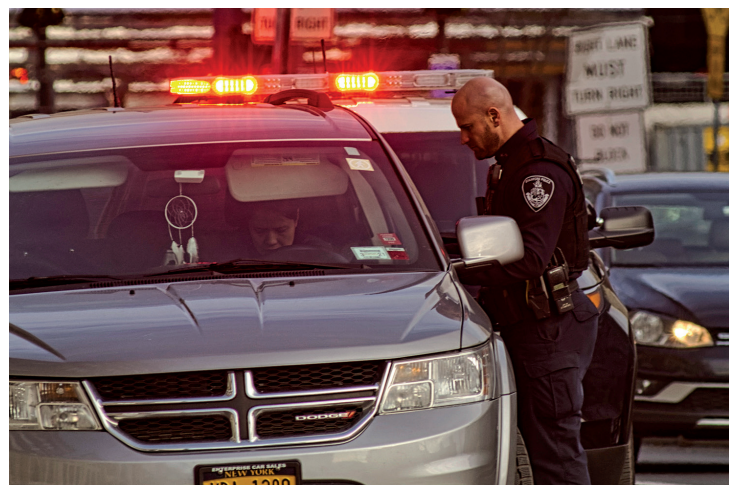
### KNOWLEDGE OF SUSPECT’S INVOCATION OF COUNSEL IMPUTED TO OTHER OFFICERS

- The rule of *Edwards v. Arizona* applies to bar police-initiated interrogation following a suspect’s request for counsel in the context of a separate investigation. A suspect who has “expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless he accused initiates further communication.” ***Arizona v. Roberson, 486 U.S. 675, 677 (1988)*** (citing *Edwards*). Here, after being arrested at the scene of a crime, and being advised by the arresting officer of his *Miranda* rights to remain silent and to have an attorney present during any interrogation, the suspect replied that “he wanted a lawyer before answering any questions,” which was noted in the investigating officer’s police report. Three days later, while the suspect was still in custody, a different officer, unaware the suspect had earlier requested counsel who had not yet been provided, advised him of his rights and interrogated him about a different crime, obtaining an incriminating statement concerning that crime.

### JUDICIAL PROCEEDING—INVOCATION OF RIGHT TO COUNSEL

- An accused’s invocation of his Sixth Amendment right to counsel during a judicial proceeding does not constitute an invocation of the right to counsel derived by *Miranda* from the Fifth Amendment’s guarantee against compelled self-incrimination.

The *Miranda-Edwards* guarantee is intended to protect the suspect’s “desire to deal with the police only through counsel. . .” ***McNeil v. Wisconsin, 501 U.S. 171, 178 (1991)*** (citation omitted). Requesting the assistance of an attorney at a bail hearing does not satisfy the minimum requirement of some statement that can reasonably be construed as an expression of a desire for counsel in dealing with custodial interrogation by the police. Here, McNeil requested counsel at a bail hearing for a charged offense. While in custody for that case, he was provided his *Miranda* rights prior to police questioning him on an unrelated matter. He waived his right to counsel and made incriminating statements. He was then charged on the unrelated matters. His motion to suppress statements was denied and he was convicted. The USSC declined impose an invocation of a Sixth Amendment right to counsel on the Fifth Amendment’s right to counsel in unrelated matters.



## Protection Against Compelled Self-Incrimination

- The Fifth Amendment also provides that a person may not be compelled in a criminal case to be a witness against himself. The Fifth Amendment does not prohibit self-incrimination, but only self-incrimination by testimonial evidence that is compelled. The Constitution usually does not require a person to be informed of their rights. It is assumed the person knows the law and his/her rights. A person must, however, be notified of his/her Fifth Amendment right not to be compelled to be a witness against himself prior to custodial interrogations. ***Miranda v. Arizona*, 384 U.S. 436 (1966)**.
- Non-testimonial evidence is not subject to the Fifth Amendment prohibition against being compelled to be a witness against himself. The prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. ***Schmerber v. California*, 384 U.S. 757 (1966)** (determining warrantless blood test non-testimonial under the Fifth Amendment).
- A suspect can be compelled to participate in a lineup and to repeat a phrase provided by the police so that witnesses could view him and listen to his voice. ***United States v. Wade*, 388 U.S. 218, 222 (1967)**.
- A suspect can be compelled to provide a handwriting exemplar. Like the voice or body itself, handwriting is an identifying physical characteristic outside the privilege's protection. ***Gilbert v. California*, 388 U.S. 263, 266-7 (1967)**. In this case, Gilbert voluntarily provided a handwriting exemplar to law enforcement and it was used to compare to a handwritten note used in a robbery. The USSC ruled the Fifth Amendment protects only the compulsion of a defendant's communications.
- A suspect can be compelled to read a transcript in order to provide a voice exemplar. ***United States v. Dionisio*, 410 U.S. 1, 7 (1973)**.
- "In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." ***Doe v. United States*, 487 U.S. 201, 210 (1988)**. Here, a court order compelling the target of a grand jury investigation to authorize banks to disclose records of the target's accounts without identifying those accounts or acknowledging their existence, did not violate the target's Fifth Amendment privilege against self-incrimination as the consent directive is not testimonial in nature.

---

Non-testimonial evidence is not subject to the Fifth Amendment prohibition against being compelled to be a witness against himself.

## FIELD SOBRIETY TESTS, CHEMICAL TESTS, AND OBSERVATIONS OF OFFICERS

- In ***South Dakota v. Neville*, 459 U.S. 553 (1983)**, the USSC tackled issues related to post-arrest questioning after a suspect was pulled over for running a stop sign, smelled of alcohol, had to use the vehicle for balance when he was asked to step out of the car, and could not produce a driver's license because it was



suspended for a previous DUI. He failed two field sobriety tests and was placed under arrest and given the *Miranda* warnings. When he was read the scripted language asking him to submit to the breath test and warning him that a refusal could be used against him in court, the defendant said he “was too drunk to pass it” and refused to take the breath test. The defendant sought to suppress all evidence related to his refusal.

The Court started with a recognition that in *Schmerber v. California*, they held that the privilege against self-incrimination in the Fifth Amendment bars the State only from compelling “communications” or “testimony.” Since “a blood test was “physical or real” evidence rather than testimonial evidence, we found it unprotected by the Fifth Amendment privilege. *Schmerber*, then, clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test.” The Supreme Court in *Neville* held that “a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination.” *Id.* at 564. The Court also found there was no Due Process violation from the fact that the defendant was not specifically warned that his refusal to submit to the test could be used against him.

*Neville* holds that a defendant’s refusal to submit to a chemical test for alcohol is admissible against him/her at trial. South Dakota enacted an implied consent law which declared that any person driving a vehicle in that state would be deemed to have given consent to chemical test to determine their alcohol concentration if they were lawfully arrested for an impaired driving offense. The statute allowed the defendant to refuse the testing, but as a consequence, authorized the state to use the evidence of the refusal against the defendant at trial. *Neville*’s claim that this amounted to a violation of his Fifth Amendment right to be free from compelled self-incrimination was rejected by the Court. The Fifth Amendment is not violated by introduction into evidence of the suspect’s refusal to submit to a blood test, even when the suspect was not warned that the results of the test or his refusal would be used against him in court. A statement is not coerced simply because a suspect is required to choose between two or more undesirable options—either choosing to take a chemical test or refusing to do so—knowing the consequences of either choice would be used against him.

- The court reached some of the same conclusions regarding the application of the privilege against self-incrimination based on questioning related to the submission to post-arrest testing. ***Pennsylvania v. Muniz*, 496 U.S. 582 (1990)**. Here, the suspect was administered field sobriety tests at roadside, was arrested and taken to the police station. Without being given *Miranda* warnings, he was subjected to some routine booking questions, was administered another round of SFSTs on video, and then asked to submit to breath testing. He refused the breath testing and was unable to tell the police officer the date of his sixth birthday during the booking phase of the process. *Muniz* argued that everything he did and said after his arrest was a Fifth Amendment violation.

---

The Fifth Amendment is not violated by introduction into evidence of the suspect’s refusal to submit to a blood test, even when the suspect was not warned that the results of the test or his refusal would be used against him in court.

The USSC found no violation of the privilege based on the standard booking questions and analyzed the distinction between “real or physical evidence” and “testimonial” evidence. They reaffirmed that the Fifth Amendment protects only “testimonial” evidence. The Court discussed *Doe v. United States*, wherein the Court stated “in order to be testimonial, an accused’s communication must itself explicitly or implicitly, relate to a factual assertion or disclose information.” *Id.* at 589. The Court noted that “[w]henver a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the ‘trilemma’ of truth, falsity, or silence, and hence the response (whether based on truth or falsity) contains a testimonial component.” *Id.* at 597.

The *Muniz* Court stated that the booking questions were not rendered inadmissible by *Miranda* “. . . merely because the slurred nature of his speech was incriminating. The physical inability to articulate words in a clear manner due to ‘lack muscular coordination of his tongue and mouth’ . . . is not itself a testimonial component of Muniz’s responses to Officer Holsterman’s introductory questions.” *Id.* at 590–1. Importantly, the Court did find that the question related to the defendant’s sixth birthday was “testimonial” and should have been suppressed.

The *Muniz* Court considered the statements made and answers given by the defendant when given the second set of SFSTs at the station and the statements made when he was read the Implied Consent warning. The Court noted that the dialogue with Muniz concerning the SFSTs consisted primarily of carefully scripted instructions as to how the tests were to be performed. The instructions were not likely to be perceived as calling for any verbal response and therefore were not custodial interrogation since they inquiries were limited to whether the suspect understood the instructions. Similarly, the Court found that the officer administering the breath test “. . . limited her role to providing Muniz with relevant information about the breathalyzer test and the Implied Consent Law.” *Id.* at 605. The Court agreed that these inquiries were attendant to “the legitimate police procedure and were not likely to be perceived as calling for any incriminating response.” *Id.*

## CRASH REPORTS

- The Fifth Amendment does not bar use of information disclosed in a report based upon a requirement that drivers stop at the scene of motor vehicle crashes and identify themselves to any parties involved and file a crash report. ***California v. Byers, 402 U.S. 424 (1971)***. This case presented the issue of whether a state’s law requiring a driver involved in a crash to stop and identify himself infringes on the privilege against compulsory self-incrimination. While the neutral act of disclosing name and address is incriminating in the traditional sense, it would be an “extravagant extension” of the privilege to hold that it is testimonial in the Fifth Amendment sense.

## USE OF COMPELLED STATEMENTS

- A defendant's statement, which is inadmissible because of a *Miranda* violation, may be used to cross-examine a defendant who takes the stand at trial. The defendant has no right to commit perjury. ***Harris v. New York*, 401 U.S. 222, 225 (1971)**. In *Harris*, the defendant made statements to the police after being arrested for drug sales. The statements were made without the benefit of *Miranda* warnings and were, therefore, not admissible in the prosecutor's case-in-chief. The defendant testified at trial and his testimony differed from the statements he made to police after his arrest. The statements were used to impeach the defendant on cross-examination. The USSC ruled that when a defendant "...voluntarily take[s]...the stand,...[he is] under an obligation to speak truthfully and accurately..." and, if he does not, the prosecutor may "...utilize the traditional truth-testing devices of the adversary process." *Id.* at 225-6. "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 226. *See also Oregon v. Hass*, 420 U.S. 714 (1975) (statements made after *Hass* asserted right to counsel may be used as impeachment at trial); *United States v. Havens*, 446 U.S. 620 (1980) (a defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to impeachment by the prosecutor, even by evidence that was illegally obtained and deemed inadmissible as substantive evidence of guilt).

---

A defendant's statement, which is inadmissible because of a *Miranda* violation, may be used to cross-examine a defendant who takes the stand at trial. The defendant has no right to commit perjury.

## DOUBLE JEOPARDY

- The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." The Double Jeopardy Clause, of course, affords a defendant three basic protections:
  - It protects against a second prosecution for the same offense after acquittal.
  - It protects against a second prosecution for the same offense after conviction.
  - And it protects against multiple punishments for the same offense.

***North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), also *Brown v. Ohio*, 432 U.S. 161, 165 (1977).**

## SEVERED DUI CHARGES/LESSER INCLUDED OFFENSES

- A defendant who is tried and acquitted on an offense, but is convicted of a lesser-included offense, and successfully appeals the verdict on the lesser offense, can be retried only on the lesser offense. There is an "implied acquittal" of the greater offense. ***Price v. Georgia*, 398 U.S. 323 (1970)**. In this case, the defendant was charged and tried for murder, but found guilty of manslaughter. His manslaughter conviction was later overturned and the state tried him a second time for murder. The USSC ruled a retrial was limited to the lesser charge because there is an implied acquittal of the higher charge.

- If the defendant expressly asks for separate trials on the greater and the lesser offenses, or, in connection with his opposition to trial together, fails to raise the issue that one offense might be a lesser included offense of the other, the state may try the defendant in separate trials regardless of verdict. ***Jeffers v. United States*, 432 U.S. 137 (1977)**.
- The acceptance of a guilty plea to lesser-included offenses while charges on the greater offenses remain pending, moreover, has none of the implications of an “implied acquittal” which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses. ***Ohio v. Johnson*, 467 U.S. 493, 501–2 (1984)**.

### CIVIL SANCTIONS AS RESULT OF CONVICTION

- Whether the Double Jeopardy Clause prohibits civil sanctions, such as a driver’s license revocation or vehicle impoundment or forfeiture, is a matter of statutory construction. The Clause does not prohibit the imposition of any additional sanction that could, “in common parlance,” be described as punishment. ***United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943)** (quoting *Moore v. Illinois*, 55 U.S. 13, (1852)). Here, Hess and others were electrical contractors working on projects with a local government, but a substantial portion of their pay came from the federal government. Petitioner brought a civil action against Hess and others charging they were defrauding the federal government by collusive bidding on the projects. The federal statutes alleged to be violated included a provision for additional financial sanctions for a violation of any of the provision of the claimed statutes. The USSC ruled it is permissible to provide for criminal and civil remedies for the same acts and that “. . .the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.” *Id.* at 549 (citation omitted).
- In evaluating the punitive nature of a civil sanction, the court is to look at the statute involved and determine whether it is penal or regulatory in character by applying the factors listed in ***Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–169 (1963)** including:
  - whether the sanction involves an affirmative disability or restraint;
  - whether it has historically been regarded as a punishment;
  - whether it comes into play only on a finding of scienter;
  - whether its operation will promote the traditional aims of punishment—retribution and deterrence;
  - whether the behavior to which it applies is already a crime;
  - whether an alternative purpose to which it may rationally be connected is assignable for it; and
  - whether it appears excessive in relation to the alternative purpose assigned.

---

Whether the Double Jeopardy Clause prohibits civil sanctions, such as a driver’s license revocation or vehicle impoundment or forfeiture, is a matter of statutory construction.

- These factors must be considered in relation to the statute on its face and not the impact on a particular defendant. ***Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 777, n.14 (1994)** (“We noted, however, that whether a sanction constitutes punishment is not determined from the defendant’s perspective, as even remedial sanctions carry the “sting of punishment.” *US v. Halper*, 490 U.S. 435, 447, n.7 (1989) (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551 (1943)).
- A court must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Even in those cases where the legislature has indicated an intention to establish a civil penalty, a court may inquire whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. ***Hudson v. United States*, 522 U.S. 93, 99 (1997)**. The factors in *Kennedy v. Mendoza-Martinez* provide useful guideposts for determining if a civil remedy transforms into a criminal penalty. Then, “only the clearest proof” will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty. *Id.* at 99–100.



### DRIVER’S LICENSE REVOCATION AND DUE PROCESS

- The United States Supreme Court has never specifically determined if the revocation of a driver’s license based upon a criminal conviction amounts to punishment for purposes of the Double Jeopardy Clause. The Supreme Court has recognized the state’s interest in removing unsafe drivers from highways by revoking driver’s licenses based upon convictions. ***Dixon v. Love*, 431 U.S. 105, 114 (1977)**. “Far more substantial than the administrative burden, however, is the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard.” *Id.* Here, the defendant’s license was suspended by the Secretary of State because of repeated traffic convictions. Power to summarily suspend was based in state’s law and the secretary’s rulemaking. Procedural due process is maintained by the use of objective rules provided drivers with notice of what conduct will be sanctioned and promotes equality of treatment of similarly situated drivers.
- The USSC has determined fines and debarment of a banker did not amount to punishment. The debarment meant the banker could not “participate in any manner” in the affairs of any banking institution. Neither the fines nor the debarment prevented the banker from being charged criminally for the same conduct that resulted in the fines and debarment. ***Hudson v. United States*, 522 U.S. 93 (1997)**. The Supreme Court’s analysis of this debarment case can be used in analysis of whether a driver’s license revocation amounts to punishment and a claim subjecting a person to both a criminal charge and a driver’s license revocation violates the Double Jeopardy Clause.

Driver's license revocations have not been historically viewed as punishment but civil in nature. The Supreme Court noted, "[f]irst, neither money penalties nor debarment has historically been viewed as punishment. We have long recognized that 'revocation of a privilege voluntarily granted,' such as a debarment, 'is characteristically free of the punitive criminal element.'" *Id.* at 104, citing *Helvering v. Mitchell*, 303 U.S. 391, 399 at n.2.

The Supreme Court's analysis of the debarment under the *Kennedy v. Mendoza-Martinez*, factors also resulted in a determination that debarment was not punishment. (1) The monetary and debarment sanctions do not involve an "affirmative disability or restraint," as that term is normally understood. *Id.* (2) as previously stated, debarment has never been viewed as punishment, *Id.* (3) the sanctions do not require proof of scienter or state of mind, (4) the fact that the sanctions are imposed may also be criminal (and in this case formed the basis for petitioners' indictments). This fact is insufficient to render the money penalties and debarment sanctions criminally punitive. *Id.* at p. 105; (5) the imposition of both money penalties and debarment sanctions will deter others from emulating petitioners' conduct, a traditional goal of criminal punishment. But the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence "may serve civil as well as criminal goals. *Id.*

## VEHICLE FORFEITURE<sup>8</sup>

- An impaired driver's vehicle may be subject to seizure and forfeiture due to multiple offenses or other reasons specified by state law. *In rem* civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause. See ***Gore v. United States*, 357 U.S. 386, 392 (1958)**.

<sup>8</sup> Vehicle Forfeiture may be challenged as an excessive fine under the Eighth Amendment. The Supreme Court in *Timbs v. Indiana*, 139 S. Ct. 682 (2019) held that the excessive fines clause of the Eighth Amendment applies to states and limits the authority of states. Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. At the time of Timbs's arrest, the police seized a Land Rover SUV Timbs purchased for \$42,000 with money he received from an insurance policy when his father died. The State sought civil forfeiture of Timbs's vehicle, charging that the SUV had been used to transport heroin. Observing that Timbs had recently purchased the vehicle for more than four times the maximum \$10,000 monetary fine assessable against him for his drug conviction, the trial court held that the excessive fines provision of the Eighth Amendment prohibited the forfeiture. The Indiana Supreme Court reversed and held that the excessive fines clause did not apply to the states. The United States Supreme Court reversed. The Supreme Court also rejected Indiana's argument that the excessive fines clause does not apply to civil *in rem* forfeitures. "In *Austin v. United States*, 509 U. S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), however, this Court held that civil *in rem* forfeitures fall within the Clause's protection when they are at least partially punitive. *Austin* arose in the federal context. But when a Bill of Rights protection is incorporated, the protection applies 'identically to both the Federal Government and the States.'" *Timbs*, at p. 689.

# Sixth Amendment

The Sixth Amendment provides “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”

## Right to Counsel

When does the Sixth Amendment right to “Assistance of Counsel” apply? In addition to a right to counsel during custodial interrogations under the Fifth Amendment, the Sixth Amendment provides a right to assistance of counsel in all criminal prosecutions. This right guarantees assistance of counsel at any critical stage of a criminal prosecution.

### WHEN DOES RIGHT TO COUNSEL ATTACH?

- The Sixth Amendment applies when the suspect appears before a judicial official. ***Kirby v. Illinois*, 406 U.S. 682, 690 (1972)** (Sixth Amendment right to counsel does not apply to an identification at the police station after arrest.).
- The Sixth Amendment right to counsel does not attach at the time of arrest. *Miranda* governs custodial interrogations. ***United States v. Gouveia*, 467 U.S. 180, 190 (1984)** (“we have never held that the right to counsel attaches at the time of arrest.”) Sixth Amendment right to counsel attaches at “the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,” *Id.* at 188 (quoting *Kirby v. Illinois*).
- The Sixth Amendment right of the “accused” to assistance of counsel in “all criminal prosecutions” is limited by its terms: “it does not attach until a prosecution is commenced.” ***McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)**. See also *Moran v. Burbine*, 475 U.S. 412, 430 (1986).
- The rule is not “mere formalism,” but recognition of the point at which “the government has committed itself to prosecute,” “the adverse positions of government and defendant have solidified,” and the accused “finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.” ***Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008)** (citing *Kirby v. Illinois*).

---

The Sixth Amendment provides a right to assistance of counsel in all criminal prosecutions. This right guarantees assistance of counsel at any critical stage of a criminal prosecution.

## RIGHT TO COUNSEL IS OFFENSE SPECIFIC

- The Sixth Amendment right to counsel cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced. ***McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)**. In this case, the defendant was charged with an offense and represented by a public defender at a bail hearing. While in jail on that charge, he was questioned by police about an unrelated, uncharged offense. He was provided his *Miranda* rights, waived them, and made statements about the second crime. He was then charged with the second offense, his motion to suppress statements was denied, and he was convicted. His invocation of his Sixth Amendment right to counsel on the first charge does not constitute an invocation of the right to counsel under *Miranda* and the Fifth Amendment's guarantee against compelled self-incrimination.
- Once the Sixth Amendment attaches to a specific offense, it applies to all interrogations whether custodial or otherwise—interrogation is a critical stage. ***Montejo v. Louisiana*, 556 U.S. 778 (2009)**. In this case, the defendant was charged with a crime and, at a required bail hearing, the court appointed him counsel without any assertion of a right to counsel by the defendant. Prior to meeting with counsel and while still in custody, police questioned him further. Police provided him with his *Miranda* rights for a second time and the defendant knowingly and voluntarily waived his right to counsel (under the Fifth Amendment). During this questioning, the defendant made an inculpatory statement which was used against him in trial.

## POLICE-INITIATED INTERROGATION AFTER COUNSEL APPOINTED

- The Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. ***Patterson v. Illinois*, 487 U.S. 285, 292, n.4 (1988); *Brewer v. Williams*, 430 U.S. 387, 404 (1977); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)**.
- The Sixth Amendment right to counsel applies to custodial and non-custodial interrogation. ***Massiah v. United States*, 377 U.S. 201 (1964)**. Here, defendant was indicted, retained a lawyer, pled not guilty, and was released on bail. Police employed a cooperating co-defendant to secretly interrogate the defendant while police listened to the conversation (*i.e.*, using investigatory techniques which are the equivalent of direct police interrogation). Defendant made incriminating statements which were used against him at trial. The USSC ruled the defendant was unknowingly interrogated by the police and was entitled to the benefit of his counsel during this critical stage; since he was not afforded that right, the statements cannot be used.
- Neither the undercover officer nor a jailhouse informant may question the defendant about any charges where Sixth Amendment rights have attached. ***United States v. Henry*, 447 U.S. 264 (1980)**.
- Even if Sixth Amendment rights have attached, undercover officers (or agents of law enforcement) may be planted inside a jail cell to simply listen (*i.e.*, makes no effort to stimulate conversations about the crime) to see if the defendant

---

The Sixth Amendment right to counsel applies to custodial and non-custodial interrogation.



confesses to the crime for which he stands indicted. ***Kuhlmann v. Wilson*, 477 U.S. 436 (1986)**.

- The standard *Miranda* rights form is sufficient to obtain a Sixth Amendment waiver. The courts do not require a different form for waiver of the Sixth Amendment right. ***Patterson v. Illinois*, 487 U.S. 285 (1988)**.
- The defendant may waive the right whether or not counsel already represents him; the decision to waive need not itself be counseled. ***Michigan v. Harvey*, 494 U.S. 344, 352–353 (1990)**. A suspect's statements made in violation of the Sixth Amendment are presumed involuntary and therefore inadmissible as substantive evidence at trial. If a defendant voluntarily waives his right to counsel, it is possible the state may be able to use such statement for impeachment purposes at trial. *Id.*
- Undercover officers or jailhouse informants may question the suspect about unrelated, uncharged crimes. *Miranda* warnings are not required to be read to the suspect in such a circumstance. ***Illinois v. Perkins*, 496 U.S. 292 (1990)**.
- The Sixth Amendment right to counsel is offense specific and does not necessarily extend to offenses that are factually related to those that have been charged. ***Texas v. Cobb*, 532 U.S. 162 (2001)**. For example, in this case, Cobb was indicted for burglary and appointed an attorney. Officers approached Cobb later to discuss two murders that occurred during the burglary. Cobb had not been charged with either murder but confessed to them. The confession was valid because Cobb did not have Sixth Amendment rights on the murders. Officers could still question Cobb about matters relating to, but not charged in, the indictment.
- Statements obtained in violation of a defendant's Sixth Amendment right to counsel are inadmissible in the state's case in chief. If voluntary, however, they may be admitted to impeach any inconsistent testimony by the defendant. ***Kansas v. Venstris*, 556 U.S. 586 (2009)**.
- When a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick to also waive his right to counsel under the Sixth Amendment, even though the *Miranda* rights purportedly have their source in the Fifth Amendment. ***Montejo v. Louisiana*, 556 U.S. 778, 786 (2009)**. The appointment of counsel does not preclude the police from initiating a conversation with a defendant without his counsel present. The officers need to read the defendant his *Miranda* rights and obtain a waiver, in absence of counsel. *Id.* Even if a defendant has invoked his Sixth Amendment right to counsel, officers may still initiate interrogation, if there is no Fifth Amendment bar to approaching. Officers must obtain a valid waiver for any statement used against the defendant. Although case law is not clear, it would appear that a second attempt to initiate interrogation after a refusal to waive counsel would be questionable. *Id.*

---

Statements obtained in violation of a defendant's Sixth Amendment right to counsel are inadmissible in the state's case in chief.

## Right to Confront Witnesses

The Sixth Amendment also provides, “[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...” When a witness appears at trial and is subjected to cross-examination, the right to confront witnesses is guaranteed. Is the right to confront witnesses preserved when out of court statements are admitted in trial?

### ADMISSIBILITY OF OUT OF COURT STATEMENTS

- For testimonial evidence to be admissible, the Sixth Amendment Confrontation Clause demands that the witness is unavailable and defendant had a prior opportunity for cross-examination. ***Crawford v. Washington, 541 U.S. 36 (2004)***. In this case, the defendant was charged with assaulting his wife. During the trial, prosecutors tried to introduce a recorded statement of his wife made during police interrogation, as evidence that the assault was not in self-defense. The wife did not testify at trial because of the state’s marital privilege. Use of this testimonial statement violated the Confrontation Clause because confrontation is the only indicium of reliability sufficient to satisfy constitutional demands. *Id.*

### UNAVAILABLE WITNESS

- The witness must be unavailable before prior testimony where the witness was cross-examined is admissible under the Sixth Amendment. A witness is not unavailable unless the State has made a good-faith effort to obtain the witness’s presence at trial. ***Hardy v. Cross, 565 U.S. 65, 70 (2011)*** (the state court was not unreasonable in determining that the prosecution established the victim’s unavailability for purposes of the confrontation clause).

### PRIOR TESTIMONY SUBJECT TO CROSS-EXAMINATION

- “[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” ***Crawford v. Washington, 541 U.S. 36, 9 n.9 (2004)***.
- The witness must be actually called to testify and not merely made available to either the state or defense to call. ***Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009)***.

At petitioner’s state-court drug trial, the prosecution introduced certificates of state laboratory analysts stating that material seized by police and connected to petitioner was cocaine of a certain quantity. As required by Massachusetts law, the certificates were sworn to before a notary public and were submitted as prima facie evidence of what they asserted. Petitioner objected, asserting that *Crawford v. Washington, 541 U.S. 36 (2004)*, required the analysts to testify in person.

The admission of the certificates violated petitioner’s Sixth Amendment right to confront the witnesses against him.

---

For testimonial evidence to be admissible, the Sixth Amendment Confrontation Clause demands that the witness is unavailable and defendant had a prior opportunity for cross-examination.

The certificates are affidavits, which fall within the “core class of testimonial statements” covered by the Confrontation Clause. They asserted that the substance found in petitioner’s possession was, as the prosecution claimed, cocaine of a certain weight—the precise testimony the analysts would be expected to provide if called at trial.

Not only were the certificates made, as *Crawford* required for testimonial statements, “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,” but under the relevant Massachusetts law their *sole purpose* was to provide prima facie evidence of the substance’s composition, quality, and net weight. Petitioner was entitled to “be confronted with” the persons giving this testimony at trial. *Melendez-Diaz, supra.*, at 311.

A witness’s testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Id.*<sup>9</sup>

## EVIDENCE NOT FOR PURPOSES OF PROVING THE TRUTH

- If a statement is offered for a purpose other than for its truth, it falls outside of the confrontation clause. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (“The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”). Evidence used only to impeach a witness is not introduced to prove the truth of the matter. ***Williams v. Illinois*, 567 U.S. 50, 106 (2012)** or as the basis of expert’s opinion.
- The Supreme Court has not ruled on other type evidences such as corroboration, to explain the course of an investigation, to explain a listener’s or reader’s reaction or response, or for illustrative purposes.

## DEFENDANT’S EVIDENCE

- The confrontation clause limits the evidence that the state may introduce but does not limit the evidence that a defendant may introduce. ***Giles v. California*, 554 U.S. 353, 376 n.7 (2008)**.

<sup>9</sup> The Supreme Court granted certiorari in the case of *Briscoe v. Virginia*, 559 U.S. 32 (2010) to consider a Virginia law which allowed a certified copy of a report to be admitted without presenting the testimony of the analyst who prepared the certificate but providing that the accused has a right to call the analyst as his or her own witness. The Supreme Court vacated the conviction and remanded the case to Virginia in consider in light of *Melendez-Diaz*. If there is a privilege or other restriction on cross-examination, then the witness may not have been subject to cross-examination. *Crawford v. Washington, supra.* (*Crawford* involved marital privilege). The Supreme Court has yet to rule on whether a witness who claims memory loss is subject to cross-examination.

## TESTIMONIAL EVIDENCE

- The *Crawford* rule applies only to testimonial evidence. Evidence that is nontestimonial is outside of the confrontation clause and is admissible if it falls with the rules of evidence. In addition to classifying as testimonial a suspect's statements during police interrogation, *Crawford* suggested that the term had broader application. The USSC held that the confrontation clause applies to those who "bear testimony" against the accused. Testimony is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." ***Crawford v. Washington*, 541 U.S. 36, 51 (2004)**.
- The *Crawford* Court did not give a comprehensive list of testimonial evidence. ***Crawford v. Washington*, 541 U.S. 36, 68 (2004)**.
- Testimonial evidence includes prior trial, preliminary hearing, and grand jury testimony, *Id.*, plea allocutions, *Id.* at 64 and deposition testimony. ***Davis v. Washington*, 547 U.S. 813, 824 n.3 (2006)**, custodial interrogation of a suspect, *Crawford*, *supra.*, and victims, *Davis*, *supra.*

## CONFRONTATION CLAUSE—TESTIMONIAL EVIDENCE

- For many states, the way the government's toxicological evidence is admitted in an impaired driving trial was greatly impacted by the ***Crawford v. Washington*, 541 U.S. 36 (2004)** line of cases. Prior to *Crawford*, the United States Supreme Court generally adhered to the view that as long as there was a firmly rooted exception to the hearsay rule, the Confrontation Clause did not bar the admission of out-of-court statements including records. *Crawford* reframed the criteria for determining when hearsay statements are admissible in a criminal trial under the Sixth Amendment's Confrontation Clause. It held out-of-court testimonial evidence is barred under the Confrontation Clause, unless the witness is unavailable and the defense had the prior opportunity to cross-examine the witness. *Id.*



## EXAMPLES OF TESTIMONIAL EVIDENCE

- Police Reports and Crash Reports

Police records and crash reports are testimonial. ***Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321–2 (2009)**.

- Certificates of Non-Existence of Records

*Melendez-Diaz* held that certificates of nonexistence of records are testimonial. ***Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 323 (2009)**.

- Chain of Custody Evidence

Chain of custody information is testimonial. However, the majority took issue with the dissent's assertion that "anyone whose testimony may be relevant in establishing the chain of custody . . . must appear in person as part of the prosecution's case." ***Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009)**. The Supreme Court noted that while the state has to establish a chain of custody, gaps go to the weight of the evidence, not its admissibility.

- Laboratory Reports

Lab reports (certificates of analysis sworn by analysts at a state lab) declaring the substance analyzed is a certain drug, generated to serve as trial evidence and offered at trial as evidence of the substance's composition, are testimonial for purposes of the Confrontation Clause. ***Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009)**. There is no "forensic evidence" exception to *Crawford*. Unless the parties stipulate to the admission of these types of reports, the State may not introduce them without live testimony from a witness with the ability to testify to the truth of the report's statements. *Id.*

A lab report (certificate of analysis) containing the results of a blood-alcohol test administered pursuant to a DUI arrest is testimonial and subject to the limitations of the Confrontation Clause. ***Bullcoming v. New Mexico*, 564 U.S. 647 (2011)**.<sup>10</sup> Blood alcohol reports are not admissible as business records; nor are they admissible through the surrogate testimony of an expert who lacks the ability to testify to the report. *Id.*

Two potentially useful factual scenarios not presented for consideration or addressed in *Bullcoming*, are: "one in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue" or "one in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." *Id.* at 672–3.

In ***Williams v. Illinois*, 567 U.S. 50 (2012)**, the Supreme Court addressed the constitutionality of permitting one expert witness to express an opinion based on "facts about a case that have been made known to the expert but about which the expert is not competent to testify" when the underlying statements are not themselves admitted as evidence. *Id.* at 56. In *Williams*, a forensic specialist from the state police lab testified in Williams's bench trial for rape. She testified she matched a DNA profile provided by an outside lab to a profile the state lab produced using a sample of Williams's blood. She testified the outside lab was accredited and that the business records showed the swabs

---

A lab report (certificate of analysis) containing the results of a blood-alcohol test administered pursuant to a DUI arrest is testimonial and subject to the limitations of the Confrontation Clause.

<sup>10</sup> The opinion in *Bullcoming* is a plurality opinion. The narrow holding is: a blood alcohol lab test report is the testimonial statement of the analyst who performed the test within the meaning of *Crawford v. Washington*, *supra*. and thus subject to the limitations of the Confrontation Clause. As the U.S. Supreme Court itself has held: "[w]hen there is no majority opinion, the narrower holding controls. *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007). See also *Marks v. United States*, 430 U.S. 188, 193 (1977).

taken from the rape victim were sent to the lab and returned. She did not testify about identification of the sample used for the outside lab's profile, how the sample was handled or tested by the outside lab, or that the outside lab's profile was accurate.

In a fractured plurality opinion, the Court ruled the defendant's right to confrontation was not violated and upheld the admission of expert testimony which conveyed the defendant's DNA profile matched a DNA profile generated by a non-testifying scientist from another lab.

Depending upon the laws in a particular state, it is possible the State may be able to admit forensic lab results, including blood test results, through an expert witness who did not participate in the testing process, without violating the *Crawford*, *Melendez-Diaz*, and *Bullcoming*, prohibitions. To do this, the testifying expert must be able to form his/her own opinion regarding the test results from the review of the notes, printouts, and results produced by the analyst who did the testing. The testifying expert must testify to his/her own opinion regarding the results. He/she cannot be a mere conduit for the opinion of the non-testifying analyst.

It may be a safe course of action to admit the lab results orally through the opinion of the testifying expert and to forgo admitting the written report. If it is done in this manner, the State has produced the witness whose opinion it is admitting and relying on. The defense may cross-examine and confront this witness. The defense can question the witness regarding how it is that the witness can form his/her own opinion when he/she did not conduct the analysis. There is neither a confrontation nor hearsay issue.

***Williams v. Illinois*, 567 U.S. 50 (2012)** lends some support to this approach as does Justice Sotomayor's concurrence in *Bullcoming*. "We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." *Bullcoming*, *supra.*, at 673.<sup>11</sup>

<sup>11</sup> Additionally, various state courts have allowed this type of testimony. An opinion on point for blood alcohol analysis is *State v. Karp (Voris, Real Party in Interest)* 236 Ariz. 120 (App. 2014). "[W]hen an expert gives an independent opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and determine whether that opinion should be found credible." 236 Ariz. at 125. "[T]he key inquiry is not whether the basis of an expert's testimony is testimonial, but rather whether the expert is testifying to the non-testifying expert's conclusions or his own." 236 Ariz. at 125.

When ruling the State had not violated the Confrontation Clause when it admitted blood test results through the testimony of an expert who did not participate in the testing, the *Karp* Court noted: "Our analysis of expert testimony based on forensic reports prepared by a non-testifying expert is consistent with that of other jurisdictions. See, e.g., *People v. Dungo*, 55 Cal.4th 608, 147 Cal.Rptr.3d 527, 286 P.3d 442, 448-49 (2012) (providing that substitute medical examiner may testify regarding his "independent

## NON-TESTIMONIAL EVIDENCE—PRIMARY PURPOSE TEST

- *Davis v. Washington* is a consolidation of two separate domestic violence cases, *Davis v. Washington* and *Hammon v. Indiana*. ***Davis v. Washington*, 547 U.S. 813 (2006)**. Both cases involved statements by victims to police officers or their agents; one statement was determined to be non-testimonial and the other testimonial. The USSC adopted a “primary purpose” test for determining the testimonial nature of statements made during a police interrogation. It held statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. On the other hand, statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past facts potentially relevant to later criminal prosecution. *Id.* at 825–6.
- The test to determine an ongoing emergency is an objective and not subjective one. A court must objectively evaluate the circumstances of the encounter and the statements and actions of both the declarant and the interrogator. ***Michigan v. Bryant*, 562 U.S. 344, 367 (2011)**. The USSC held the existence of an ongoing emergency “is among the most important circumstances informing the ‘primary purpose’ of an interrogation. *Id.* at 361 (a mortally wounded shooting victim’s statements to first-responding officers were non-testimonial).
- Statements by a child to a teacher about abuse were non-testimonial because the abuse was an ongoing emergency. The USSC did not “adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment,” but held that “[c]ourts must evaluate challenged statements in context, and part of that context is the questioner’s identity.” ***Ohio v. Clark*, 576 U.S. 237, 249 (2015)**. The USSC has clarified “that ‘there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony’”; in these instances, the statements will be nontestimonial. *Id.* at 246.

---

opinion” as expert witness when that opinion was based solely on a review of an autopsy report prepared by non-testifying expert); *State v. Greineder*, 464 Mass. 580, 984 N.E.2d 804, 815–16 (2013) (holding that defendant’s confrontation rights were not violated by admission of testimony of DNA expert despite expert’s reliance on the DNA test results obtained by non-testifying analyst); *Jenkins v. State*, 102 So.3d 1063, 1069 ¶ 17 (Miss.2012) (holding that defendant’s confrontation rights were not violated when laboratory supervisor was allowed to testify about a GC/mass spectroscopy report on defendant’s blood sample and his conclusion that the substance seized from defendant was cocaine, even though another analyst performed the test); *State v. Ortiz-Zape*, 367 N.C. 1, 743 S.E.2d 156, 163–64 (2013) (holding that admission of crime-lab analyst’s expert opinion, based on her independent analysis of testing performed by another analyst in her laboratory of defendant’s blood sample, that substance tested was cocaine did not violate defendant’s confrontation rights).” 236 Ariz. at 125. Each of these opinions was issued post-*Bullcoming*.

## EXAMPLES OF NON-TESTIMONIAL EVIDENCE

- Business Records

A business record created for the administration of an entity's affairs and not to establish or prove a fact at trial is non-testimonial. ***Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321–2 (2009)**.

- Public Records

"Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." ***Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009)**. Driver's license records including status of license, convictions, suspensions, reinstatements and notices probably fall under the business records exception, but the USSC has never specifically addressed driver's license records.

- Records Regarding Equipment Maintenance

In *Melendez-Diaz*, the USSC stated "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." ***Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009)**.

- Medical Records

***Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2 (2009)**.

- Court Records

Court records for the proposition that facts regarding the conduct of a prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to the defendant's guilt or innocence and thus were nontestimonial. ***Davis v. Washington*, 547 U.S. 813 (2006)** (citing *Dowdell v. United States*, 221 U.S. 325 (1911)).

- Statements from One Prisoner to Another

Prisoner statements to other prisoners are non-testimonial. ***Davis v. Washington*, 547 U.S. 813 (2006)** (citing *Dutton v. Evans*, 400 U.S. 74, 87–89 (1970)).

- Statements to Friends and Neighbors

"Statements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules...." ***Giles v. California*, 554 U.S. 353, 376 (2008)**.



- Statements to Medical Personnel

Statements to “physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules...” ***Giles v. California*, 554 U.S. 353 (2008)**.

- Statements to Informants

Statements made unwittingly to government informants are nontestimonial. ***Davis v. Washington*, 547 U.S. 813 (2006)**.

- Statements in Furtherance of a Conspiracy

The USSC indicated that statements in furtherance of a conspiracy are non-testimonial. ***Crawford v. Washington*, 541 U.S. 36 (2004); *Giles v. California*, 554 U.S. 353 (2008)**.

- Casual or Offhand Remarks to an Acquaintance

The USSC stated that “off-hand, overheard remark[s]” and “casual remark[s] to an acquaintance” bear little relation to the types of evidence that the confrontation clause was designed to protect and thus are non-testimonial. ***Crawford v. Washington*, 541 U.S. 36 (2004)**.

- Statements by Children to Teachers or Social Workers

See ***Ohio v. Clark*, 576 U.S. 237 (2015)**, above.

## DYING DECLARATIONS

The USSC acknowledged cases supporting a dying declaration exception to the confrontation clause but declined to rule on the issue. ***Crawford v. Washington*, 541 U.S. 36 (2004)**.

## FORFEITURE BY WRONGDOING

The USSC has recognized forfeiture by wrongdoing exception to the confrontation clause that extinguishes confrontation claims on the equitable grounds that a person should not be able to benefit from his or her wrongdoing. Forfeiture by wrongdoing applies when a defendant engages in a wrongful act designed to prevent the witness from testifying, such as threatening, killing, or bribing the witness. ***Giles v. California*, 554 U.S. 353, 359 (2005)**. When the defendant intends to cause the witness’s absence at trial, he/she cannot complain of that absence.

The prosecution must establish that the defendant engaged in the wrongdoing with intent to make the witness unavailable. It is not enough that the defendant engaged in a wrongful act, for example, killing the witness. The defendant must have killed the witness to make the witness unavailable for trial.

The *Giles* Court suggested that forfeiture applies not only when the defendant personally engages in the wrongdoing that brings about the witness’s absence but also when the defendant “uses an intermediary for the purpose of making a witness absent.” *Id.* at 360. Acts of domestic violence often are intended to

dissuade a victim from resorting to outside help and may be the basis of a forfeiture argument. The state must prove that the defendant engaged in the wrongful conduct and that is the reason the witness is unavailable to testify.

### FACE-TO-FACE CONFRONTATION

- The Sixth Amendment confrontation clause usually “guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.” ***Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).**
- In ***Maryland v. Craig*, 497 U.S. 836 (1990)** the USSC upheld a Maryland statute that allowed a judge to receive, through a one-way closed-circuit television system, the testimony of an alleged child abuse victim. Under the one-way system, the child witness, prosecutor, and defense counsel went to a separate room while the judge, jury, and defendant remained in the courtroom. The child witness was examined and cross-examined in the separate room, while a video monitor recorded and displayed the child’s testimony to those in the courtroom. The procedure prevented the child witness from seeing the defendant as she testified against the defendant at trial. However, the child witness had to be competent to testify and to testify under oath; the defendant retained full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant were able to view by video monitor the demeanor of the witness as she testified. Throughout the procedure, the defendant remained in electronic communication with defense counsel, and objections were made and ruled on as if the witness were testifying in the courtroom.

The Court made clear that the State must make a case-specific showing of necessity. Specifically, “[t]he trial court must hear evidence and determine [whether use of the one-way closed-circuit television procedure]...is necessary to protect the [welfare of the particular child witness who seeks to testify]...; find that the child [witness] would be traumatized, not by the courtroom generally, but by the defendant’s presence; and find that the emotional distress suffered by the child in the presence of the defendant is more than *de minimis*. [*i.e.*, more than mere nervousness or excitement or some reluctance to testify]” *Id.* at 838.

The Court went on to note that in the case before it, the reliability of the testimony was otherwise assured. Although the Maryland procedure prevented a child witness from seeing the defendant as he/she testified at trial, the procedure required that (1) the child be competent to testify and testify under oath; (2) the defendant have full opportunity for contemporaneous cross-examination; and (3) the judge, jury, and defendant be able to view the witness’s demeanor while he/she testified.

*Craig* requires (1) denial of confrontation is necessary to further an important public policy interest and (2) the reliability of the testimony is otherwise assured. The USSC has not yet considered whether the type of procedure sanctioned in *Craig* for child victims survives the confrontation requirements established in *Crawford v. Washington*, 541 U.S. 36 (2004).

## TWO-WAY VIDEO TESTIMONY

The United States Supreme Court has never ruled on two-way video testimony. See ***Wrotten v. New York*, 560 U.S. 959 (2010)** (Statement of Justice Sotomayor respecting the denial of the petition for writ of certiorari).

## NOTICE & DEMAND—WAIVER

- Confrontation clause rights, like constitutional rights generally, may be waived. ***Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314 n.3 (2009)** (“The right to confrontation may, of course, be waived.”).
- To be valid, a waiver of confrontation rights, like a waiver of any constitutional right, must be knowing, voluntary, and intelligent. ***Maryland v. Shatzer*, 559 U.S. 98, 104 (2010)** (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)).

## Speedy Trial

- The Sixth Amendment provides “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .”
- The defendant’s right to a speedy trial is based on the Sixth Amendment to the United States Constitution applies to state criminal charges. ***Klopper v. North Carolina*, 386 U.S. 213 (1967)**.
- The Sixth Amendment right to a speedy trial attaches at arrest, indictment, or other official accusation, whichever occurs first. ***Doggett v. United States*, 505 U.S. 647 (1992); *Dillingham v. United States*, 423 U.S. 64 (1975)**.
- Pre-indictment delays are analyzed under the Fourteenth Amendment Due Process and not the Sixth Amendment speedy trial provisions. ***United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971)**.
- Even when the defendant is unaware that he/she has been charged with a crime, the defendant’s speedy trial right attaches and the clock begins to run on issuance of the indictment or other official accusation. ***Doggett v. United States*, 505 U.S. 647 (1992)** (the defendant unaware of indictment until arrest eight years later).
- Defendants who have been convicted of an unrelated crime do not lose the Sixth Amendment right to a speedy trial while in prison. ***Smith v. Hooey*, 393 U.S. 374 (1969)**.



### ASSESSING A CLAIM OF DENIAL OF SPEEDY TRIAL

- There is not a *per se* length of delay or bright-line test to determine whether the speedy trial right has been violated. ***Barker v. Wingo*, 407 U.S. 514 (1972)** held that the following four factors must be balanced to determine whether the right to speedy trial has been violated:
  - length of the pretrial delay,
  - reason for the delay,
  - prejudice to the defendant, and
  - defendant's assertion of the right to a speedy trial.
- The nature of the right “necessarily compels courts to approach speedy trial cases on an *ad hoc* basis.” ***Barker v. Wingo*, 407 U.S. 514, 530 (1972)**. “Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.” *Id.* at 530; (See *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) (finding the longer the delay, the more heavily this factor weighs against the State; a delay of eight years required dismissal)). “A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered . . . . Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.” *Id.* at 531.

---

There is not a *per se* length of delay or bright-line test to determine whether the speedy trial right has been violated.

### SPEEDY TRIAL APPLIES ONLY TO GUILTY/INNOCENCE AND NOT SENTENCING OR AFTER DISMISSAL

- The Sixth Amendment's speedy trial guarantee does not apply to the sentencing phase of a criminal prosecution. ***Betterman v. Montana*, \_\_ U.S. \_\_, 136 S. Ct. 1609 (2016)**. *United States v. Loud Hawk*, 474 U.S. 302 (1986) (finding no Sixth Amendment right to speedy trial after dismissal, even if the government is appealing the dismissal); *United States v. MacDonald*, 456 U.S. 1 (1982) (ruling Sixth Amendment right to speedy trial not implicated during four years between dismissal and reinstatement of charges).
- Undue delay in re-prosecuting the charge must be analyzed under the Due Process Clause. ***United States v. Lovasco*, 431 U.S. 783 (1977)**; ***United States v. Marion*, 404 U.S. 307 (1971)**.

### OVERCROWDED COURTS—TRYING OTHER OLDER CASES

- “[O]vercrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” ***Barker v. Wingo*, 407 U.S. 514, 531 (1972)**.

## DELAYS BY DEFENSE

- Because “the attorney is the [defendant’s] agent when acting, or failing to act, in furtherance of the litigation,” delay caused by the defendant’s counsel is also charged against the defendant. ***Coleman v. Thompson*, 501 U.S. 722, 753 (1991)**.
- The same principle applies whether counsel is privately retained or publicly assigned, for “[o]nce a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.” ***Polk County v. Dodson*, 454 U.S. 312, 318 (1981)** (internal quotation marks omitted). ***Vermont v. Brillon*, 556 U.S. 81, 90–1 (2009)**. See also ***United States v. Loud Hawk*, 474 U.S. 302, 316, (1986)** (noting that a defendant whose trial was delayed by his interlocutory appeal “normally should not be able ... to reap the reward of dismissal for failure to receive a speedy trial”).
- The state may be responsible if there is a breakdown in the public defender system. ***Vermont v. Brillon*, 556 U.S. 81, 92–93 (2009)**.

## PREJUDICE TO DEFENDANT

- The *Barker* Court identified three types of prejudice that may result from a delayed trial:
  - oppressive pretrial incarceration;
  - the social, financial, and emotional strain of living under a cloud of suspicion; and
  - impairment of the ability to present a defense. ***Barker v. Wingo*, 407 U.S. 514, 532 (1972)**.
- The strongest prejudice claims are those in which a defendant can show that his or her ability to defend against the charges was impaired by the delay. ***United States v. Marion*, 404 U.S. 307 (1971)**. Formal accusation may “interfere with the defendant’s liberty, ... disrupt his employment, drain his financial resources, curtail his associations, ... and create anxiety in him, his family and his friends.” *Id.* at 320.

## DEFENDANT IS NOT REQUIRED TO DEMAND SPEEDY TRIAL

- The USSC rejected a rule whereby a defendant who failed to demand a speedy trial would waive his or her right to one. Instead, *Barker* held that the defendant’s assertion of or failure to assert his or her right to a speedy trial is one factor to be weighed in the inquiry into the deprivation of the right. ***Barker v. Wingo*, 407 U.S. 514, 528 (1972)**. This factor will be weighed most heavily in favor of defendants who have repeatedly asked for a trial and who have objected to State motions for continuances.

## REMEDY FOR VIOLATION OF SPEEDY TRIAL RIGHTS

- Dismissal of the charge with prejudice (which means the charge cannot be tried again) is the only remedy for violation of a defendant's constitutional right to a speedy trial. ***Barker v. Wingo*, 407 U.S. 514, 522 (1972).**

## Trial by an Impartial Jury of the State—Cross-Section of Community

- The Sixth Amendment provides “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .”
- Under the Sixth Amendment and the Fourteenth Amendment’s Due Process Clause, jurors who are biased against the defendant and cannot decide the case based on the trial evidence and the law must be excused. ***Irvin v. Dowd*, 366 U.S. 717, 722 (1961).**
- It is a violation of the Equal Protection Clause of the Fourteenth Amendment for either party to exercise a peremptory challenge based on a prospective juror’s race or sex. ***Batson v. Kentucky*, 476 U.S. 79, 89 (1986).**
- The defendant need not be of the same race or sex as the prospective juror who was excused in order to assert that the State improperly challenged the juror. ***Powers v. Ohio*, 499 U.S. 400, 415 (1991).**
- Although *Batson* concerned only racial discrimination, its principles have been extended to sex discrimination. ***J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994).**
- The right to peremptory challenges is a statutory right and not a constitutionally protected right. ***Rivera v. Illinois*, 556 U.S. 148, 157 (2009)** (finding peremptory challenges are creatures of statute and states may decline to authorize them).
- A prima facie showing of a *Batson* violation does not require a litigant to show that it is more likely than not that the opposing party has engaged in discrimination. “[E]vidence sufficient to permit the trial judge to draw an inference that discrimination has occurred,” is all that is required. ***Johnson v. California*, 545 U.S. 162, 170 (2005).**
- If the judge rules that the party has made a prima facie showing, step one, the remaining steps in the three-step process must be completed. If a party offers, or the trial judge requests, a neutral justification before the trial judge has ruled on the sufficiency of the prima facie case and a non-discriminatory reason is provided, the sufficiency of the prima facie case for step one becomes moot. The issue becomes the validity of the neutral justification. ***Hernandez v. New York*, 500 U.S. 352, 359 (1991).**

- The neutral justification need not be the level of a challenge for cause. “Although the prosecutor must present a comprehensible reason, ‘[t]he second step of this process does not demand an explanation that is persuasive or even plausible’; so long as the reason is not inherently discriminatory, it suffices. *Purkett v. Elem*, 514 U.S. 765, 767–768 (1995) (per curiam).” ***Rice v. Collins*, 546 U.S. 333, 338 (2006)**. Unless the reason shows discrimination, the court must determine if discrimination occurred as provided in step three.
- In the final step of the process, the court must determine whether the party who exercised the preemptory challenge engaged in purposeful discrimination. The burden of showing discrimination rests with the party making a *Batson* claim. ***Rice v. Collins*, 546 U.S. 333, 338 (2006)**.
- The party making the claim must be given an opportunity to rebut the neutral justification offered by the other party before the court rules. The party making the claim need not show that the party using its preemptory challenge did so based solely or exclusively on the race or sex of the prospective juror. It is sufficient to show that the juror’s race or sex was a “significant,” reason for the strike. ***Miller-El v. Dretke*, 545 U.S. 231, 252 (2005)**.
- In the typical preemptory challenge inquiry, the decisive question will be whether counsel’s race-neutral explanation for a preemptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor’s state of mind based on demeanor and credibility lays ‘peculiarly within a trial judge’s province.’ (citations omitted) ***Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003)**.
- A neutral explanation can be rebutted by showing the acceptance of a juror of another race or sex who gave a similar answer or different questions being directed to a juror of a different race or sex. Juror comparisons have been characterized as “[m]ore powerful than ... bare statistics.” ***Miller-El v. Dretke*, 545 U.S. 231, 241 (2005)**.
- When a party contends that the other side has exercised a preemptory challenge in a discriminatory manner—that is, when a party makes a *Batson* claim—the trial judge must follow a three-step process to resolve the issue:
  - The party making the *Batson* claim must make a prima facie showing that the other side exercised a preemptory challenge based on race or sex.
  - Neutral justification. If a prima facie showing has been made, the other side must offer a justification for its use of its preemptory challenge that is not based on race or sex.
  - The Court determines if the other party in fact engaged in purposeful discrimination. ***Snyder v. Louisiana*, 552 U.S. 472, 476–77 (2008)**.
- The remedy at trial for a *Batson* violation is to deny the party the right to exclude the juror. The remedy for a violation after trial is a new trial.

# Fourteenth Amendment

The 14th Amendment provides no State shall "...deprive any person of life, liberty, or property without due process of law. ..." The main concept behind "due process" is the idea of a fair trial. A fair trial is one that provides confidence in its verdict.

This monograph thus far has examined the constitutional law issues arising under the 4th, 5th, and 6th Amendments in impaired driving cases. This examination is a somewhat chronological examination as issues arise from the time prior to a traffic stop through the confrontation of witnesses at trial. This portion of the monograph considers the 14th Amendment Due Process considerations relating to a prosecutor's discovery and disclosure obligations.

## Discovery Rules

Discovery rules are contained within a jurisdiction's rules of criminal procedure, court rules, and/or legislation and provide for what and how the parties of a criminal case disclose information. Additionally, a prosecutor's office may have policies relating to discovery and disclosure obligations. A prosecutor should be well aware of the rules in his/her jurisdiction and the policies of his/her office for the failure to comply may not only negatively impact the criminal case at hand (*e.g.*, evidence may be suppressed, case may be dismissed) but the failure could also potentially negatively impact a prosecutor's bar license and employment. Although this monograph is about constitutional issues in impaired driving cases, it is worthy to note the American Bar Association's Model Rules of Professional Conduct. Rule 3.8 outlines the Special Responsibilities of a Prosecutor. Relating to a prosecutor's duty to disclose, "[t]he prosecutor in a criminal case shall ... (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigation information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal ...".<sup>12</sup>

Under the Federal Rules of Criminal Procedure Rule 16, a prosecutor is generally required to provide to the defendant, upon the defendant's request: the substance of any relevant oral statement made by the defendant before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the prosecutor intends to use the statement at trial;<sup>13</sup> relevant written,

---

Discovery rules are contained within a jurisdiction's rules of criminal procedure, court rules, and/or legislation and provide for what and how the parties of a criminal case disclose information.

<sup>12</sup> American Bar Association's Model Rules of Professional Conduct, 2020 edition.

<sup>13</sup> FRCP Rule 16(a)(1)(A).



or recorded statement made by the defendant;<sup>14</sup> a copy of the defendant's prior record;<sup>15</sup> reports of examinations or tests;<sup>16</sup> and a written summary of any expert witness a prosecutor intends to use at trial.<sup>17</sup> Additionally, the prosecutor must provide an opportunity to inspect and to copy any documents and/or objects (*i.e.*, papers, documents, photographs, etc.) intended to be used in the case against the defendant that may be material to preparing a defense, or was obtained from the defendant.<sup>18</sup>

Rule 16 allows for reciprocal discovery as well.<sup>19</sup> A prosecutor is permitted to make the same requests of the defendant. Rule 16 also imposes an ongoing obligation on the parties to continue to provide requested discovery as it becomes available.

The Jencks Act<sup>20</sup> requires a prosecutor to preserve and disclose to the defendant at trial, any prior statement of its witnesses who testify at trial. The underlying purpose of the Act is to allow the defendant to review those statements for possible inconsistencies between a witness's prior statement and his/her trial testimony. These requirements are extended to defense witnesses through the Federal Rules of Criminal Procedure.<sup>21,22</sup>

To be producible under Jencks, the writing must be: (1) a statement of a witness [A signed or adopted writing (including grand jury or preliminary hearing testimony) or a substantially verbatim recital of an oral statement which was recorded contemporaneously with the oral statement.]; (2) In the possession of the government; (3) Relating to the subject matter of the testimony; and (4) requested by the opponent.

If defendant makes a request for discovery and prosecutor fails to provide, the trial court may consider the reason for the failure and has broad discretion to determine the sanction. Reasons may include negligence or a prosecutor's bad faith suppression of the information. Sanctions may include granting a continuance for the trial, dismissal of the case,



<sup>14</sup> FRCP Rule 16(a)(1)(B).

<sup>15</sup> FRCP Rule 16(a)(1)(D).

<sup>16</sup> FRCP Rule 16(a)(1)(F).

<sup>17</sup> FRCP Rule 16(a)(1)(G).

<sup>18</sup> FRCP Rule 16(a)(1)(E).

<sup>19</sup> FRCP Rule 16(b).

<sup>20</sup> 18 USC Sec. 3500 (1957, as amended 1970).

<sup>21</sup> See Federal Rules of Criminal Procedure, Rule 26.2—Producing a Witness's Statement.

<sup>22</sup> See also *Jencks v. United States*, 353 U.S. 657 (1957).

provision of a missing evidence instruction, striking evidence, and/or excluding evidence from the prosecutor's case-in-chief. The reason for the failure and/or the prejudice to the defendant may likely impact the severity of the sanction.

## Disclosure Obligations

- Separate and distinct from obligations imposed by criminal rules or discovery statutes, prosecutors have a constitutionally based duty under ***Brady v. Maryland*, 373 U.S. 83 (1963)**.
- The suppression by the prosecution of evidence favorable to and requested by an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. ***Brady v. Maryland*, 373 U.S. 83 (1963)**. In *Brady*, the defendant was charged with murder and sentenced to death. In his testimony, he admitted his participation in the crime, but claimed a co-defendant did the actual killing. Brady's counsel conceded guilt of murder but requested the verdict without capital punishment. Prior to trial, Brady's counsel requested to see all of the co-defendant's statements. All but one was provided to counsel; the one not turned over is the one the co-defendant admitted committing the homicide. Brady did not learn of this until after sentencing.
- Impeachment information that is materially exculpatory falls within the *Brady* rule, ***Giglio v. United States*, 405 U.S. 150, 154 (1972)**. In this case, there was a single witness linking Giglio to the charged crime. A co-defendant confessed his involvement to police and agreed to help the police. He was promised leniency for his assistance, but the deal was not disclosed to Giglio. When reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within rule that suppression of material evidence justifies a new trial irrespective of good faith or bad faith of the prosecution.
- In determining whether a defendant has been denied a fair trial on theory that evidence, unknown to him, has been suppressed by prosecution, important factors to be considered are whether prosecution suppressed the evidence after defense made a request for evidence, whether evidence was favorable to defense and whether it was material. ***Moore v. Illinois*, 408 U.S. 786 (1972)**. In *Moore*, the defendant was convicted of murder for the shotgun killing of a bartender. Some evidence was not disclosed to the defendant prior to trial but was deemed not material under *Brady*. Here, the defendant's right to due process was not violated by the prosecutor's failure to produce evidence where the evidence did not impeach the identification of the defendant as the assailant and was therefore not material to the issue of guilt.
- The Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as juvenile delinquent when such an impeachment would conflict with a State's asserted interest in preserving the confidentiality of juvenile

---

The suppression by the prosecution of evidence favorable to and requested by an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

adjudications of delinquency. ***Davis v. Alaska*, 415 U.S. 308 (1974)**. Here, a crucial witness for the prosecution was on juvenile probation. At trial, prior to the witness's testimony, the prosecutor moved for a protective order to prevent any reference to his juvenile record based on the state's juvenile confidentiality laws. Davis's counsel wanted to be able to argue the witness acted out of fear or concern of possible jeopardy to his probation. In other words, he wanted to reveal the witness's record "...only as necessary to probe [the witness] for bias and prejudice and not generally to call [his] good character into question." *Id.* at 311. The trial court granted the protective order. The USSC "...recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* at 316.

- Prosecutor's constitutional duty of disclosure is not measured by his moral culpability or willfulness, but if suppression of evidence results in constitutional error, it is because of character of evidence, not character of prosecutor. If evidence is so clearly supportive of claim of innocence that it gives prosecution notice of duty to produce, duty should equally arise even if no request by defense counsel is made; and for such purposes, there is no significant difference between cases in which there has been merely general request for exculpatory matter and cases in which there has been no request at all. ***United States v. Agurs*, 427 U.S. 97, 112 (1976)**. In the *Agurs* case, the defendant was charged with murder after stabbing the victim with a knife. The victim had a prior criminal record that included convictions for assault and carrying a deadly weapon; this record was not disclosed to the defendant prior to the trial. The defendant was convicted and appealed after learning of the victim's prior criminal history.

In this case, the USSC laid out three situations where information is known to the prosecutor at trial but is discovered by the defendant only after the trial:

- The undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew or should have known, of the perjury;
- The undisclosed evidence was requested by the defendant but suppressed by the prosecutor and the evidence was material and may have affected the outcome of the trial; and
- The undisclosed evidence was not requested by the defendant but is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed by the prosecutor even in the absence of such a request. *Id.* 103-111.

Here, the USSC held that the prosecutor's failure to disclose the victim's prior criminal history did not deprive the defendant of a fair trial where it appeared the record was apparently not requested by the defendant and gave no rise to an inference of perjury.

---

Prosecutor's constitutional duty of disclosure is not measured by his moral culpability or willfulness, but if suppression of evidence results in constitutional error, it is because of character of evidence, not character of prosecutor.

- It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably. There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; as the Court wrote, “the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded... ” ***Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)**. In *Bursey*, the defendant was arrested along with Weatherford, an undercover police agent. Prior to the trial, Weatherford was not identified by the prosecutor as a witness. Weatherford’s status as an undercover police agent was maintained until the trial when he was called as a witness for the prosecution and testified about the events giving rise to the arrest of the defendant. *Brady* is not implicated in this circumstance where the only claim is that the prosecutor should have revealed that “...a government informer would present eyewitness testimony of a particular agent against the defendant at trial.” *Id.* at 559–60.
- The *Brady* rule does not require prosecutor to deliver his entire file to defense counsel, but only to disclose evidence favorable to accused that, if suppressed, would deprive him of fair trial. Impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule. Government’s failure to assist defense by disclosing information that might have been helpful in conducting cross-examination amounts to constitutional violation only if it deprives defendant of fair trial; constitutional error occurs, and conviction must be reversed, only if evidence is material in sense that its suppression undermines confidence in outcome of trial. ***United States v. Bagley*, 473 U.S. 667, 676 (1985)**.

In this case, two witnesses in the case against Bagley were state law enforcement officers employed as private security guards and assisting with a federal law enforcement agency in an investigation against the defendant. Defense asked for disclosures of any deals, promises, or inducements made to these two witnesses. The prosecutor denied the existence of any. Later, after the defendant was convicted and sentenced, he discovered the existence of contracts with each of the witnesses wherein the federal agency provided the promise of a money payment for information provided and the accomplishment of the objective sought (*e.g.*, conviction of the defendant). Failure to disclose these contracts prior to trial “...misleadingly [led] defense counsel to believe the witnesses could not be impeached on the basis of bias or interest arising from inducements offered by the Government.” *Id.* at 683.

- Suppression by prosecution of evidence favorable to defendant upon request violates due process, where evidence is material either to guilt or punishment, irrespective of good faith or bad faith of prosecution. Defendant’s failure to request favorable evidence does not leave government free of all obligation to disclose such evidence to defendant under *Brady*. ***Kyles v. Whitely*, 514 U.S. 419, 434–35 (1995)**. Here, the Court ruled favorable evidence is subject to constitutionally mandated disclosure when it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict; the effect of suppressed evidence is to be viewed “collectively” rather than “item by item.”

- The due process duty of the prosecution under *Brady* to disclose evidence favorable to defendant is applicable even though there has been no request by defendant, and encompasses impeachment evidence as well as exculpatory evidence. The *Brady* rule encompasses evidence known only to police investigators and not to the prosecutor, and thus the individual prosecutor has a duty to learn of any evidence favorable to the defense which is known to the others acting on the government's behalf in the case, including the police. ***Strickler v. Greene*, 527 U.S. 263 (1999).**

In this case, the defendant did not make a specific request for discovery of exculpatory evidence because of the prosecutor's open file policy. Here, the government failed to disclose exculpatory materials in the police files (*i.e.*, notes taken by police of interview with eyewitness and letters written by eyewitness to police) that cast serious doubt on the trial testimony of one of the eyewitnesses. In this case, however, it could not be shown that there was a reasonable probability the conviction or sentence would have been different if the materials were disclosed. *Id.* at 296.

## Conclusion

Impaired drivers pose a serious threat to public safety. It is important for police and prosecutors to be prepared to handle the numerous challenges presented by impaired driving cases, including constitutional challenges. Additionally, prosecutors need to be fully aware of the state court rules and laws that may afford a defendant additional protection. For further information, prosecutors may contact their state Traffic Safety Resource Prosecutor or the National Traffic Law Center.

# List of Cited Cases

*Adams v. Williams*, 407 U.S. 143 (1972) • 10, 19  
*Alabama v. White*, 496 U.S. 325 (1990) • 11  
*Arizona v. Gant*, 556 U.S. 332 (2009) • 29–30  
*Arizona v. Hicks*, 480 U.S. 321 (1987) • 6  
*Arizona v. Johnson*, 555 U.S. 323 (2009) • 18, 24  
*Arizona v. Roberson*, 486 U.S. 675 (1988) • 48  
*Arkansas v. Sullivan*, 532 U.S. 769 (2001) • 14, 36  
*Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) • 29

*Barker v. Wingo*, 407 U.S. 514 (1972) • 69–71  
*Batson v. Kentucky*, 476 U.S. 79 (1986) • 71  
*Beck v. Ohio*, 370 U.S. 89 (1964) • 26  
*Beckwith v. United States*, 425 U.S. 341 (1976) • 43  
*Berghuis v. Thompkins*, 560 U.S. 370 (2010) • 47  
*Berkemer v. McCarty*, 468 U.S. 420 (1984) • 22, 44  
*Betterman v. Montana*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 1609 (2016) • 69  
*Birchfield v. North Dakota*, 579 U.S. \_\_\_, 136 S.Ct. 2160 (2016) • 26, 31  
*Bond v. United States*, 529 U.S. 334 (2000) • 6  
*Brady v. Maryland*, 373 U.S. 83 (1963) • 75  
*Brigham City v. Stuart*, 547 U.S. 398 (2006) • 32  
*Brinegar v. United States*, 338 U.S. 160 (1948) • 33  
*Brendlin v. California*, 551 U.S. 249 (2007) • 7, 13  
*Brewer v. Williams*, 430 U.S. 387 (1977) • 57  
*Brower v. County of Inyo*, 489 U.S. 593 (1989) • 12  
*Brown v. Illinois*, 422 U.S. 590 (1975) • 37  
*Brown v. Ohio*, 432 U.S. 161 (1977) • 52  
*Brown v. Texas*, 443 U.S. 47 (1979) • 16  
*Bullcoming v. New Mexico*, 564 U.S. 647 (2011) • 62  
*Burdeau v. McDowell*, 256 U.S. 465 (1921) • 8  
*Byrd v. United States*, 138 S.Ct. 1518 (2018) • 35

## LIST OF CITED CASES

- Cady v. Dombrowski*, 413 U.S. 433 (1973) • 27  
*California v. Byers*, 402 U.S. 424 (1971) • 51  
*California v. Ciraolo*, 476 U.S. 207 (1986) • 6  
*California v. Hodari D.*, 499 U.S. 621 (1991) • 13, 41  
*California v. Trombetta*, 467 U.S. 479 (1984) • 25  
*Carroll v. United States*, 267 U.S. 132 (1925) • 33  
*Chimel v. California*, 395 U.S. 752 (1969) • 28  
*City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) • 16, 17  
*Coleman v. Thompson*, 501 U.S. 722 (1991) • 70  
*Colorado v. Bertine*, 479 U.S. 367 (1987) • 36  
*Coy v. Iowa*, 487 U.S. 1012 (1988) • 67  
*Crawford v. Washington*, 541 U.S. 36 (2004) • 59–61, 66
- Davis v. Alaska*, 415 U.S. 308 (1974) • 75–76  
*Davis v. United States*, 512 U.S. 452 (1994) • 47  
*Davis v. Washington*, 547 U.S. 813 (2006) • 61, 64–66  
*Delaware v. Prouse*, 440 U.S. 648 (1979) • 9, 16, 19–20  
*Dept. of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994) • 54  
*Devenpeck v. Alford*, 543 U.S. 146 (2004) • 14, 27  
*Dillingham v. United States*, 423 U.S. 64 (1975) • 68  
*Dixon v. Love*, 431 U.S. 105 (1977) • 54  
*Doe v. United States*, 487 U.S. 201 (1988) • 49  
*Doggett v. United States*, 505 U.S. 647 (1992) • 68  
*Dow Chemical Company v. United States*, 476 U.S. 227 (1986) • 6
- Edwards v. Arizona*, 451 U.S. 477 (1981) • 45
- Ferguson v. City of Charleston*, 532 U.S. 67 (2001) • 25  
*Florida v. Bostick*, 501 U.S. 429 (1991) • 15  
*Florida v. Jimeno*, 500 U.S. 248 (1991) • 38  
*Florida v. JL*, 529 U.S. 266 (2000) • 11  
*Florida v. Meyers*, 466 U.S. 380 (1984) • 34  
*Florida v. Powell*, 559 U.S. 50 (2010) • 43  
*Florida v. Royer*, 460 U.S. 491 (1983) • 13, 15, 18, 26, 37–38  
*Florida v. Wells*, 495 U.S. 1 (1990) • 36
- Giglio v. United States*, 405 U.S. 150 (1972) • 75  
*Gilbert v. California*, 388 U.S. 263 (1967) • 49  
*Giles v. California*, 554 U.S. 353 (2008) • 60, 65–66  
*Gore v. United States*, 357 U.S. 386 (1958) • 55



## LIST OF CITED CASES

- Hardy v. Cross*, 565 U.S. 65 (2011) • 59  
*Harris v. New York*, 401 U.S. 222 (1971) • 52  
*Hayes v. Florida*, 470 U.S. 811 (1985) • 20  
*Heien v. North Carolina*, 574 U.S. 54 (2014) • 21  
*Hernandez v. New York*, 500 U.S. 352 (1991) • 71  
*Hudson v. United States*, 522 U.S. 93 (1997) • 54–55
- Illinois v. Caballes*, 543 U.S. 405 (2005) • 17, 18  
*Illinois v. Gates*, 462 U.S. 213 (1983) • 10  
*Illinois v. Krull*, 480 U.S. 340 (1987) • 39  
*Illinois v. Lidster*, 540 U.S. 419 (2004) • 17  
*Illinois v. Perkins*, 496 U.S. 292 (1990) • 58  
*Illinois v. Rodriguez*, 497 U.S. 177 (1990) • 9  
*Illinois v. Wardlow*, 528 U.S. 119 (2000) • 12  
*INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) • 38  
*Irvin v. Dowd*, 366 U.S. 717 (1961) • 71
- J.E.B. v. Alabama*, 511 U.S. 127 (1994) • 71  
*Jeffers v. United States*, 432 U.S. 137 (1977) • 53  
*Jencks v. United States*, 353 U.S. 657 (1957) • 74  
*Johnson v. Zerbst*, 304 U.S. 458 (1938) • 57  
*Johnson v. California*, 545 U.S. 162 (2005) • 71
- Kansas v. Glover*, \_\_\_ U.S. \_\_\_, 140 S.Ct. 1183 (2020) • 10  
*Kansas v. Ventris*, 556 U.S. 586 (2009) • 58  
*Katz v. United States*, 389 U.S. 347 (1967) • 5  
*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) • 53  
*Kentucky v. King*, 563 U.S. 452 (2011) • 32  
*Klopfer v. North Carolina*, 386 U.S. 213 (1967) • 68  
*Knowles v. Iowa*, 525 U.S. 113 (1998) • 29  
*Kirby v. Illinois*, 406 U.S. 682 (1972) • 56  
*Kuhlmann v. Wilson*, 447 U.S. 436 (1986) • 57–58  
*Kyles v. Whitely*, 514 U.S. 419 (1995) • 77

## LIST OF CITED CASES

- Mapp v. Ohio*, 367 U.S. 643 (1961) • 38
- Maryland v. Craig*, 497 U.S. 836 (1990) • 67
- Maryland v. Dyson*, 527 U.S. 465 (1999) • 34
- Maryland v. King*, 569 U.S. 435 (2013) • 26
- Maryland v. Shatzer*, 559 U.S. 98 (2010) • 23, 47, 68
- Maryland v. Wilson*, 519 U.S. 408 (1997) • 24
- Massiah v. United States*, 377 U.S. 201 (1964) • 57
- McNeil v. Wisconsin*, 501 U.S. 171 (1991) • 48, 56, 57
- Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) • 59–62, 65, 68
- Michigan v. Bryant*, 562 U.S. 344 (2011) • 64
- Michigan v. Chesternut*, 486 U.S. 567 (1988) • 12, 40–41
- Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) • 16
- Michigan v. Harvey*, 494 U.S. 344 (1990) • 58
- Michigan v. Thomas*, 458 U.S. 259 (1982) • 34
- Miller-El v. Cockrell*, 537 U.S. 322 (2003) • 72
- Miller-El v. Dretke*, 545 U.S. 231 (2005) • 72
- Minnesota v. Dickerson*, 508 U.S. 366 (1993) • 6
- Minnesota v. Carter*, 525 U.S. 83 (1998) • 7
- Minnesota v. Murphy*, 465 U.S. 420 (1984) • 44
- Minnick v. Mississippi*, 498 U.S. 146 (1990) • 47
- Miranda v. Arizona*, 384 U.S. 436 (1966) • 42, 49
- Missouri v. McNeely*, 569 U.S. 141 (2013) • 25–26, 33
- Mitchell v. Wisconsin*, 588 U.S. \_\_\_, 139 S.Ct. 2525 (2019) • 26, 33
- Montejo v. Louisiana*, 556 U.S. 778 (2009) • 57, 58
- Moore v. Illinois*, 408 U.S. 786 (1972) • 75
- Moran v. Burbine*, 475 U.S. 412 (1986) • 46
- Murray v. United States*, 487 U.S. 533 (1988) • 40
- 
- Navarette v. California*, 572 U.S. 393 (2014) • 11, 21–22
- New York v. Belton*, 453 U.S. 454 (1981) • 29
- North Carolina v. Butler*, 441 U.S. 369 (1979) • 45
- North Carolina v. Pearce*, 395 U.S. 711 (1969) • 52
- Nix v. Williams*, 467 U.S. 431 (1984) • 39

## LIST OF CITED CASES

- Ohio v. Clark*, 576 U.S. 237 (2015) • 64–66  
*Ohio v. Johnson*, 467 U.S. 493 (1984) • 53  
*Oregon v. Mathiason*, 429 U.S. 492 (1977) • 43  
*Ornelas v. United States*, 517 U.S. 690 (1996) • 26
- Patterson v. Illinois*, 487 U.S. 285 (1988) • 57, 58  
*Pennsylvania v. Bruder*, 488 U.S. 9 (1988) • 45  
*Pennsylvania v. Mimms*, 434 U.S. 106 (1977) • 24  
*Pennsylvania v. Muniz*, 496 U.S. 582 (1990) • 50–51  
*Polk County v. Dodson*, 454 U.S. 312, 318 (1981) • 70  
*Powers v. Ohio*, 499 U.S. 400 (1991) • 71  
*Price v. Georgia*, 398 U.S. 323 (1970) • 52
- Rakas v. Illinois*, 439 U.S. 128 (1978) • 5, 7  
*Rawlings v. Kentucky*, 448 U.S. 98 (1980) • 28–29  
*Rhode Island v. Innis*, 446 U.S. 291 (1980) • 45  
*Rice v. Collins*, 546 U.S. 333 (2006) • 72  
*Riley v. California*, 573 U.S. 373 (2014) • 31  
*Rivera v. Illinois*, 556 U.S. 148 (2009) • 71  
*Rodriguez v. United States*, 575 U.S. 348 (2015) • 17, 18  
*Rothgery v. Gillespie County*, 554 U.S. 191 (2008) • 56
- Schmerber v. California*, 384 U.S. 757 (1966) • 25, 32, 49  
*Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) • 37  
*Smith v. Hooey*, 393 U.S. 374 (1969) • 68  
*Snyder v. Louisiana*, 522 U.S. 472 (2008) • 72  
*South Dakota v. Neville*, 459 U.S. 553 (1983) • 49–50  
*South Dakota v. Opperman*, 428 U.S. 364 (1976) • 36  
*Stansbury v. California*, 511 U.S. 318 (1994) • 26  
*Strickler v. Greene*, 527 U.S. 263 (1999) • 78
- Texas v. Brown*, 460 U.S. 730 (1983) • 5  
*Texas v. Cobb*, 532 U.S. 162 (2001) • 58  
*Terry v. Ohio*, 392 U.S. 1 (1968) • 7, 19

## LIST OF CITED CASES

- United States v. Agurs*, 427 U.S. 97 (1976) • 76  
*United States v. Arvizu*, 534 U.S. 266 (2002) • 21  
*United States v. Bagley*, 473 U.S. 667 (1985) • 77  
*United States v. Cortez*, 499 U.S. 411 (1981) • 20  
*United States v. Dionisio*, 410 U.S. 1 (1973) • 49  
*United States v. Drayton*, 536 U.S. 194 (2002) • 8, 15  
*United States v. Gouveia*, 467 U.S. 180 (1984) • 56  
*United States v. Henry*, 447 U.S. 264 (1980) • 57  
*United States v. Hensley*, 469 U.S. 221 (1985) • 10  
*United States v. Jones*, 565 U.S. 400 (2012) • 35  
*United States v. Kyllo*, 533 U.S. 27 (2001) • 6  
*United States v. Leon*, 468 U.S. 897 (1984) • 38  
*United States v. Loud Hawk*, 474 U.S. 302 (1986) • 70  
*United States v. Lovasco*, 431 U.S. 783 (1977) • 68, 69  
*United States v. Marion*, 404 U.S. 307 (1971) • 68, 69–70  
*United States v. Mendenhall*, 446 U.S. 544 (1980) • 12, 15  
*United States v. Robinson*, 414 U.S. 218 (1973) • 28  
*United States v. Ross*, 456 U.S. 798 (1982) • 33–34  
*United States v. Salvucci*, 448 U.S. 83 (1980) • 5  
*United States v. Sokolow*, 490 U.S. 1 (1989) • 20  
*United States v. Wade*, 388 U.S. 218 (1967) • 49  
*United States v. Watson*, 423 U.S. 411 (1976) • 37  
*United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) • 53  
*Utah v. Strieff*, 136 S.Ct. 2056 (2016) • 38
- Vermont v. Brillon*, 556 U.S. 81 (2009) • 70
- Walter v. United States*, 447 U.S. 649 (1980) • 8  
*Weatherford v. Bursey*, 429 U.S. 545 (1977) • 77  
*Weeks v. United States*, 232 U.S. 383 (1914) • 38  
*Whren v. United States*, 517 U.S. 806 (1996) • 13, 21  
*Williams v. Illinois*, 567 U.S. 50 (2012) • 60, 62–63  
*Wrotten v. New York*, 560 U.S. 959 (2010) • 68  
*Wyoming v. Houghton*, 526 U.S. 295 (1999) • 34

