

Hot Topics Under the Fourth and Fifth Amendments

- I. Exclusionary rule
 - a. Good faith defense to exclusion
 - i. Where police rely in good faith on a statute or reliance that is later declared unconstitutional
 - ii. Good faith reliance on a
 - iii. Good faith reliance on a defective search warrant
 - b. Police will not get the benefit of good faith defense
 - i. An affidavit so lacking in probable cause that no officer
 - ii. Warrant was invalid on its face (warrant failed to state w/ particularity the place to be searched)
 - iii. Magistrate has wholly abandoned his judicial role
 - c. Final limitation on exclusion: Use of excluded evidence for impeachment purposes
 - i. Confessions inadmissible for failure to comply w/ M warnings can be admitted to impeach the credibility of
 - ii. All illegally seized evidence may be used to impeach
 - iii. Only D's trial testimony may be impeached – not the testimony of other defense witnesses
 - d. Scope of the rule
 - i. Three ways that gov't can break chain between an original unlawful police action and some supposedly derived piece of evidence:
 1. Independent source: Some source independent of that police illegality

2. Inevitable discovery: We would have inevitably discovered this evidence any way
3. Intervening acts of free will on part of D: D was illegally arrested on Friday. Will that Tue. Confession be the fruit of the Friday illegal arrest. The hiring of an attorney,
4. Note: FOPT does not apply when the original police illegality was a M violation. If the original violation was a M violation

II. Fourth

a. Arrests

- i. Arrest warrants are generally not required when arresting a person in public place. But the nonemergency arrest of someone in his own home requires an arrest warrant
- ii. Station house detention: Police need pc to arrest you to compel you to come to the police station for (1) fingerprinting or (2) interrogation

b. Search and seizure

- i. Step 1: Does the person in the question even have a Fourth right?
 1. Whose conduct is government conduct for purposes of the fourth?
 - a. Is their governmental conduct? Fourth only protects people from illegal searches from the government
 - b. On or off-duty, the publicly paid police are government conduct
 - c. Any private individual acting at the direction of the police. The Glendale police ask your roommate to search your room
 - d. What about the privately paid police? They are not government conduct unless they are deputized w/ the

power to arrest you. Privately paid police at a campus would be government actors

2. Person must have a reasonable expectation of privacy
 - a. No standing to object to legality of search
 - b. Three automatic categories of standing. Have standing to search of the place searched:
 - i. Own the premises searched (if so, you always have standing to object to search)
 - ii. If you live on the premises searched regardless of whether you live there
 - iii. Overnight guest
 - c. Sometimes categories of standing:
 - i. If you are present when the search takes place,
 - ii. If you own the property seized (those are my photos, my drugs)
 - d. Most common
 - i. Overnight guests have standing to object to search of the place where they are staying
 - ii. Passengers in cars who don't claim they own the car and don't claim they own the stuff that was taken out of the car (i.e. guns) do not have standing to object to search of car just b/c they are present when search takes place
 - iii. An individual – drug dealer – briefly on another's premises solely for the business purpose of cutting

up drugs for sale does n/ have standing to challenge the search of the premises

- e. Things held out to public the seizure of which implicate no reasonable expectation of privacy
 - i. Sound of voice
 - ii. Style of handwriting
 - iii. Paint on outside of car
 - iv. Account records held by bank
 - v. Monitoring the location of your car in a public street or driveway
 - vi. Anything that can be seen across the open fields
 - vii. Anything that can be seen from a public place
 - viii. Odors emanating from your luggage
 - ix. Garbage set out on the curb for collection

ii. Step 2: Did the search violate D's reasonable expectation of privacy

iii. Step 3: Did the government have a warrant?

1. Searches conducted pursuant to a warrant

a. Showing of probable cause

- i. Use of informers: Today, you can have a valid warrant based in part on an informer's tip even though that informer is anonymous. The sum of everything must be enough to allow magistrate to make a common sense evaluation of probable cause. This requires a lot of discussion

b. Warrant must be precise on its face

- i. Warrant must state w/ particularity the place to be searched and the items to be seized

c. Neutral and detached magistrate

- i. The person who issued the warrant must be separate from law enforcement
- ii. Who is neutral from law enforcement?
- iii. Court clerk
- d. If warrant is no good, then see if you can use that good faith defense for reliance on a defective warrant

2. Exceptions to warrant requirement

a. SIA

- i. Requirements:
- ii. Arrest must be lawful: If arrest is unlawful, then search is unlawful
- iii. Search must be contemporaneous in time and place w/ the arrest
- iv. What can be searched? The person and his wingspan can be searched
- v. When a person is validly arrested in a car, their wingspan will include the entire passenger compartment of that car (including containers). D argued that he was outside of his car in a police cruiser. Even though D was in police cruiser, the entire passenger compartment is w/in the arrestee's wingspan, but n the trunk

b. Automobile exception

- i. The police must have probable cause. If the police have pc to believe that a vehicle contains fruits, instrumentalities, or evidence of a crime, they may search the whole vehicle and any container that

might reasonably contain the item for which they had
pc to search

- ii. Police officer can stop the car. Say that police were looking for stolen T.V. sets, they can't
- iii. They can open any package, luggage, or container that could reasonably contain the item for which they had probable cause to look whether that package is owned by the driver or the passenger
- iv. Pc to search under automobile exception can arise after the car has been stopped but
- v. A Denver officer has pulled a car over to give a ticket. The officer noticed that the people in car fit description of a recent telecast of theft of car part. It must arise before anything or anybody is searched

c. Plain view

- i. Be sure the Officer is legitimately on the premises. If officer is legitimately on premises and then sees the fruits or instrumentalities of contraband, the police may make a warrantless seizure

d. Consent

- i. What should you know? Outer areas of requirement
- ii. Saying that they have a warrant negates consent
- iii. Police do n/ have warn you that you have a right not to consent
- iv. A warrantless search is valid if the police have a voluntary and intelligent consent

- v. Authority to consent: Where two or more people have an equal right to use a piece of property, any one of them can consent to its warrantless search
- e. Stop and frisk
- i. What is the minimum standard for stop and frisk? Articulate and reasonable suspicion. This is less than pc
 - ii. Step 1: If police are reasonably suspicious, what can they do? Stop the person
 - iii. Step 2: A protective pat down . Admissibility of How much like a weapon or contraband could it have seemed from the outside
 - iv. Weapons are always admissible so long as the stopping is reasonable
 - v. What is reasonable standard of ... How much like
- f. Hot pursuit, evanescent evidence
- i. Evanescent: Evidence that might go away if police took the time to get a warrant. Police can scrape under D's finger nails for dried blood. B/c if police took time to get a warrant, D may wash his hands
 - ii. How "hot" must the pursuit be? If we're going to give the police an exception to the warrant requirement, the rule would be swallowed up
 - iii. Principal SC case for hot pursuit: Must keep hot pursuit hot. Once police enter a home on a hot pursuit exception, there is no geographic scope limitation. If the police are in hot pursuit, there are no geographic boundaries for...

All wire tapping requires a warrant. But everyone assumes the risk that the person they are talking to will consent to the government wiretapping the conversation

iv. Step 4: Was the warrant proper?

III. Privileges: M warnings

- a. You have a right to remain silent. You have a right to terminate the examination at any time
- b. Requirements
 - i. Custody,
 1. A person is in custody if, at the time of the interrogation, he is not free to leave.
 2. Probation interviews and routine traffic stops are not custodial – At routine traffic stops and police interviews, the police
 - ii. Interrogation
 1. M warnings are n/ required before spontaneous statements are made by a D
 2. Any conduct where the police knew or should have known they might get a damaging statement
 3. # 28 on page 481: This q is about custodial police interrogation. If any one blurts a statement out, the statements are volunteered and not the result of interrogation
 - iii. Waiver
 1. A suspect can waive his M rights, but the prosecution must prove that the waiver was knowing, voluntary, and intelligent
 2. There can be no waivers of M rights by silence or by shoulder shrugging

c. Right to terminate

- i. Once D asserts his right to terminate the interrogation and requests an attorney, re-initiation of questioning. Sixth right is offense specific and the attorney only has to be present at interrogation if D is being asked questions about the attorney's case
- ii. Fifth right applies in one situation: "I want a lawyer" – this means that ... Fifth amendment right to counsel is not offense specific. Arises only when someone, upon hearing M warnings, says, "I need a lawyer." P
- iii. McNeil made damaging statements during interrogation. Sixth amendment right is offense specific.

IV. Pretrial identification

a. Two ways you can attack

b. Denial of right to counsel

- i. Post-charge lineups or show-ups give rise to counsel
- ii. Showing of photos does n/ give rise to counsel

c. Denial of due process

- i. Example: Victim of crime said that perpetrator was white and the only person in the lineup was white

d. Remedy: Exclude the in-court identification (won't let victim or witness identify person)

e. Purpose: That witness is remembering D from crime and n/ from these proceedings

f. State can defeat claim for remedy by showing an independent source to support an in-court identification: Ample opportunity to look at the guy at the time of the crime

- g. Here, the accused was white and the lineup had only one white person – won't get remedy when prosecutor stands up and says, "we're ashamed of that bad lineup, but the officer had 40 minutes"
- h. Where prosecutor can show ample opportunity to observe at the time of the crime – we will allow
- i. No right to counsel at the showing of photographs
- j. Sixth: A suspect has a right to the presence of an attorney at any post-charge lineup or show-up. An accused does n/ have a right to counsel at photo identification or when police take physical evidence, such as handwriting exemplars or fingerprints, from him

Pretrial

Bail issues are immediately appealable and prevented detention is constitutional

Grand juries: States don't have to use grand juries as a regular part of their charging process

How does a state charge w/o a grand jury? An information signed by prosecutor

A GJ witness may be compelled to testify based on illegal

Proceedings of GJ are secret – D has no right to appear and no right to send witnesses

V. Trials

- a. Bias: Financial interest in outcome of case
- b. Right to jury trial: When does it attach? If maximum authorized sentence exceeds six months, you have a right to trial. If the maximum authorized sentence is up to and including six months, no right to jury trial
- c. If sum of sentences exceeds 6 months, the alleged contemnor is entitled to go back and have a jury trial

- d. Number and : Minimum number of jurors you can use is 6 – if use 6, it must be unanimous. There is no constitutional right to 12 juries
- e. Cross-sectional requirement: You have the right to have county jury pool to reflect a fair cross-section of the community.
- f. Use of peremptory challenges for racial: It is unconstitutional for the prosecutor or the defense to exercise peremptory challenges to exclude prospective jurors from the jury on account of race or gender
- g. Ineffective assistance of counsel:
 - i. Requirements
 - 1. Deficient performance by counsel, and
 - 2. But for such deficiency, the result of the proceeding would have been different
 - ii. Set out standard, then deny relief
- h. Guilty pleas and plea bargaining
 - i. Guilty pleas are waivers to the right of jury trial
 - ii. USSC will not disturb guilty pleas after sentencing. SC has adopted the K theory for plea bargaining. SC treats plea bargaining like Ks
 - iii. If D pleads guilty, at this point, judge must address D personally about:
 - 1. Nature of charge: Judge can rely on attorney's assertion that they have informed D about the nature of the crime. Judge must tell D that he has a right to plead not guilty and give him the maximum possible and minimum. Any discrepancy w/ this allows D to replead
 - iv. General rule: SC will not disturb guilty pleas after sentence.
 - v. Four good bases for withdrawing guilty plea

1. Plea involuntary: Failure to meet the const'l standard for taking a guilty plea
2. Lack of jurisdiction
3. Ineffective assistance of counsel
4. Failure of prosecutor to keep an agreed upon plea bargain
 - a. Judge asks attorney, what do you recommend I sentence D to

VI. Re-sentencing after successful appeal and reconviction

- a. Chilling right to appeal: D can n/ be given a harsher sentence

VII. Death penalty

- a. Any death penalty statute that does n/ give D a chance to present mitigating facts and circumstances is unconstitutional
- b. There can be no automatic category for imposition of the death penalty
- c. The state may n/ by statute limit the mitigating factors; all relevant mitigating evidence must be admissible or the statute is unconstitutional
- d. Only a jury and not a judge may determine the aggravating factors justifying imposition of the death penalty
- e. On MBE, they'll give you a death penalty statute

VIII. Double jeopardy

- a. Attaches at a jury trial when the jury is sworn
- b. Attaches at a judge trial when the first witness is sworn
- c. DJ does n/ attach when the proceedings are civil

d. Exceptions permitting retrial

- i. Jury is unable to agree on verdict
- ii. Mistrials for manifest necessity
- iii. Retrial after successful appeal
 - 1. Smith waived his right to jury trial.
- iv. Breach of an agreed-upon plea bargain by D
 - 1. When a D breaches a plea bargain agreement, his plea and sentence can be vacated and the original charges can be reinstated

e. What constitutes the same offense?

- i. General rule: Two crimes do n/ constitute the same offense if each crime requires proof of an additional element the other does not
- ii. State wants to try you for manslaughter w/ automobile and hit and run. You can show the running w/o the manslaughter. You can show the drunkenness w/o the
- iii. Robbery = larceny and assault
- iv. Put in jeopardy for the greater offense, robbery, bars retrial for any lesser included offense, larceny
- v. Exception: They put you in jeopardy for battery, and they want to try you for murder. State can do that
- vi. Separate sovereigns: State and federal government are not the same sovereign. Two states are n/ the same sovereign. State and locality are the same sovereign.

IX. Fifth against compelled testimony

- a. Who can assert it? Anyone asked under oath in any kind of case whether it be a civil proceeding
- b. If you don't assert your fifth privilege the first time you are asked the question
- c. If anyone ever asks you a question under oath which can incriminate you, you must assert your fifth privilege or else you waive it
- d. The privilege must be claimed
- e. Fifth protects from compelled testimony: State can't make us undergo lie detector test. Fifth does n/ protect us from state requiring blood sample, hair sample. What can't gov't do to use? Undergo lie detector test,
- f. It is unconstitutional for the prosecutor to make a negative comment on D's failure to testify or his remaining silence on hearing the Miranda warnings
- g. Fifth privileged can be eliminated in three ways
 - i. Grant of immunity
 - 1. Use and derivative use immunity:
 - ii. No possibility of incrimination
 - iii. Waiver of privilege: The criminal D by taking the stand waives

X. Hot topics

- a. Exclusion and limitations on exclusion
 - i. Expands exclusion: FOPT
- b. Search and seizure
 - i. Popular for essays (page 5 is a good model)
- c. Miranda-based questions
- d. Pre-trial identification

- i. No right to counsel at the showing of photographs
- e. Right to jury trials and guilty pleas
 - i. Guilty pleas
- f. Know ineffective assistance of counsel then deny relief
- g. DJ and the Fifth privilege against compelled testimony