

Law School Survival Guide

Constitutional Criminal Procedure

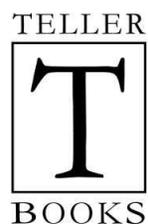
Outlines and Case Summaries

2010
Edition

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CONSTITUTIONAL CRIMINAL PROCEDURE
Outlines and Case Summaries
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Some judicial decisions discussed in this book, due to their ambiguity, are subject to different interpretations. Other authors may come to conclusions different from those presented herein. No representation is therefore made that these materials reflect a definitive statement of the state of the law or of the views that will be applied by any court in any particular case or jurisdiction.

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ABBREVIATIONS

A	Grantee (for present estate/ future interest hypotheticals)	JT	Joint tenant/tenancy
AGI	Adjusted gross income	K	Knowledge (criminal law) or Contract (all other law)
AP	Adverse possession	K.B.	King's Bench (UK)
A/R	Assumption of the risk	KSC	Knowledge to a substantial certainty
B	Buyer	L	Loss in value
BFP	Bona fide purchaser or bona fide purchase	L1	First landlord
C	Constitution	Lat.	Latin
CIF	Cause-in-fact	LE	Life estate
Cl.	Clause	LED	Life estate determinable
CLEO	State Chief Law Enforcement Officer	LLC	Limited liability company
Court (cap.)	United States Supreme Court	LLP	Limited liability partnership
CP	Court of Pleas (UK)	LRM	Least restrictive means
CR	Contingent remainder	MPC	Model Penal Code
CSD	Common Scheme of Development	MSAJ	Motion to set aside the judgment
CSI	Compelling state interest	N	Negligence
Ct.	Court	N.B.	Nota bene
Ct. App.	Court of Appeals	NIED	Negligent infliction of emotional distress
Ct. Chan.	Court of Chancery (England)	O	Original owner, or grantor (in present estates and future interests)
ED	Emotional distress	OLQ	Owner of the <i>locus in quo</i>
EI	Executory interest	OO	Original owner
Eng.	England	P	Purpose or purchaser
ES	Equitable Servitude	PE	Privity of Estate
FI	false imprisonment	PJ	Personal jurisdiction
FLSA	Fair Labor Standards Act	PJI	Pattern Criminal Jury Instruction
FMLA	Family and Medical Leave Act	PK	Privity of Contract
FQJ	Federal question jurisdiction	Q.B.	Queen's Bench (UK)
FRAP	Federal Rules of Appellate Procedure	R	Recklessness
FRCP	Federal Rules of Civil Procedure	RAP	Rule against perpetuities
FRCrP	Federal Rules of Criminal Procedure	RC	Real Covenant
FRE	Federal Rules of Evidence	Restatement	Restatement (of Contracts, Torts, Judgments, etc.)
FS	Fee simple absolute (fee simple)	RFRA	Religious Freedom Restoration Act of 1993
FSCS	Fee simple on condition subsequent	RIL	Res ipsa loquitur
FSD	Fee simple determinable	RPP	Reasonable prudent person
FS EL	Fee simple on executory limitation	Rule	Federal Rule of Evidence or Federal Rule of Civil Procedure
FT	Fee tail	§	Section
H.L.	House of Lords (England)	S	Sublessee or seller
IIED	Intentional infliction of emotional distress	S.Ct.	Supreme Court or US Supreme Court Reporter
IT	Intentional tort	SF	Statute of Frauds
JMOL	Judgment as a matter of law	SJ	Summary judgment
JNOV	Judgment non obstante veredicto	SL	Strict liability, or statute of limitations
J/SL	Joint and several liability, or jointly and severally liable		

CONSTITUTIONAL CRIMINAL PROCEDURE

SMJ	Subject matter jurisdiction		(compilation of US Supreme Court opinions)
SP	Specific performance		
T1	First tenant	USC	United States Code
TE	Tenant/tenancy by the entireties	VR	Vested remainder
TO	True owner	VR SD	Vested remainder subject to divestment
UCC	Uniform Commercial Code		
US	United States of America or United States Reports		

PERTINENT CONSTITUTIONAL AMENDMENTS

Fourth Amendment Searches and Seizures

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

Fifth Amendment Grand Jury; Double Jeopardy; Self-Incrimination; Due Process

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

Sixth Amendment Speedy, Public Trial by an Impartial Jury; Right to Confront; Right to Counsel

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

Eighth Amendment Excessive Bail or Fines; Cruel and Unusual punishment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment Citizenship Rights

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

I. THE EXCLUSIONARY RULE IN SEARCHES AND SEIZURES

A. INDIVIDUAL RIGHTS UNDER THE CONSTITUTION

1. Many of the founders did not support enumerating individual rights in the Constitution.
2. Many of them, including James Madison, the Constitution's principal author, instead supported enumerating rights in state constitutions.
3. The Bill of Rights was nonetheless included for political reasons. However, it originally applied only to the federal government—not to the states.
4. This was changed under the Fourteenth Amendment, which has in large part incorporated the Bill of Rights. Today, the following criminal procedural provisions have been incorporated:
 - a. **Fourth Amendment:** protection against illegal searches and seizures;
 - b. **Fifth Amendment:** right against self-incrimination; due process under the law; protection against double jeopardy;
 - c. **Sixth Amendment:** confrontation of witnesses; the right to counsel;
 - d. **Eighth Amendment:** right to be free of cruel or unusual punishment.
5. However, certain constitutional guarantees in federal court do not apply to the states, including:
 - a. The right to a grand jury indictment for felonies (Fifth Amendment);
 - b. The right to a jury trial in all criminal cases (Seventh Amendment).

B. THE EXCLUSIONARY RULE AND OTHER REMEDIES

1. The exclusionary rule requires a court to exclude evidence obtained in violation of the Constitution. *Boyd v. United States* (U.S. 1886) (the landmark exclusionary rule case).
2. The courts have long struggled with what to do with the excluded evidence. One potential solution was to return it to the defendant.
 - a. *See Weeks v. United States* (U.S. 1914) (William Day, J.), where letters were seized unlawfully without a warrant. Held: in order to prevent the government from using the evidence on retrial, it should be returned.
 - b. *N.B.:* this court's overbroad holding failed to take into account situations when the government seized drugs and other contraband.
3. Parties have tried to get around *Weeks* in various ways.
 - a. *See Silverthorn Lumber Co. v. United States* (U.S. 1920) (Holmes, J.), where the plaintiff seized the defendant Silverthorn Lumber Co.'s originals, photocopied them, and returned them. Held: this act

violates the intent of *Weeks*. The exclusionary rule applies not only to the original evidence, but also to the fruits (or in this case, copies) of the evidence.

4. Twenty nine years later, the Fourth Amendment was incorporated against the states in *Wolf v. People of the State of Colorado* (U.S. 1949) (Frankfurter, J.), since it was comprised of rights “implicit in the concept of ordered liberty.”
5. However, the ***exclusionary rule*** was not incorporated against the states until *Mapp v. Ohio* (U.S. 1961) (Clark, J.), where police entered the defendant’s home without a search warrant and found obscene materials that they used to convict her. Thus, in 1961 there came a bright line rule: the Fourth Amendment applied to the states through the Fourteenth Amendment. From that moment onward, if state law enforcement violated the defendant’s constitutional rights, the judicially created exclusionary applied as a sanction, just as it would had the violation been at the hands of federal law enforcement.

C. LIMITATIONS ON THE EXCLUSIONARY RULE

1. The exclusionary rule does *not exclude all illegally obtained evidence for all purposes*.
2. Such illegally obtained evidence may be used, for example, to impeach the defendant if he testifies contrary to the excluded evidence.
3. The exclusionary rule applies to the person on trial, but if someone else’s constitutional rights have been violated, the person on trial has no standing to exclude it.
4. In recent years, the Court has been limiting the scope of the exclusionary rule, holding that it acts to exclude evidence obtained ***through police misconduct only***, not through the errors of others (e.g., a magistrate who erroneously grants a warrant). *US v. Leon* (U.S. 1984) (White, J.).
 - a. Rationale: excluding evidence *when another party errs* will not have a deterrent effect on the police. *US v. Leon* (U.S. 1984) (White, J.).
 - b. The “*good faith*” exception to the exclusionary rule allows evidence to be admitted when police, acting with good faith, reasonably rely on the validity of a warrant, even if the warrant is invalid.
5. The Fourth Amendment is designed to protect citizens from illegal government searches. Thus, information obtained by a ***search conducted by a private or corporate person is admissible*** and does not need to be excluded when used by the government for prosecution (unless the person conducting the search is an agent of the government).
 - a. *See Jacobsen*, where the Drug Enforcement Agency was permitted to use evidence obtained from FedEx, which broke open packages to be mailed, discovered cocaine, and turned them over to the government.

6. Traditionally, grand juries have been able to function without all of the same limits as those placed in trials.
 - a. In *United States v. Calandra* (U.S. 1974) (Powell, J.), the Court limited the application of the exclusionary rule so as not to “seriously impede the grand jury.”
 - b. Illegally obtained evidence is thus admissible in grand jury proceedings.
7. The exclusionary rule applies only to criminal cases. In civil cases, the exclusionary rule does not apply because no liberty interest is jeopardized.

D. TECHNOLOGICAL SURVEILLANCE

1. Searches from the outside of a person’s home using ***technological devices that are outside of ordinary public use*** are presumed to be unreasonable searches requiring a warrant under the Fourth Amendment.
 - a. See *Kyllo v. United States* (U.S. 2001) (Scalia, J.), where the Court excluded evidence obtained with a thermal imaging device from a helicopter that showed that the defendant had been using heat lamps for growing marijuana plants in his home. Because the apparatus was not within the ordinary public use, the defendant had a reasonable expectation of privacy that was violated.
2. This rule does not extend to drug-sniffing canines.
 - a. See *Illinois v. Caballes* (U.S. 2005) (Stevens, J.), where a narcotics dog sniffed drugs in the trunk of the defendant, who was stopped by a trooper. The defendant argued that just as evidence obtained with the heat imaging device was excluded, so too should the drugs be excluded. Held: the analogy cannot be drawn. Here, the only information that could be obtained is incriminating. A heat imaging device could, on the other hand, invade legitimate privacy rights, such as the hour that a resident enters her sauna.

E. “FRUIT OF THE POISONOUS TREE” AND PURGING THE TAIN

1. When police effect an illegal search or seizure, both illegally obtained primary evidence as well as all derivative evidence, including verbal statements, is to be excluded at trial as “*tainted fruit of the poisonous tree.*” *Wong Sun v. United States* (U.S. 1963) (Brennan, J.).
2. However, the taint may be ***purged*** through the following:
 - a. Inevitable Discovery
 - i. If police can show that the evidence was to be inevitably discovered, it is admissible in trial.
 - ii. See *Nix v. Williams* (U.S. 1984) (Warren Burger, C.J.), where a police officer made a statement to another that was calculated to elicit an incriminating response from the defendant, which it did. The defendant led the officers to the body of the victim. Although

the defendant's constitutional rights were violated, the evidence was not excluded, since it was going to be inevitably discovered by independent sources in a matter of time.

- b. Intervening Voluntary Conduct
 - i. Intervening voluntary conduct, such as a voluntary, subsequent confession by the defendant, purges the tainted fruit of the poisonous tree.
 - ii. *See Wong Sun v. United States* (U.S. 1963) (Brennan, J.), where an unlawful arrest resulted in both a confession (primary evidence) and a witness lead (derivative evidence). The Court excluded both. Held: since the heroin would not have been seized but for the unlawful questioning of Toy, it is excluded. However, Sun's testimony is admissible because it has no connection to the arrest. Rather, it was voluntarily made.

F. THE EXCLUSIONARY RULE APPLIED TO FIFTH AMENDMENT VIOLATIONS

- 1. If a party is unlawfully arrested or detained, the testimony obtained is ***automatically inadmissible*** if the party's *Miranda* rights are not read.
- 2. Yet reading the *Miranda* rights on its own is not sufficient to make the confession admissible.
- 3. Under *Brown v. Illinois* (U.S. 1975) (Blackmun, J.), the following factors are to be considered when determining whether the confession is admissible:
 - a. *The presence of intervening events;*
 - b. *The flagrancy of the police misconduct;* and
 - c. *The amount of time elapsed* between the illegal act and the confession.
 - i. Six hours is too little time to purge the taint of the confession. *Taylor v. Alabama* (U.S. 1982) (Marshall, J.).
- 4. The Court affirmed *Brown v. Illinois* in *Dunaway v. New York* (U.S. 1979) (Brennan, J.). Because the confession could not be separated from the initial illegality, it was excluded.

G. STANDING AND SCOPE OF THE FOURTH AMENDMENT

- 1. Traditional Rule: Standing Requires a Possessory Interest
 - a. In *Olmstead v. United States* (U.S. 1928) (Taft, C.J.), the Court held that the Fourth Amendment did not apply to a *wiretap* on a telephone pole outside of the defendant's home, since the defendant ***did not have a possessory interest*** in the pole and conversations were not protected by the Fourth Amendment.
 - b. Under the law as it existed shortly after WWII, the only way to make a motion to exclude evidence would be to admit ownership.

- c. This led to problems when the evidence was contraband. If the defendant admitted ownership, he would incriminate himself; but if he did not admit ownership, he would lack standing to challenge admission of the evidence.
 - d. Thus, in *Jones v. United States* (U.S. 1960) (Frankfurter, J.), the Court resolved this problem by granting defendants **automatic standing**. Without needing to admit ownership of contraband, defendants could challenge the admission of such contraband into evidence.
2. Modern Rule: Standing Requires a Reasonable Expectation of Privacy
- a. *Olmstead* (U.S. 1928) was later overruled, with a new rule pronounced in *Katz v. United States* (U.S. 1967) (Stewart, J.). Even if a defendant lacks a proprietary interest in a telephone booth, a wiretap infringes on a **reasonable expectation of privacy** that therefore requires that police obtain a search warrant.
 - b. The reasonable expectation of privacy standard involves a two-prong test:
 - i. Does the defendant assert a **subjective interest** in privacy?
 - ii. If so, is **society prepared to accept** that subjective privacy expectation as an area that is private?
 - c. *Rakas v. Illinois* (U.S. 1978) (Rehnquist, J.) modified *Jones*, holding that the *Jones* “legitimately on premises” test was overbroad. Just because the defendant is legitimately on the premises does not mean that he has standing to challenge the search or seizure.
 - i. The new test is whether the defendant has a **reasonable expectation of privacy** based on *Katz v. United States* (U.S. 1967). The defendant **has the burden of establishing both prongs**.
 - ii. *The defendant* has standing to challenge evidence if he owns or has a right to possess the place or thing searched. A car passenger therefore has no standing to challenge a search of that car.
 - d. Because Fourth Amendment rights are personal, a party may not demand that evidence be excluded when that party was not the direct victim of a constitutional violation. *United States v. Payner* (U.S. 1980).
 - e. Ownership of items on its own does not give rise to standing to challenge a Fourth Amendment search or seizure.
 - i. *See Rawlings v. Kentucky* (U.S. 1980) (Rehnquist), where the court did not apply the exclusionary rule against drugs seized from the defendant’s companion’s purse, because the defendant did not have a **reasonable expectation of privacy in the purse**.

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- b. If, while searching for something inside of a house, there are other people present, it is reasonable to segregate them for just long enough to ascertain their involvement in the potential crime and to prevent any interference with the search.
- c. Upon conclusion of the search, they may be arrested or let go.

III. EXCEPTIONS TO THE INVALIDITY OF WARRANTLESS SEARCHES AND SEIZURES

- 1. Under *Illinois v. Gates* (U.S. 1983), a search warrant is generally required and searches realized without a warrant are presumed to be invalid. *Mincey v. Arizona* (U.S. 1978).
- 2. However, as we will examine in this section, there are several notable exceptions to these general rules.

A. SEARCH INCIDENT TO LAWFUL ARREST

- 1. If the defendant is already being arrested, *no additional search warrant is necessary*.
- 2. Under *Weeks v. United States* (U.S. 1914) (Day, J.), the probable cause for the arrest is imported as probable for the search; separate probable cause is not necessary.
- 3. If the arrest is invalid, then so too is the search, since both are based on the same probable cause.
- 4. There are two reasons justifying a search:
 - a. The *officer's protection*; and
 - b. To *secure evidence* before it is destroyed.
- 5. Under these circumstances, the officer does not need to actually fear for his safety or have any reasonable suspicion that illegal materials will be found; once a lawful arrest is effected, a search is permitted.
- 6. Police may search the *arrestee's person* and the area within his *immediate control*.
 - a. The rationale is to prevent the destruction of evidence within the defendant's "*wingspan*."
 - b. See *Chimel v. California* (U.S. 1969) (Stewart, J.), where a warrantless search of the defendant's entire house after his arrest was held unconstitutional. The permitted scope of a search incident to lawful arrest is the area under the defendant's immediate control, known as the "*Chimel Perimeter*."
- 7. However, *when police have reasonable suspicion* and they arrest the defendant in his home for a violent crime, they may search his entire home. *Maryland v. Buie* (U.S. 1990).

III. EXCEPTIONS TO THE INVALIDITY OF WARRANTLESS SEARCHES AND SEIZURES

8. If police arrest a criminal for one offense, and in the course of a search incident to lawful arrest, they find evidence of a separate, unrelated crime, that evidence is admissible. *United States v. Robinson* (U.S. 1973) (Rehnquist, J.) (heroin was recovered while an officer searched a man who was arrested for a traffic violation).
9. However, searches incident to lawful arrest apply *only when the defendant is arrested*. Police may not search the defendants during mere traffic stops.
 - a. *See Knowles v. Iowa* (U.S. 1998) (Rehnquist), where the officer stopped the defendant, issued a summons, and sent him on his way. A search was not permitted because there was no full-blown arrest.

B. THE CARROLL DOCTRINE/AUTOMOBILE EXCEPTION

1. A separate exception allowing for warrantless searches applies only to automobiles and other mobile vehicles (planes, boats, etc.).
2. Since these vehicles are mobile, requiring police to obtain a warrant before searching them gives rise to the risk that the evidence, along with the vehicles, will disappear.
3. This exception applies, even if there has been no arrest, when police have ***probable cause*** to believe a crime is being committed.
 - a. *See Carroll v. United States* (U.S. 1925) (Taft, C.J.), where police were permitted to search the trunk of a car of a known bootlegger when they noticed the car heavily laden.
 - b. *N.B.*: this case is the beginning of the ***exigent circumstances doctrine***.
4. After an automobile is seized, police are not required to obtain a search warrant, since they could have searched it at the time it was stopped.
5. This doctrine is justified by the fact that (i) cars and other mobile vehicles are primarily means of transportation; (ii) they are driven in plain view; and (iii) they are subject to heavy regulation. *Chambers v. Maroney* (U.S. 1970) (White, J.).
6. However, this rationale does not apply to closed objects, such as footlockers or trunks found within the car, since they are *not within plain view* and since they are intended for the *storage of personal effects*.
 - a. Furthermore, since police may seize the objects before applying for a search warrant, the exigent circumstances inherent in automobiles does not apply.
 - b. *See United States v. Chadwick* (U.S. 1977) (Burger, C.J.), where the Court excluded evidence obtained from a footlocker seized from a vehicle that was opened without a search warrant.

7. Although *Chadwick* gives heightened protection to suitcases and personal luggage, this protection does not apply to *containers* or *canisters* found inside the car when there is probable cause to warrant a search.
8. When police have probable cause to stop a car, they **may search the entire car** until they find the object of the probable cause. *United States v. Ross* (U.S. 1982) (Stevens, J.) (permitting police to search a film canister found in a vehicle, although they did not have a warrant).

C. HOT PURSUIT

1. When pursuing a dangerous suspect and *time is of the essence*, police may conduct warrantless searches.
 - a. *See* *Warden v. Hayden* (U.S. 1967) (Brennan, J.), where police were informed that the defendant Hayden had entered a house after a crime was committed. The police entered the house, searched it, and found clothing in the washing machine matching the description of the suspect. The defendant challenged the admission of the evidence, since it was obtained without a warrant. Held: because speed was essential, the warrantless search was justified. The Fourth Amendment is about reasonableness; it does not require police to obtain a warrant when doing so would allow the defendant to escape.
2. Hot pursuit justifies entry when:
 - a. There is **probable cause** (always necessary for searches and seizures);
 - b. Under **exigent circumstances** justifying the warrantless search;
 - c. The pursuit begins from a place where the police have **a lawful right to be**; and
 - d. The legal violation is **serious** enough to justify a warrantless search.

D. THE EMERGENCY DOCTRINE

1. In emergency situations, police are not required to obtain a warrant.
 - a. *See* *Michigan v. Tyler* (U.S. 1978) (Stewart, J.), where a fire chief and detective discovered flammable liquid in plastic bags while the fire department responded to a fire in a department store. They went back shortly thereafter, while the fire was still being fought, and collected more evidence. Three weeks later, investigators again went of the scene of the crime. Held: no search warrant was necessary during the first two investigations because there was an emergency and the fire department was lawfully on the premises. However, the third investigation was unlawful because it took place three weeks after the emergency.
2. The emergency doctrine does not permit police to collect evidence of the crime scene if they do not obtain a warrant.

III. EXCEPTIONS TO THE INVALIDITY OF WARRANTLESS SEARCHES AND SEIZURES

- a. In *Mincey v. Arizona* (U.S. 1978) (Stewart, J.), the Court struck down an Arizona statute that allowed police to conduct investigations at crime scenes without a warrant. Held: the statute is unconstitutional; there is **no crime-scene exception**. If police have probable cause, they must obtain a search warrant. If they do not have probable cause, they need consent.

E. EXIGENT CIRCUMSTANCES

1. The exigent circumstances exception arises when:
 - a. Police have **probable cause** that a crime has been committed; and
 - b. Absent immediate action, the evidence would be **lost**.
 - i. Standard: whether a reasonable person would expect the police to stop and obtain a warrant.
2. Body Searches
 - a. If a defendant ingests drugs, the evidence of a crime, police may not **pump his stomach**, not because of a Fourth Amendment prohibition, but rather, because Fourteenth Amendment Due Process would be offended. *Rochin v. California* (U.S. 1952) (Frankfurter, J.).
 - b. **Blood tests**, on the contrary, are not prohibited by the Fourteenth Amendment, since they are so commonplace that they do not offend ordinary sensibilities. *Breithaupt v. Abram* (U.S. 1957) (Clark, J.).
 - c. Any body search, including blood samples and DNA tests, must meet the following three prong test:
 - i. There is a **“clear indication”** that the search will result in the evidence being sought;
 - ii. **Exigent circumstances** prevent the obtention of a warrant (*e.g.*, drugs in the blood will disappear); and
 - iii. The search is done in a reasonable manner. *Schmerber v. California* (U.S. 1966) (Brennan, J.).
3. Border Searches and Airport Security Searches
 - a. The Fourth Amendment applies only to searches and seizures *within the United States*. At the borders, with a reasonable suspicion on its own, a suspect may be detained and searched. Since the government has an interest in regulating who comes into the country, a search warrant is not necessary. *United States v. Montoya de Hernandez* (U.S. 1985) (Rehnquist, J.).
 - b. Justification of this doctrine: at the borders, people have less expectation of privacy, there are exigent circumstances, and there is implied consent.

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- c. When evidence that had a reasonable probability of being material to the defense is excluded, the defendant is entitled to a new trial.

G. THE RIGHT TO A FAIR TRIAL: AN IMPARTIAL JUDGE

1. The Sixth Amendment guarantees the *right to an impartial judge* as part of a fair trial through the Due Process Clauses of the Fifth and Fourteenth Amendments.
2. The judge must be neutral and detached—he may be neither financially nor otherwise connected to the outcome of the case.
 - a. *See Ward v. City of Monroeville* (U.S. 1972) (Brennan, J.), where the defendant was convicted of two traffic violations under an Ohio statute that allowed mayors to sit as judges in traffic offenses. Held: there is an *appearance of impropriety* and a *conflict of interest* because the mayor indirectly benefits every time somebody is convicted, since fines contribute to the town treasury. The right to an impartial judge has been violated.
3. Pre-Trial Rights
 - a. The right to an impartial judge similarly applies before the actual trial: the custody and bail decision must be made before a neutral, detached judicial officer.
 - b. In order to detain a defendant before trial, there must be a *Gerstein* hearing before a *neutral magistrate* to determine probable cause.
 - i. *See Gerstein v. Pugh* (U.S. 1975), holding that when a person is arrested with no warrant or indictment, he is entitled to a hearing by a *neutral magistrate* to determine probable cause. The hearing should take place promptly after the arrest in order to avoid unconstitutional restraints on liberty.

VIII. THE SIXTH AMENDMENT CONFRONTATION CLAUSE

A. THE INCIDENTAL RIGHTS TO BE PRESENT AND INFORMED OF THE ACCUSATION

1. The Confrontation Clause is established in the Sixth Amendment, which states that in all criminal prosecutions, the accused shall enjoy the right “to be confronted with the witnesses against him.”
2. This right necessarily implies the *right to be present* at one’s trial, since the defendant who is not present will not have the opportunity to confront those witnesses who testify against him.
 - a. This right is not absolute; it may be waived by the defendant’s disruptive behavior in the courtroom.
 - b. After a warning, the court may remove the defendant from the courtroom, who thereby loses his right to confront witnesses against him.

- i. *See Illinois v. Allen* (U.S. 1970) (Black, J.), where the defendant, who represented himself, threatened the judge and destroyed a file in the courtroom. After an initial warning, which was to no avail, the trial judge removed the defendant from the courtroom and ordered the defendant’s standby counsel to be present. The defendant challenged the decision. Held: if a defendant is warned of the consequences of his conduct, he can waive his right to be present if he persists in his misconduct. If the defendant later promises to behave, he may return.
3. If the defendant has a right to be physically present in the courtroom, by corollary, he also has a right to understand and “*be informed of the nature and cause of the accusation.*”⁵
 - a. His presence in the courtroom is not meaningful unless he understands what is happening therein.
 - b. Due process requires that *incompetent defendants not be tried* until they regain competence (through medical treatment, therapy, etc.).
 - c. When there is a reasonable doubt as to the defendant’s competence, there is to be a competency hearing.
 - i. *See Pate v. Robinson* (U.S. 1966) (Clark, J.), where the defendant claimed insanity and incompetence to stand trial. The state insisted that Robinson waived these rights. Held: when either party raises a *bona fide* doubt, due process requires that a hearing to determine competency be held. If an incompetent the defendant is tried, *the right to be present is rendered meaningless.*

B. INTRODUCTION TO THE CONFRONTATION CLAUSE

1. The Sixth Amendment Confrontation Clause gives the accused the right to confront all witnesses against him “in all criminal prosecutions.”⁶
 - a. *See Griffin v. California* (U.S. 1965) (Douglas, J.), where the Court held that the Confrontation Clause would be violated if a prosecutor, on closing argument, implied that the defendant was guilty because he did not take the stand, since the prosecutor could not be cross examined.
2. The Sixth Amendment Confrontation Clause is the right to cross-examine witnesses and to test evidence being used against the defendant.
3. The right to confront is to be read in the context of the drafting of the common law at the time of the ratification of the Constitution, which is what the founders had in mind.

C. THE HISTORY OF THE CONFRONTATION CLAUSE

1. The Court has held that, where one codefendant gives a confession implicating another, the first codefendant’s confession is admissible against

⁵ U.S. Const. amend. VI.

⁶ U.S. Const. amend. VI.

the second codefendant only *if the first codefendant takes the stand* and submits himself to cross-examination.

- a. *See Bruton v. United States* (U.S. 1968) (Brennan, J.), where the prosecutor tried to convict one of the codefendants by using a statement that implicated a second codefendant. The defendant subpoenaed the second codefendant, but the second codefendant refused to testify under the Fifth Amendment, since she was on trial. Held: under these circumstances, the invocation of the Fifth Amendment made the second codefendant unavailable to the first, thereby infringing on his right to confront witnesses that testify against him. The cases can be tried separately, but this may not be practical and the courts cannot tell the Executive Branch how to bring charges.
2. Later, the Court held that the Confrontation Clause does not guarantee cross-examination, but rather, only *the opportunity to cross-examine*.
 - a. *See Ohio v. Roberts* (U.S. 1980) (Blackmun, J.), where evidence was presented at a preliminary hearing by a witness who later became unavailable. The prosecution offered the testimony of the witness from the preliminary hearing. The defendant objected on the basis of the Confrontation Clause. Held: the Confrontation Clause was not violated. At the preliminary hearing, the witness was presented and placed under oath, *but the defendant chose not to cross examine*. The Constitution guarantees only the opportunity to cross-examine. The state may therefore use the testimony in trial, even though the witness became unavailable.
 - b. *N.B.*: this rule applies only to situations in which the witness becomes unavailable. If the witness is available, the prior testimony cannot be offered in lieu of the actual testimony.
 3. In dicta, the *Ohio v. Roberts* Court held that *the FRE and the Sixth Amendment are largely congruent*. If the FRE are complied with, the Constitution is satisfied. An out of court statement against the defendant was admissible, even if the defendant did not have the opportunity to confront the witness, if it bore an *“adequate indicia of reliability.”*
 4. This test was met if either of the following elements was satisfied:
 - a. The evidence fell within a “firmly rooted hearsay exception”; or
 - b. The evidence contained “particularized guarantees of trustworthiness.”
 5. The *Roberts* ruling worked well until 1999, when *Lilly v. Virginia* was handed down.
 - a. In *Lilly v. Virginia* (U.S. 1999) (Stevens, J.), three codefendants, the defendant, his brother, and his roommate, broke into a home and stole guns, liquor, and a safe. They later kidnapped a passing

motorist and committed robberies and murder. All were later taken into custody and questioned. The defendant did not mention the murder and explained that his brother and roommate forced him to participate in the robberies. The others stated that the defendant masterminded the incidents. The state charged the defendant with several offenses and offered his statements as declarations against penal interest as an exception to the hearsay rule. The lower courts held that since the FRE were satisfied, the statements were admissible under *Ohio v. Roberts*. The defendant appealed. Held: because the declaration against penal interest exception to the hearsay rule does not trace its way back to the time of the *ratification of the Bill of Rights*, it is not ***firmly rooted*** and is not what the framers had the mind. *Ohio v. Roberts* is good law, but ***in order for a FRE to be good under the Sixth Amendment, it must be firmly rooted.***

- b. *N.B.*: many commentators read this case as saying that a FRE must be rooted in the rules of evidence as they were at the time of the ratification.

D. THE CONFRONTATION CLAUSE TODAY

1. Supreme Court jurisprudence based on *Roberts* was radically overturned in 2004, when the *Crawford* Court introduced the ***testimonial*** test:
 - a. If the evidence is not testimonial in nature, the Constitution is not implicated; if it is, then the defendant must have the opportunity to confront his accuser.
 - b. Evidence is testimonial when it is being used ***in furtherance of criminal prosecution.***
2. Evidence obtained in a 911 call whose primary purpose is to obtain emergency assistance is not testimonial in nature. The Confrontation Clause is therefore *not implicated*.
 - a. *See Crawford v. Washington* (U.S. 2004) (Scalia, J.), where Michael Crawford stabbed Keneeth Lee, who he suspected of sexually assaulting his (Crawford's) wife. During the trial, the defendant's wife did not testify because of the marital privilege, but the prosecution played a recorded statement that she previously made to police and that contradicted Crawford's claim that he acted in self-defense. Crawford challenged the recording as violative of the Confrontation Clause. The state Supreme Court upheld his conviction, relying on the "adequate indicia of reliability" test of *Ohio v. Roberts* (U.S. 1980), which permits out of court statements against a defendant when such statements are reliable. Held: *Ohio v. Roberts* is overruled. The test for determining whether the Confrontation Clause was violated is no longer whether incriminating evidence that is admitted is reliable; rather, when the

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REVIEW CHARTS AND SUMMARIES

WHEN CONSTITUTIONAL RIGHTS APPLY

<i>Fifth Amendment Right to a Trial by Jury</i>	Anytime the defendant is charged with a crime that bears the possibility of a prison sentence of six or more months.
<i>Sixth Amendment Right to Confront One's Accusers</i>	When incriminating testimony offered against the defendant is <i>testimonial</i> (offered and used in furtherance of criminal prosecution).
<i>Sixth Amendment Right to Counsel</i>	Anytime the defendant is charged with <i>any offense</i> where prison may be imposed, whether it is a petty offense, misdemeanor, or felony. The right applies to all trial and pre-trial <i>critical stages</i> , which take place after adversarial proceedings have begun.

LANDMARK CRIMINAL PROCEDURE CASES

- 1925 – ***Carroll v. United States*** – police are not required to obtain a warrant to effect a search of automobiles and other moving vehicles when they have ***probable cause*** that a crime is being committed, since the time required in obtaining a search would permit the mobile evidence to be lost or destroyed.
- 1961 – ***Mapp v. Ohio*** – the exclusionary rule for illegally searches and seizures applies in the states.
- 1963 – ***Gideon v. Wainwright*** – the state must provide an attorney to indigent defendants whenever there is the possibility of imprisonment.
- 1963 – ***Wong Sun v. United States*** – illegally obtained derivative evidence (“fruit of the poisonous tree”) can be purged through voluntary conduct, such as a voluntary confession given after an improperly obtained confession.
- 1964 – ***Massiah v. United States*** – the right to counsel is activated at ***all critical stages*** of an adversarial proceeding. Cf. *Gilbert v. California*.
- 1966 – ***Miranda v. Arizona*** – (Warren, J.) police must read defendants the four warnings in interrogations of defendants in police custody. Otherwise, confessions are to be excluded.
- 1967 – ***Gilbert v. California*** – the right to counsel applies in all critical stages of an adversarial proceeding. Signature analyses are not critical stages, since the presence of an attorney would not in any way protect a defendant.

- 1967 – *United States v. Wade* – post-indictment police lineups are critical stages for purposes of the Sixth Amendment Right to Counsel.
- 1967 – *Warden v. Hayden* - when pursuing a dangerous suspect and time is of the essence, police may conduct warrantless searches. The following elements must be met: (i) there is **probable cause** (always necessary for searches and seizures); (ii) under **exigent circumstances** justifying the warrantless search; (iii) the pursuit begins from a place where the police have **a lawful right to be**; and (iv) the legal violation is **serious** enough to justify a warrantless search.
- 1968 – *Terry v. Ohio* – police do not need probable cause in order to effect a frisk of a defendant’s body in order to assure officer safety. If police, while conducting a frisk, develop independent probable cause that a crime is being committed or that the defendant is in possession of contraband, they may search for and seize the contraband without a warrant. A police stop does not require probable cause, but rather, a reasonable and articulate suspicion that a crime is being committed.
- 1969 – *Chimel v. California* – police need neither a warrant nor probable cause in order to effect a search of a defendant’s wingspan (the area within his immediate control) in order to assure officer protection (**search incident to lawful arrest** exception to the need for a warrant).
- 1970 – *Chambers v. Maroney* – once police have seized a vehicle, they are not required to obtain a search warrant. They may search it as they would have at the time that it was stopped. Rationale: (i) cars and other mobile vehicles were primarily means of transportation; (ii) they are driven in plain view; and (iii) they are subject to heavy regulation.
- 1971 – *Coolidge v. New Hampshire* – when the incriminating nature of evidence is immediately apparent to police while they are in a place where they have a lawful right to be, they may seize it under the plain view doctrine.
- 1972 – *Argersinger v. Hamlin* – the state must provide an attorney to indigent defendants whenever imprisonment is imposed, for any offense, whether it is a felony, misdemeanor, or petty.
- 1972 – *Kirby v. Illinois* – there is no right to counsel under the Sixth Amendment during a pre-indictment police lineup, since adversarial judicial proceedings have not yet begun.
- 1973 – *United States v. Ash* – photographic lineups are not critical stages for the purposes of the Sixth Amendment Right and do not require the right of counsel.
- 1975 – *Gerstein v. Pugh* – a person who is arrested without a warrant is entitled to a hearing to determine whether there is probable cause to arrest him.
- 1975 – *Michigan v. Mosley* – if police read a defendant his *Miranda* rights and the defendant refuses to speak, the police may return to the defendant and interrogate him afresh without rereading the *Miranda* rights, provided it is done within a reasonable time.
- 1977 – *United States v. Chadwick* – police must first apply for a search warrant for small closed objects seized from a car before opening them. Since police may seize the objects before applying for a search warrant, the exigent circumstances inherent in mobile automobiles does not apply.

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GLOSSARY

Ad coelum doctrine Under this doctrine, for the purpose of immovable minerals, “to whomever the soil belongs, he also owns to the sky and to the depths.” It refers to the right of the owner of property to the space that extends vertically upward and downward from his property.

Arson The malicious, willful, and unlawful burning of a structure which, at common law, had to be the dwelling place of another.

Assignment A transfer of property that grants the possession of land for the *entire period of a lease*. By default, an assignment grants *all of the property* for the lease period. A *partial assignment* may however, be granted for only *part of the property* during the lease period. Compare SUBLEASE.

Bailment A legally recognized property relationship between a bailor, who gives personalty to another to be held for a particular purpose, and a bailee, party that receives the property.

Bill of attainder An unconstitutional legislative action that singles out an individual or group for punishment without the benefit of a trial.

Burglary At common law, the specific intent crime that consisted of the breaking and entering of the dwelling of another at night with the intent to commit a felony therein.

Causation in fact Actual causation that links an act with a result through implementing the “but-for” test (*i.e.*, “but for A, B would not have occurred”). Compare PROXIMATE CAUSE.

Circumstantial evidence Secondary facts and other evidence that lead to primary fact inferences.

Chattel An item of personal, as opposed to real property; any moveable object.

Claim preclusion See *RES JUDICATA*.

Closing (real property) The final meeting between the seller and the purchaser in a land sale contract, whereby the executory period is concluded and the payment and property are exchanged.

Closing of escrow See CLOSING.

Collateral estoppel Under the doctrine of collateral estoppel, a factual issue *may not be litigated* in any lawsuit if it was litigated and decided in a previous proceeding. Also referred to as ISSUE PRECLUSION.

Constructive notice Legal notice derived from the circumstances.

Construction The act of interpreting the sense or intention of a constitution, statute, contract, or some other text; the process of construing the meaning of a writing.

Constructive possession doctrine Doctrine by which control or dominion of property is granted to the owner of the *locus in quo*, in situations in which it would otherwise go to the finder (*e.g.*, in cases of treasure trove and findings generally). The doctrine is applied, for example, when an object is found in a private place of a store. The owner of the *locus in quo*, rather than the finder, obtains possession.

Conversion A tortious act of willful interference with the property of another without lawful justification, in a way that *deprives the owner of the use of his property*. Examples of conversion include illegal takings, the assumption of ownership, and the destruction of the property of another.

Counterclaim An independent cause of action made by the defendant against the plaintiff in order to defeat the plaintiff’s claim.

Criminal negligence Extremely negligent conduct that creates a risk of death or serious bodily injury beyond that of mere civil negligence.

Cross-claim A claim under FRCP 13(g) by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.

Dead Man's Act A statute that disqualifies a party from testifying *against the estate* of the deceased because of the party's incentive to lie based on: (i) his interest in the case; and (ii) the unavailability of the deceased to contradict him.

Detinue An action at common law to recover PERSONALTY or its value when it is unlawfully held by another.

Devise To make a gift of real property by will. Property that can be given in such a gift is referred to as "devisable."

Duress A defense that applies when the defendant acts illegally and against his own will as a result of another's *unlawful threat* of bodily harm. Duress excuses an actor from the legal effects of his actions (*e.g.*, a defendant is not guilty for a theft committed under duress).

Easement The right to use part of land owned by another for a special purpose. *See* EASEMENT APPURTENANT and EASEMENT IN GROSS.

Easement appurtenant An easement that benefits the grantee's (dominant tenant) land. When there is an easement appurtenant, there are *both dominant* and *servient tenements*. Compare EASEMENT IN GROSS.

Easement in gross An easement that does not benefit the grantee's land. Although there is a servient estate, but there is no *dominant estate*. Compare EASEMENT APPURTENANT.

Equitable servitude Covenants restricting the use of land that run with the land at equity and thus offer remedies at equity (*e.g.*, injunctions). Compare REAL COVENANTS.

Executory period In a land sale contract, the period between the formation of the sale contract and the closing.

Ex post facto law (Lat., a law "after the fact"). A law that does any of the following retroactively: (i) makes conduct criminal; (ii) establishes a stricter punishment for a crime; or (iii) alters the procedural or evidentiary rules in favor of the prosecution.

False pretenses A specific intent crime consisting of the acquiring of title to the property of another through making false statements or misrepresentations with the intent of defrauding the owner.

First degree murder Under the modern statutory approach to murder, first degree murder is generally defined as all forms of murder having malice aforethought *and* premeditation and deliberation. Compare SECOND DEGREE MURDER.

Freehold estate An estate where the possessor is the owner of the property (at least for a temporary period of time).

Grand theft The commission of LARCENY when the value of the property unlawfully taken exceeds some predetermined amount.

Habeas corpus Legal proceeding where a writ is brought to determine whether a person is being lawfully detained.

Holdover tenant A tenant who keeps possession of the property beyond the expiration of the lease.

Implied easement by prior use An easement that comes into being when an owner of two parcels of land uses one of them, the servient estate, to benefit the other in such a way that when he sells one of them, the purchaser can *reasonably expect* that the servient estate will continue to be used in a way that is consistent with its prior use.

In-court identification Modality of identification where an attorney asks a witness

if she recognizes the perpetrator of a crime in court.

Indictment Since a defendant may not cross-examine witnesses presented against him in a grand jury indictment, the Confrontation Clause does not apply. Compare PRELIMINARY HEARING.

Infant A person who has not yet reached the legal age of majority (generally, eighteen years of age); a minor.

Intent (torts) The *mens rea* element for intentional torts, which is formed when the defendant possesses either: (i) purpose (a wanting or desiring) that a certain result come about; or (ii) knowledge to a substantial certainty that a result is substantially certain to come about as a result of his act (based on belief or knowledge).

Intervening cause An act that intervenes in the series of events after an act, such that it alters the resulting consequence. When intervening causes are strong enough to relieve wrongdoer of liability, they become SUPERSEDING CAUSES.

Involuntary manslaughter An *unintentional* killing lacking malice aforethought committed either with criminal negligence or during the commission of an unlawful act.

Issue preclusion See COLLATERAL ESTOPPEL.

Joinder The uniting of distinct claims or parties in an action.

Knowledge to a substantial certainty (torts) Knowledge of an extremely high risk that a particular consequence will materialize as a result of one's act. It may be based on knowledge or belief and, like purpose, satisfies the *mens rea* required in intentional torts.

Larceny A specific intent crime consisting of the unlawful taking and carrying away of the property of another with the intent to permanently deprive him thereof.

Leasehold estate An estate where the possessor is not the owner of the property (*e.g.*, in the case of a rental property). Possession will spring back to the owner after the current possessor's lease or rental comes to a close.

License (property law) A right to use another's property that is terminable at the will of the possessor of the land.

Malum in se (Lat., "a wrong in itself"). An inherently evil or immoral act, regardless of whether it is prohibited.

Malum prohibitum (Lat., "a prohibited wrong"). An act or offense which is prohibited but is not inherently wrong (*e.g.*, failing to stop at a stop sign).

Merchantable title Title not subject to such reasonable doubt that it would create a just apprehension of its validity in the mind of a reasonable prudent person. Merchantable title is not necessarily good title; it may have *slight defects*.

Mortgage Security for a debt given by a mortgagor (a debtor) to a mortgagee (a creditor) to secure a loan given to the mortgagor, usually for the purpose of purchasing land or some other real estate.

Mortgagee In a mortgage, the creditor, loan company, or bank that lends to the debtor, or mortgagor.

Mortgagor In a mortgage, the party that borrows from a creditor, loan company, or bank; a debtor.

Negligence per se Negligence established as a matter of law such that the plaintiff need not establish duty and breach. The violation of civil and criminal statutes gives rise to negligence *per se* in most states, such that the jury is instructed that the violation of a statute constitutes the breach of duty for the purposes of negligence.

Nonjusticiable political question A question that involves the exercise of *discretionary*

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