
TABLE OF CONTENTS

PREFACE.....	III
ACKNOWLEDGMENTS.....	VII
TABLE OF CASES.....	XXVII
Chapter 1. Overview	1
I. What This Book Is About	1
II. The Central Constitutional Provisions.....	3
A. Amendment IV: Search and Seizure.....	3
B. Amendment V: Compelled or Involuntary Confessions and Other Fundamentally Unfair Procedures	3
C. Amendment VI: Right to Counsel and Fair Adjudication Process	4
D. Amendment XIV: Application of the Bill of Rights and of Principles of Fundamental Fairness to the States	4
III. The Steps in the Criminal Process.....	5
A. Report of Crime	5
B. Pre-Arrest Investigation	5
C. Arrest	6
D. Booking	6
E. Preliminary Arraignment.....	6
F. Continuing Investigation.....	8
G. Preliminary Hearing.....	8
H. Grand Jury Review	9
I. Filing the Information or Indictment	9
J. Arraignment on the Information or Indictment	9
K. Pretrial Motions	10
L. Trial?.....	11
M. Sentencing	12
N. Appeals and Postconviction Remedies.....	12
IV. Themes in Constitutional Criminal Procedure.....	14
A. Discretion.....	14
B. Remedies.....	16
Mapp v. Ohio	16
C. Race and Ethnicity of Suspects	21
D. Role of the Lawyer	22
E. Policing	23
Problem 1-1.....	24
Chapter 2. Suppression Motions and Hearings	27
I. Introduction.....	27
A. Motions to Suppress and Pretrial Suppression Hearings	28
B. Evidence Presented at Suppression Hearings	29
1. Judicial Scrutiny of Police Perjury.....	30
People v. James McMurty.....	31
2. Prosecutors and Police Perjury.....	33
II. <i>United States v. Matos</i> Litigation	34
United States of America v. Edgar Adam Matos, Defendant	53

Chapter 3. Searches: Basic Concepts	59
I. Introduction to the Fourth Amendment.....	59
II. Procedural Concepts	60
A. The “Government (State) Action” Requirement.....	61
1. <i>Burdeau v. McDowell</i> , 256 U.S. 465 (1921)	61
2. <i>United States v. Jacobsen</i> , 466 U.S. 109 (1984).....	62
3. <i>Skinner v. Railway Labor Executives’ Ass’n</i> , 489 U.S. 602 (1989).....	62
4. <i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	62
Problem 3-1.....	63
B. The Limitation of “the People” in Fourth Amendment Analysis	64
C. “Standing”: Who May Complain About Searches and Seizures?.....	64
III. The Fourth Amendment Analysis	65
A. What Is a “Search”?	65
1. The <i>Katz</i> Test.....	65
<i>Katz v. United States</i>	66
a. The Reasonable Expectation of Privacy Test.....	70
Problem 3-2.....	72
Note	72
2. The <i>Jones</i> Physical Trespass Test.....	73
<i>United States v. Jones</i>	73
Problem 3-3.....	80
3. Application of <i>Katz</i> and <i>Jones</i> to Police Investigative Practices.....	80
a. The Home and Surrounding Areas	80
(i) The Home	81
(ii) Curtilage	81
<i>Collins v. Virginia</i>	82
Note	83
(iii) Open Fields	84
Problem 3-4	85
(iv) Aerial Surveillance of Property	85
Problem 3-5	86
(v) Trash	87
Problem 3-6	87
Note	88
b. Sensory Enhancement Tools.....	88
(i) Thermal Imaging.....	89
<i>Kyllo v. United States</i>	89
Problem 3-7	91
(ii) Dog Sniffs	91
<i>Florida v. Jardines</i>	91
<i>Illinois v. Caballes</i>	95
Note	98
(iii) Chemical Field Test.....	98

- c. Assumption of the Risk: Information Revealed by Third Parties..... 99
 - (i) Agents and Informants..... 99
 - (ii) The Third Party Rule 100
- d. Modern Tracking and Surveillance Techniques..... 101
 - (i) Cell Site Location Information (“CSLI”) 101
 - Carpenter v. United States 101
 - Note 111
 - Problem 3-8 112
 - (ii) Electronic Monitoring with Ankle Bracelets 113
- 4. Zones of Privacy: A *Katz/Jones* Review 113
- B. Standing Revisited: The *Rakas* Test..... 116
 - Byrd v. United States 117
 - Problem 3-9..... 121
 - Problem 3-10..... 122

Chapter 4. Probable Cause125

- I. Introduction..... 125
- II. The Probable Cause Analysis..... 126
 - A. The Definition of “Probable Cause”..... 126
 - B. Probable Cause Analytical Framework 128
 - 1. The Quantity of Information to Establish Probable Cause..... 128
 - Maryland v. Pringle 128
 - 2. The Quality of Information to Establish Probable Cause ... 131
 - a. Police Officers 131
 - b. Known Citizen Informants: Victims and Eyewitnesses..... 132
 - c. Anonymous Tipsters and Police Informants..... 133
 - 3. The *Aguilar-Spinelli* Two-Pronged Test 134
 - 4. The “Totality of the Circumstances” Test 137
 - Illinois v. Gates..... 137
 - Notes 144
 - Problem 4-1 151
 - Problem 4-2..... 151
 - Problem 4-3..... 151
 - Problem 4-4..... 152
 - Problem 4-5..... 152
 - Problem 4-6..... 153

Chapter 5. Warrants155

- I. Warrant Content..... 155
 - A. Overview 155
 - Johnson v. United States..... 156
 - B. Issuance of Warrants 157
 - 1. What Can Be Seized? 157
 - 2. Elements of a Warrant..... 158
 - a. Neutral and Detached Magistrates 159
 - b. Oath or Affirmation Supporting Probable Cause..... 160

c.	Particularity Regarding Location.....	165
	Maryland v. Garrison.....	165
d.	Specificity Regarding What Will Be Seized.....	167
(i)	Residual Clauses.....	167
(ii)	Absence of a List of “ <i>Items to Be Seized</i> ”.....	168
	Groh v. Ramirez.....	168
II.	Executing the Warrant.....	172
A.	Overview.....	172
B.	“Knock and Announce” and “No-Knock” Warrants.....	173
1.	“No-Knock” Warrants.....	174
C.	Use of Force.....	175
D.	The Death of Breonna Taylor.....	179
	Problem 5-1.....	183
	Problem 5-2.....	184
	Problem 5-3.....	184
	Chapter 6. Seizures: Property and Arrests.....	187
I.	Introduction.....	187
II.	Seizure of Property.....	187
III.	Seizures of People.....	188
A.	Custodial Arrests.....	189
1.	Probable Cause.....	189
2.	The Warrant Requirement: Public Arrests.....	189
3.	Arrests in the Home.....	191
	Payton v. New York.....	191
4.	The <i>Watson</i> Rule or the <i>Payton</i> Rule?.....	193
a.	Overnight Guests.....	193
b.	Casual Visitors.....	193
c.	Search Warrant vs. Arrest Warrant.....	194
5.	Seriousness of the Criminal Offense.....	197
	Atwater v. City of Lago Vista.....	197
	Virginia v. Moore.....	200
	Note.....	201
6.	Use of Force.....	202
a.	Use of Deadly Force to Seize a Fleeing Felon.....	203
	Tennessee v. Garner.....	203
	Note.....	206
b.	Evaluating the Reasonableness of Force Used.....	206
	Graham v. Connor.....	206
	Note.....	208
c.	Use of Force and Public Safety Concerns.....	209
	Scott v. Harris.....	209
	Note.....	211
d.	Police Accountability for Excessive Force.....	212
(i)	Use of Force Standards.....	212
(ii)	Federal Accountability for Excessive Force.....	216
e.	Race and Use of Force.....	220
	Problem 6-1.....	221
	Questions.....	221

Chapter 7. Seizures: Stop and Frisk Investigatory Detentions225

I. Introduction..... 225

II. The *Terry* Doctrine..... 226

 Terry v. Ohio 226

 Notes 233

 A. When Does Police Contact Become a “Seizure”? 236

 1. Voluntary Encounter Versus Seizure 238

 United States v. Mendenhall..... 238

 Florida v. Royer 240

 INS v. Delgado..... 241

 United States v. Drayton 245

 2. Is Capture Required for a Seizure to Occur? 249

 California v. Hodari D..... 250

 Torres v. Madrid..... 251

 B. What Is Reasonable Suspicion?..... 254

 1. Quantity of Information for Reasonable Suspicion 254

 United States v. Arvizu..... 254

 Kansas v. Glover..... 257

 2. Quality of Information Needed for Reasonable Suspicion 258

 Alabama v. White 259

 Florida v. J.L. 262

 Note 263

 3. Other Relevant Factors in the Reasonable Suspicion Analysis..... 264

 a. Use of Criminal Profiles 264

 b. Fleeing from Police 265

 C. What Is a Frisk or Pat Down Search? 267

 Notes 268

 D. Scope of Police Authority During *Terry* Stops..... 270

 1. Duration of Detention 270

 2. Manner of Police Investigation..... 271

 3. Forced Movement 271

 4. Mandatory Identification Requirement 272

 Hiibel v. Sixth Judicial District Court of Nevada 272

III. Traffic Stops 273

 A. Introduction 273

 B. The “Bright Line” Rules..... 275

 Arizona v. Johnson..... 275

 C. Investigation of Unrelated Crimes..... 276

 1. Narcotics Detection Dog Sniff..... 277

 2. Consent Searches 277

 3. Interrogation..... 277

 D. Racial Profiling..... 278

 Whren v. United States 279

 Note..... 282

 1. Federal Accountability: DOJ “Pattern and Practice” Investigations 284

 a. Ferguson, MO 284

b.	Baltimore, MD	285
	Note	286
	A Primer in Profiling: The Merger of Civil Rights and Criminal Defense	286
	Problem 7-1	292
	Questions	292
	Chapter 8. Exceptions to the Warrant Requirement	295
I.	Introduction.....	295
II.	Categories of Warrantless Searches and Seizures	296
A.	Searches Incident to Lawful Arrest	296
1.	Traditional Rule: Search of Arrestee	296
	United States v. Robinson	296
	Note	298
	Knowles v. Iowa.....	298
	Note	299
2.	Limitations on the SITA Exception	300
a.	Location Limitation: Arrestee’s “Wingspan”	300
	Chimel v. California	300
b.	Location Limitation: Motorists and Vehicles	302
	Arizona v. Gant.....	303
	Note	305
c.	Location Limitation: Arrest in the Home	306
	Maryland v. Buie	306
d.	Seizure (to Search) Limitation: Arrestee’s “Items”	310
	(i) Physical Effects.....	310
	United States v. Chadwick.....	310
	(ii) Digital Data	313
	Riley v. California.....	313
	(iii) Blood Alcohol Content (“BAC”)	319
	Birchfield v. North Dakota.....	320
B.	Exigent Circumstances	324
1.	General Rule.....	324
2.	Evidence Destruction	324
a.	Narcotics and Other Physical Evidence	324
	Kentucky v. King.....	326
	Notes and Questions	330
b.	Blood Alcohol Content Evidence.....	332
	Schmerber v. California	332
	Note	334
	Missouri v. McNeely.....	334
	Note	338
	Mitchell v. Wisconsin	339
3.	“Emergency Aid” Exception (Inside the Home).....	343
	Brigham City v. Stuart	343
	Caniglia v. Strom	347
C.	“Hot Pursuit”	348
	United States v. Santana	349
	Lange v. California.....	351

Problem 8-1.....	356
Problem 8-2.....	357
D. Plain View, Touch, and Smell	357
Texas v. Brown	358
Horton v. California	360
Note.....	364
Minnesota v. Dickerson	364
Problem 8-3.....	366
Problem 8-4.....	366
Problem 8-5.....	367
Problem 8-6.....	367
Problem 8-7.....	368
E. Vehicle (and Containers Within) Searches.....	369
1. The Automobile Exception: General Rule.....	369
2. Mobility + Regulation = ↓ Lesser Privacy Expectation.....	370
California v. Carney.....	371
Note	374
3. Containers Within Vehicles.....	374
United States v. Di Re.....	376
Problem 8-8.....	377
Problem 8-9.....	377
Problem 8-10.....	378
F. Consent	378
1. Requirement of Voluntariness.....	378
Schneckloth v. Bustamonte	379
Note	384
2. Authority to Consent.....	387
a. Actual Authority.....	387
Georgia v. Randolph	388
Note	390
Fernandez v. California	391
Notes and Questions	397
b. Apparent Authority	398
c. Scope of Consent.....	399
Florida v. Jimeno.....	399
d. Withdrawing Consent	403
Problem 8-11	404
Problem 8-12	405
Problem 8-13.....	406
Problem 8-14	407
Problem 8-15.....	408
Chapter 9. Special Needs Searches.....	409
I. Introduction.....	409
A. What Is the Governmental Purpose?.....	410
B. Evaluating the Governmental Interest	410
II. Recognized Areas of Special Needs.....	410
Camara v. Municipal Court.....	411
See v. City of Seattle.....	412

A.	Pervasively Regulated Industries	413
	New York v. Burger	415
	Problem 9-1.....	419
	Problem 9-2.....	420
	Problem 9-3.....	421
B.	Drug Testing.....	421
1.	Drug Testing Public School Children.....	422
	Vernonia School Dist. 47J v. Acton	423
	Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls.....	425
	Safford Unified School Dist. #1 v. Redding	429
	Problem 9-4.....	431
2.	Drug Testing Adult Public Employees in the Workplace	431
	National Treasury Employees Union v. Von Raab	433
3.	Drug Testing Adults Outside of the Workplace	437
	Ferguson v. City of Charleston.....	438
C.	Searches of Probationers and Their Homes	443
	Samson v. California.....	446
	Notes and Questions	448
D.	Border Search Exception: Searches and Seizures by Customs and Border Patrol Agents	450
	United States v. Montoya de Hernandez.....	451
	United States v. Flores-Montano	459
	Notes and Questions	461
E.	Roadblocks, AKA “Vehicle Checkpoints”	462
	City of Indianapolis v. Edmond.....	464
	Problem 9-5.....	468
	Illinois v. Lidster	469
	Problem 9-6.....	471
F.	Inventory Searches	472
	Problem 9-7.....	474
	Problem 9-8.....	475
G.	DNA Identification.....	476
	Maryland v. King	477

Chapter 10. Race and Policing.....489

I.	Introduction.....	489
A.	“Original Intent”	489
	Dred Scott v. Sandford.....	492
B.	“Black Crimes”	495
C.	The Warren Court “Revolution”	497
II.	The Movement: The Birth of #BlackLivesMatter	498
III.	The Moment: The Killing of George Floyd and the Summer of 2020 Protests.....	515
IV.	The Problem: The Unassailable “Superpowers” of the “Objectively Reasonable” Officer.....	520
A.	The Power to Racially Profile	521
B.	The Power to Arrest	522

C.	The Power of “Objective” Policing	522
D.	The Power to Kill.....	523
E.	The Power of Protection (Qualified Immunity)	524
V.	Post-Floyd Police Reform.....	528
A.	Reform the Police	529
B.	#DefundThePolice	532
C.	Police the Police.....	538
VI.	Epilogue.....	541
Chapter 11. Technology and Surveillance		545
I.	Introduction.....	545
II.	Constitutional Limits on Surveillance.....	546
A.	Fourth Amendment.....	546
1.	Pre- <i>Katz</i> Surveillance Law	546
	<i>Berger v. New York</i>	546
2.	Post- <i>Katz</i> Surveillance Law.....	549
B.	First Amendment	551
III.	Statutory Limits on Surveillance.....	551
A.	Historical Background	551
B.	The Wiretap Act and Its Amendments: The Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510– 2523.....	553
1.	Communication	554
	Problem 11-1.....	556
2.	Interception/Acquisition	556
3.	“Contents”	557
4.	“Device”	558
5.	Authorization.....	558
6.	“Consent”.....	560
7.	Private Actors	561
	Problem 11-2.....	561
	Problem 11-3.....	561
	Problem 11-4.....	561
8.	Remedies	562
C.	The Stored Communications Act.....	563
D.	Communication Assistance for Law Enforcement Act	565
E.	The USA PATRIOT Act	566
IV.	Emerging Surveillance Technologies.....	567
A.	Cell Site Simulators (“Stingrays”).....	568
B.	Geofence, “Reverse,” or “Reverse Location” Warrants.....	570
1.	GLHS.....	570
2.	GLHS Versus CSLI	571
3.	“Search”?	572
4.	“Warrant”?	572
	Problem 11-5.....	573
C.	Facial Recognition Technology	574
D.	The Internet of Things (“IoT”)	576
E.	Automated License Plate Readers (“ALPR”)	586
F.	“Predictive Policing”	587

G. “Sensorveillance”	590
V. January 6, 2021: Surveillance Technologies in Action	591
Chapter 12. The Exclusionary Rule	611
I. Introduction.....	611
Wong Sun v. United States	612
II. Exceptions to the Exclusionary Rule	616
United States v. Calandra.....	616
A. The Inevitable Discovery Exception	618
Nix v. Williams.....	618
Notes and Questions	623
B. The Independent Source Exception	624
Murray v. United States.....	624
C. The Attenuation (of the Taint of Illegality) Exception	628
Kaupp v. Texas.....	629
Utah v. Strieff.....	629
Notes and Questions	632
Problem 12-1.....	634
Problem 12-2.....	635
D. The Good Faith Exception	636
United States v. Leon	636
Arizona v. Evans	642
Questions	644
Heien v. North Carolina	645
Herring v. United States	647
Davis v. United States	653
Problem 12-3.....	656
Problem 12-4.....	657
III. Collateral Use Exceptions to the Exclusionary Rule.....	658
A. The “Criminal Case” Exception.....	658
B. The Impeachment Exception.....	659
Kansas v. Ventris	660
Problem 12-5.....	663
Problem 12-6.....	664
IV. Alternatives to the Exclusionary Rule	665
Notes and Questions	668
A. Civil Remedies.....	669
1. Section 1983.....	669
2. <i>Bivens</i> Actions and Qualified Immunity.....	672
3. The Federal Tort Claims Act.....	676
4. Section 1985.....	678
5. RICO	679
6. Injunctive Relief.....	681
a. Private Actors	681
b. Public Actors	682
B. Criminal Remedies.....	682
1. 18 U.S.C. § 241	683
2. 18 U.S.C. § 241 and § 242	683
Problem 12-7.....	686

Notes and Questions	687
Chapter 13. Confessions	691
I. Introduction.....	691
II. Due Process and Voluntariness	691
Brown v. Mississippi.....	692
A. The “Totality of the Circumstances” Test.....	694
B. Key Factors in the “Totality of the Circumstances” Analysis	694
1. Use of Force and Fear of Physical Injury	694
2. Lengthy Interrogations and Deprivation of Bodily Needs.....	695
3. Administering <i>Miranda</i> Rights	695
4. Use of Psychological Techniques	696
a. Pressure Tactics.....	696
b. False Promises of Leniency.....	696
c. Deception.....	697
5. Ending Deceptive Police Interrogation Tactics	699
C. The Requirement of Police Coercion	699
Colorado v. Connelly	699
Notes	701
Problem 13-1.....	702
Problem 13-2.....	703
III. The <i>Miranda</i> Rule.....	704
A. Voluntariness vs. Self-Incrimination.....	705
B. The Landmark <i>Miranda</i> Decision.....	706
Miranda v. Arizona	706
1. Adequacy of Warnings	714
2. Pretrial Confessions vs. Confessions at Trial.....	716
3. <i>Miranda</i> ’s Impact	716
C. Affirming <i>Miranda</i> ’s Constitutional Status	717
Dickerson v. United States	717
D. “Custodial Interrogation”.....	722
1. The Definition of “Custody”	722
Yarborough v. Alvarado	722
Notes	726
Problem 13-3.....	729
Problem 13-4.....	730
Problem 13-5.....	730
2. The Definition of “Interrogation”	731
Rhode Island v. Innis	731
Notes	735
Problem 13-6.....	736
Problem 13-7.....	736
3. Waiver of <i>Miranda</i> Rights	737
a. Waiver of Right to Silence.....	740
Michigan v. Mosley.....	740
b. Waiver of Right to Counsel	744
Moran v. Burbine.....	744

4.	Invocation of <i>Miranda</i> Rights	748
a.	The Unambiguous Assertion Requirement	748
b.	The Assertion of the Right to Counsel	749
	Edwards v. Arizona	749
	Note	752
5.	Scope of the <i>Miranda</i> Exclusionary Rule	753
a.	Fruit of the Poisonous Tree	753
	(i) Missouri v. Seibert, 542 U.S. 600 (2004)	753
	(ii) United States v. Patane, 542 U.S. 630 (2004)	754
b.	Impeachment	755
	Problem 13-8	756
	Questions	757
6.	<i>Miranda</i> Exceptions	757
a.	Public Safety Exception	757
b.	Undercover Activities	758
E.	Review Exercise: Critiquing Portions of a Suppression Hearing Transcript Raising <i>Miranda</i> Issues	758
	Questions	766
IV.	The Sixth Amendment Right to Counsel	766
A.	The <i>Massiah</i> Doctrine's Historical Background	766
B.	The Decision in <i>Massiah</i> and Interpretive Issues	768
C.	Thresholds: Formal Charge and Deliberate Elicitation	769
	1. The Requirement of a Formal Charge	769
	2. Deliberate Elicitation	769
D.	Waiving Sixth Amendment Rights	772
E.	<i>Massiah</i> 's Offense-Specific Nature	774
F.	Scope of the Sixth Amendment Exclusionary Rule	778
G.	Review Problems	780
	Problem 13-9	780
	Problem 13-10	781
	Problem 13-11	782
	Problem 13-12	782
	Problem 13-13	783
	Chapter 14. Eyewitness Identifications	787
I.	Introduction	787
II.	Identification Procedures	788
A.	Photospread/Photo Array	789
B.	Lineups	789
C.	Showups	790
III.	The Sixth Amendment Right to Counsel and the <i>Wade</i> Trilogy	791
A.	Lineups	791
	United States v. Wade	791
B.	Showups	796
	Stovall v. Denno	797
C.	Photo Arrays	798
	Simmons v. United States	798
	Notes and Questions	801

- IV. Fifth and Fourteenth Amendments Due Process 802
 - Perry v. New Hampshire 804
- V. Current Science on Eyewitness Identification 810
 - A. Specific Findings 810
 - 1. Witness Factors 810
 - 2. Perpetrator, Event, and Post-Event Factors 811
 - 3. Suggestive Procedure Factors 812
 - B. Recent Science 812
 - C. Review Problems 815
 - Problem 14-1..... 815
 - Problem 14-2..... 816
 - Problem 14-3..... 817
 - Problem 14-4..... 817
 - Problem 14-5..... 818
- VI. Other Constitutional Issues 818
 - A. Fifth Amendment 818
 - B. Fourth Amendment..... 818
- VII. U.S. Department of Justice Memorandum on Eyewitness Identification Procedures 819
- Chapter 15. National Security.....833**
- I. Introduction..... 833
- II. Federal Law..... 833
 - A. The USA Patriot Act 834
 - 1. Provisions Affecting Fourth Amendment Searches 834
 - 2. Provisions Affecting Statutory Powers 834
 - B. The Foreign Intelligence Surveillance Act (“FISA”) 836
 - C. The National Security Agency’s Global Surveillance Program 838
 - D. Other Special Statutory Powers..... 839
 - 1. The Homeland Security Act..... 839
 - 2. Extended Detention of Persons in the War on Terrorism .. 839
 - 3. Material Witness Warrants 844
- III. Terrorism..... 847
 - A. Domestic Terrorism..... 847
 - B. International Terrorism..... 851
- IV. January 6, 2021: Insurrection..... 852
- INDEX 875