

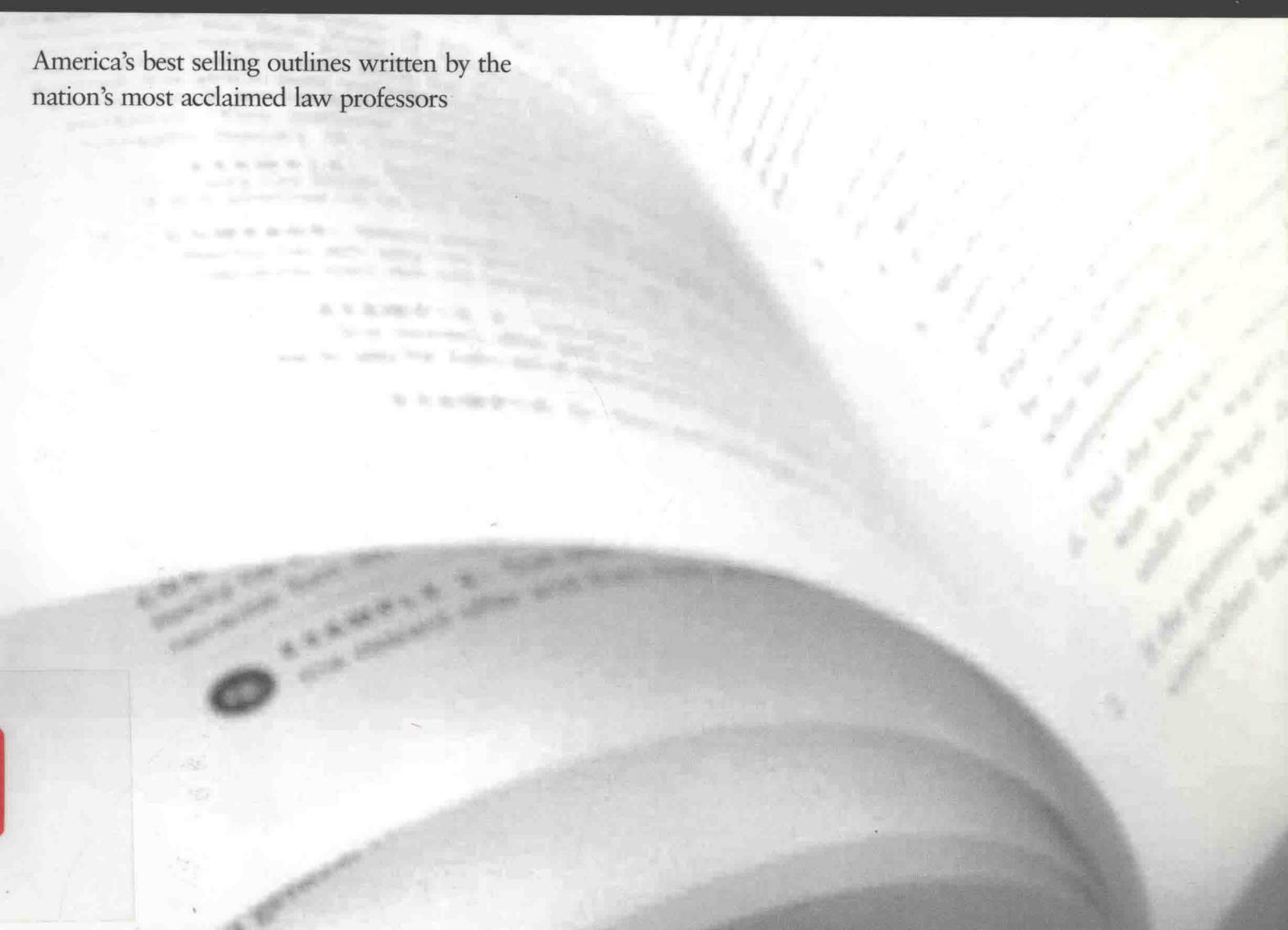
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LAW SUMMARIES

Criminal Procedure

Paul Marcus & Melanie D. Wilson

America's best selling outlines written by the
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Criminal Procedure

BY PAUL MARCUS

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Eighteenth Edition

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Capsule Summary

I. CONSTITUTIONAL PRINCIPLES

A. THE BILL OF RIGHTS

§1

The first 10 amendments to the Constitution (the Bill of Rights) include a number of provisions limiting the government's power over criminal procedure (e.g., the **Fourth Amendment** prohibits unreasonable searches and seizures; the **Fifth Amendment** prohibits double jeopardy, compelled self-incrimination, and deprivations of life, liberty, or property without due process; the **Sixth Amendment** requires speedy trials and grants a right to the assistance of counsel).

1. Selective Incorporation

§2

Many of the individual rights guaranteed by the Bill of Rights are applicable to the states only via the Fourteenth Amendment's Due Process Clause, which requires "fundamental fairness" in state criminal proceedings. Such rights include:

- a. **The prohibition against unreasonable searches and seizures** and the **exclusionary rule** (Fourth Amendment);
- b. **The bar against double jeopardy** and the privilege against forced **self-incrimination** (Fifth Amendment);
- c. **The rights to a speedy and public trial**, to a **jury trial**, to **confrontation** and **compulsory process** to obtain witnesses, and to **counsel** in felony and some misdemeanor cases (Sixth Amendment); and
- d. **The prohibition against cruel and unusual punishment** (Eighth Amendment).

2. Rights Not Incorporated

§7

Not all provisions of the Bill of Rights apply to the states:

- a. **The Fifth Amendment right to indictment** for capital and infamous crimes does not apply; and
 - b. **The Eighth Amendment prohibition against excessive bail** may or may not apply to the states.
-

B. EXCLUSION OF EVIDENCE

1. General Principles of the Exclusionary Rule

§9

To deter government agents from trampling constitutional protections, the

Supreme Court adopted the exclusionary rule. Under the rule, **evidence obtained by an unconstitutional search or seizure** generally is **not admissible** at a criminal trial **as proof of guilt**. Note: The rule applies to both state **and** federal actions.

- 2. **General Scope** §14

Under the exclusionary rule, all evidence unconstitutionally obtained must be excluded—including evidence acquired directly or indirectly as a result of the unconstitutional search or arrest (*i.e.*, “fruit of the poisonous tree”).

 - a. **Dissipation of the taint** §16

Evidence otherwise inadmissible may be allowed if the prosecution demonstrates removal of the taint in one of the following ways:

 - (1) **Inevitable discovery**—police would have discovered the evidence regardless of illegal action;
 - (2) **Independent source**—police obtained the evidence from an independent, untainted source; or
 - (3) **Confessions**—confessions obtained in violation of a person’s Fifth Amendment right against compelled self-incrimination generally will be excluded from evidence, but confessions obtained in violation of a defendant’s Fourth Amendment rights (*e.g.*, confessions arising during an unconstitutional search) may be admissible if there is a weak link between the evidence and the unconstitutional police conduct (*e.g.*, defendant’s confession was an act of free will).
 - b. **Identification exception** §21

If the police seize the defendant improperly and use the seizure to assist in identifying the victim, the court need not exclude the resulting evidence.
 - c. **Witness’s statement exception** §22

In cases where the ultimate evidence obtained is a statement of a third-party witness, courts are likely to find that the taint has been eliminated.
- 3. **Enforcement of Exclusionary Rule** §23

The issue of whether to exclude evidence is normally raised at a **pretrial suppression hearing**. The judge decides, by a **preponderance of the evidence**, whether the evidence was constitutionally obtained. At the hearing, the defendant may testify, and her testimony may **not** be used at trial to prove her guilt.
- 4. **Exceptions to the Exclusionary Rule**
 - a. **Impeachment exception** §27

Unconstitutionally obtained evidence may be used at trial to impeach the credibility of a witness, but not to prove guilt. However, a truly involuntary confession (*e.g.*, one coerced by threat of force) is inadmissible for any purpose. Similarly, immunized testimony may not be used for impeachment purposes.
 - b. **Post-conviction federal habeas corpus proceeding** §32

If the state provided the defendant with a full and fair hearing of an

unreasonable search and seizure claim, the defendant cannot raise the exclusionary question again later in a federal habeas corpus proceeding.

- c. **Private party search exception** §33
The Fourth and Fifth Amendments apply only to government action. Therefore, courts will **not** exclude evidence obtained by a private party acting independently of the police.
- d. **Civil proceedings exception** §34
The exclusionary rule does not apply in civil proceedings.
- e. **Police good faith exception** §36
The exclusionary rule does not apply when police officers act in the objectively reasonable belief that their conduct is not violating the defendant's rights. Thus, the rule does not apply when there has been good faith reliance by the police on a facially valid law or, under most circumstances, on a defective search warrant. The rule does not apply even if the police conduct a search or make an arrest relying on a negligently maintained police record.
- f. **Grand jury exception** §38
Grand jury witnesses may not refuse to answer questions based on illegally seized evidence.
- g. **State law/agency rule exception** §39
If the search does not violate the Constitution and only violates state law or agency rule, the defendant is not entitled to exclusion of the evidence.
- h. **Parole revocation proceeding exception** §40
The exclusionary rule does not apply in parole revocation proceedings.
- i. **Knock and announce rule violation** §41
Exclusion is not an available remedy for violations of the knock and announce rule pertaining to the execution of a search warrant. (See *infra*, §62.)
5. **Effect of Exclusionary Rule Violation** §42
If the defendant has made a timely motion to suppress, it is error for the court to admit unconstitutionally obtained evidence. Admission of such evidence will result in a reversal on appeal if the defendant is convicted **unless**: (i) the defendant **waived** the error by failing to object to the use of the unconstitutionally obtained evidence; **or** (ii) the error is found, beyond a reasonable doubt, to be **"harmless"**—i.e., did not contribute to the conviction.
6. **Retroactivity** §46
If a Supreme Court decision interprets or delineates constitutional rights, the decision will be applied retroactively to all **convictions affected by the decision** that are **not yet final** or that are **pending on direct review**.

II. THE FOURTH AMENDMENT

A. ARREST AND OTHER DETENTIONS

1. **Introduction** §47
The Fourth Amendment prohibits **the government** from conducting

unreasonable searches (intrusions into a person's place of privacy) or seizures (exercise of control by the government over a person or a thing).

- 2. **Arrests** §51

An arrest is a Fourth Amendment seizure that occurs when a **person is taken into custody against her will**. It requires a physical application of force by a police officer **or** submission to an officer's show of force.

 - a. **Probable cause requirement** §53

No arrest is valid unless there is probable cause—*i.e.*, a **reasonable belief that this suspect has committed or is about to commit a crime**.
 - b. **Effect of invalid arrest** §54

An unconstitutional arrest, by itself, has no impact on a subsequent criminal prosecution, although evidence found during a search incident to an unlawful arrest will be suppressed. Note that an arrest is not unconstitutional merely because the grounds stated at the time of the arrest were erroneous or even if state law did not provide for arrest under the circumstances, as long as the police had probable cause to make the arrest.
 - c. **Arrest warrant not required except for home arrests** §55

The Fourth Amendment reasonableness standard does not require that a warrant be obtained prior to an arrest in a public place, as long as there is probable cause to make the arrest.

 - (1) **Arrests in public places** §56

A police officer may make a warrantless arrest in a public place when she has **reasonable grounds to believe a felony has been committed** by a particular person or when a **misdemeanor has been committed in her presence**.
 - (2) **Arrests in the home** §59

The Supreme Court imposes a presumption that warrantless, in-home arrests are unreasonable and therefore invalid under the Fourth Amendment unless exigent circumstances are present or the arrestee consents.

 - (a) **Exception—hot pursuit** §60

If probable cause exists, the police may, without a warrant, pursue a suspect into his home if necessary to prevent the suspect's escape or destruction of evidence.
 - (b) **Exception—emergency assistance** §61

Police may enter a home without a warrant to render emergency aid to an injured occupant or to protect an occupant from imminent injury. This is often referred to as the community caretaker exception.
 - (c) **Announcement requirement** §62

Generally, a police officer must announce her authority and purpose before using force to enter a home to make an arrest. Most jurisdictions allow officers to make a "no-knock"

entry only if the officers have a reasonable belief that an announcement would endanger the officers, prompt a suspect's escape, or allow the destruction of evidence. In any case, failure to knock and announce will not result in the exclusion of evidence.	
(d) Scope of search	§64
A warrant to arrest in a home does not authorize a full search of the home. Police must stop searching once the suspect is found.	
(e) Third-party premises	§65
A search warrant is required for the arrest of a suspect in another person's home.	
(3) Obtaining a warrant	§66
To obtain an arrest warrant, a police officer's affidavit, containing facts showing the commission of an offense and the accused's responsibility for it, must be presented to a judicial officer who determines its sufficiency.	
3. Deadly Force	§67
There is a Fourth Amendment "seizure" when a police officer uses deadly force to apprehend a suspect. An officer may not use deadly force unless it is reasonable to do so under the circumstances (e.g., where a suspect might pose a danger to himself or others).	
4. Stops and Other Detentions	§68
Not all seizures need to be supported by full probable cause; limited stops and detentions may be justified on a lesser showing.	
a. Limited detention—stop and frisk	
(1) Stop	§69
Police officers may <i>briefly</i> detain a person for questioning ("stop") without probable cause if they <i>observe unusual conduct</i> leading to a " <i>reasonable suspicion</i> " that criminal activity may be afoot, and the officer is <i>able to point to specific and articulable facts to justify</i> that suspicion. The officer must consider the <i>totality of the circumstances</i> and must have a <i>particularized, objective basis</i> for suspecting the particular person stopped of criminal activity. The investigatory stop must be <i>temporary</i> and <i>no longer than necessary to effectuate its purpose</i> . Note that if the police have a reasonable suspicion that luggage contains narcotics, this will support a <i>temporary</i> detention of the unopened luggage for investigative purposes.	
(2) Frisk	§74
An officer may conduct a limited pat-down ("frisk") of a person's <i>outer clothing</i> for a <i>weapon</i> if the officer <i>reasonably suspects</i> that the suspect is armed and dangerous.	

(3)	Stop and identify statutes	§76
	Requiring loiterers to give police a “credible and reliable identification” is unconstitutionally vague if it is unclear what is sufficient for identification. The Due Process Clause prohibits regulations that fail to give persons reasonable notice of what is prohibited. However, merely requiring a person once lawfully stopped to state his name is constitutional as long as the police have reasonable suspicion to make a <i>Terry</i> stop.	
b.	Automobile stops	§77
	Police officers may not stop a single vehicle for the sole purpose of checking the driver’s license or the vehicle’s registration unless they have “reasonable suspicion.”	
(1)	Pretextual stops	§78
	If an officer has probable cause to stop a vehicle, the officer may do so even if the officer’s motive is to investigate whether some other law—for which the officer lacks reasonable suspicion—has been violated.	
(2)	Seizure of occupants	§79
	An automobile stop constitutes a seizure not only of the automobile’s driver, but also of any passengers.	
(3)	Roadblocks	§80
	The Supreme Court has upheld roadblock searches—made without individualized suspicion that the driver has violated some law—when the roadblock stops cars on the basis of some neutral, articulable standard (e.g., every car, every third car, etc.) <i>and</i> the roadblock is designed to serve purposes closely related to a particular problem related to automobiles and/or their mobility (e.g., drunk driving).	
(4)	Ordering persons out of a vehicle	§85
	If a police officer has lawfully stopped a vehicle, the officer may, without further justification, order the vehicle’s occupants to get out.	
c.	Detention during search permissible	
	When executing a search warrant, police may detain persons present on the searched premises while the search is conducted. However, the police officers may not conduct a weapons patdown unless they have a reasonable and articulable suspicion that criminal activity is afoot and the detainee is armed.	
d.	Police station investigations	§87
	Generally, police officers must have probable cause to bring a suspect to the police station for questioning or fingerprinting.	
5.	Grand Jury Subpoena Exception	§90
	The Fourth Amendment requirement that searches and seizures be reasonable does not protect a person from being compelled by subpoena to appear before a grand jury. Thus, a grand jury subpoena to appear need not be based on probable cause or objective suspicion.	

B. EVIDENTIARY SEARCH AND SEIZURE

1. **Introduction** §91

The Fourth Amendment prohibits *the government* from conducting *unreasonable* evidentiary searches and seizures. To be reasonable, most searches must be conducted pursuant to a warrant. When conducting a search, police may usually look for: *instrumentalities* of crime, *fruits* of crime, *contraband*, or *evidence* of crime.
2. **Governmental Conduct Requirement** §93

The Fourth Amendment applies only to actions by *government officials*, unless a private person is acting on behalf of the government.
3. **Reasonable Expectation of Privacy Requirement** §94

A defendant can raise a Fourth Amendment claim only if he has *standing*, meaning a *reasonable or legitimate expectation of privacy*. Courts must look at the *totality of circumstances* to make a determination.

 - a. **Standing** §95

To have standing to challenge a search, a person must have a *legitimate expectation of privacy*, which is assessed under the totality of the circumstances. The Supreme Court has found standing when the place searched was the defendant's home, or a place he was staying overnight with the owner's permission, or a place the defendant had a right to possess. Anyone in an automobile stopped unconstitutionally may challenge the stop and evidence obtained from the stop, but if an automobile is constitutionally stopped, a passenger does not have standing to challenge a search of the automobile just because the passenger was legitimately within the automobile.

 - (1) **Legitimately on premises alone—insufficient** §96

Someone merely present in a home with a homeowner's consent does not necessarily have standing to complain of a search of the home.
 - (2) **Conspirator—no automatic standing** §100

That a conspirator might be aggrieved by evidence seized from a co-conspirator does not automatically give the conspirator standing; he must show that his *own expectation of privacy* was violated.
 - b. **Items held out to the public** §102

There can be no reasonable expectation of privacy in items held out to the public (e.g., handwriting, voice, bank records, location of car on public streets, the smell of one's luggage or automobile, etc.).

 - (1) **Open fields doctrine** §103

Areas outside the curtilage of a home are considered to be held out to the public; searches of such areas do not violate the Fourth Amendment (e.g., outbuildings).
 - (2) **Flyovers** §105

Items that can be viewed from legal airspace are subject to warrantless searches even within the curtilage.

(a) **Vision enhancement**

§106

The Court has allowed the warrantless use of powerful cameras—that are generally available to the public—to take photographs from legal airspace of **industrial fields**, but has prohibited the warrantless use of sense-enhancing technology (specifically, thermal imaging cameras) to gain information from the interior of a home that could not otherwise have been obtained without physical intrusion, at least where the technology in question is not in general public use. The difference between the two situations lies in the differing expectations of privacy.

(3) **Contraband**

§108

There can be no legitimate expectation of privacy in contraband. Therefore, there is no unconstitutional search when contraband in luggage in a public place or in a constitutionally stopped automobile is sniffed out by a narcotics detection dog.

4. **Searches Conducted Pursuant to a Warrant**

a. **Warrant requirement**

§110

Normally, a warrant is needed for a search or seizure (unless the action is within one of the established exceptions, *infra*). To be valid, a warrant must be based on probable cause, be supported by oath or affirmation, particularly describe what is to be searched or seized, and be issued by a neutral magistrate.

b. **Probable cause requirement**

§112

No warrant may be issued until an independent magistrate has determined that there is probable cause to issue the warrant. Note that a warrant may be anticipatory—it is sufficient that there is reason to believe seizable evidence will be found at a future date, when the search is conducted.

(1) **Affidavits based on hearsay—totality of the circumstances**

§116

Credible hearsay **may** be used to establish probable cause. The validity of a warrant based on an informant's tip is determined by a **totality of the circumstances** test: All of the allegations in the affidavit, taken together, must permit the magistrate to make a common sense evaluation that there is a fair probability that contraband or evidence of a crime will be found in a particular place.

(2) **Challenging the warrant**

§121

A warrant valid on its face may be challenged by the defendant, but the challenge must establish that the affiant made false statements knowingly or recklessly. Even then, the false statements will be excised and the affidavit analyzed for probable cause without the false portions.

c. **Precision requirement**

§123

A warrant must describe with reasonable certainty the **place** to be searched and the **items** to be seized. It is not sufficient that such detail

is in the affidavit underlying the warrant. However, a reasonable error in the description will not necessarily invalidate the search.

d. Disinterested magistrate requirement **§124**

A warrant must be issued by a *neutral and detached* magistrate.

e. Third-party premises may be searched **§125**

Searches of property belonging to persons not suspected of a crime are permissible as long as probable cause exists to believe that evidence of someone's guilt (or other items subject to seizure) will be found.

f. Execution of warrant **§126**

Generally, police officers must execute a warrant alone (e.g., the media or other third parties may not accompany the police), unless a third party's assistance is needed. Police officers must knock and announce their authority and purpose unless they have reasonable suspicion *based on facts specific to the particular case*, that knocking and announcing would be *dangerous or futile*, or that it would *inhibit the investigation* (e.g., it would lead to the destruction of evidence). However, failure to knock and announce will not result in exclusion of evidence. During execution of the warrant, persons on the premises may *not* be fully searched but may be detained. The search cannot go beyond the scope of the warrant, but an objectively reasonable error in execution does not invalidate a search. Generally, a separate search warrant is required to execute an arrest warrant on third-party premises.

5. Exceptions to Warrant Requirement **§137**

The Supreme Court has recognized exceptions to the warrant requirement when faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like.

a. Search incident to a constitutional arrest **§138**

The police may search a person without a warrant after a constitutional arrest. Such a search may be conducted pursuant to *any custodial arrest*, even for minor violations of law.

(1) Arrest must be constitutional **§141**

Most Supreme Court cases dealing with searches incident to arrest have indicated that the search must be "lawful," which the Supreme Court has recently held to mean "constitutional." To be constitutional, an arrest must be made pursuant to a warrant—in some circumstances—or otherwise based on *probable cause* to make the arrest. The constitutionality of an arrest does not depend on whether, under the circumstances, state law authorized the arrest.

(2) Scope of search **§144**

The search can be of the person arrested *and* the areas within the person's immediate reach.

(a) Protective sweep **§145**

If police officers reasonably believe that dangerous accomplices

may be present, they may conduct a “protective sweep” of the entire area to assure their safety.

(b) Automobile occupants **§147**

After arresting an automobile occupant, police officers may search the passenger compartment if they reasonably believe that the arrestee may access the vehicle to obtain immediate control of a weapon or if it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

(3) Search must be contemporaneous to arrest **§151**

The search must be contemporaneous to the time and place of arrest; a search conducted at a different location and after the arrest generally cannot be justified by the arrest exception.

(a) Exception—station house inventory search **§153**

When an arrestee is taken to the police station, police may make a full inventory search of the arrestee’s person and all property in his possession (to protect the police and the property) if such a search is done pursuant to established procedure. Similarly, a full inventory search (including closed containers) can be made of impounded vehicles.

b. Automobile exception **§155**

A search of a vehicle (either on the road or at the police station) is valid if there is probable cause to believe that evidence or fruits of a crime will be found. The search may encompass the whole vehicle, as well as containers in the vehicle where evidence or fruits may be found. However, if officers have probable cause to search only a container within a vehicle, they may search only that container. Note that the search need not be contemporaneous to the time the vehicle is stopped.

c. Plain view exception **§167**

If officers are *legitimately on the premises*, they may lawfully seize items that they discover on the premises *in plain view* that they have probable cause to believe are *contraband or fruits or instrumentalities* of crime. The items need not be described in the warrant.

d. Stop and frisk exception **§175**

An officer may detain a suspect if the officer has an *articulable, reasonable suspicion* that the suspect is engaging in criminal activity. Reasonable suspicion need not be based on personal knowledge. The officer may question the suspect; if he believes the suspect may be dangerous, he is permitted to pat down the suspect’s outer garments and reach into garments if he feels something that, based on its plain feel, he reasonably believes to be a weapon or has probable cause to believe is contraband.

(1) Totality of circumstances considered **§178**

In deciding whether to stop and frisk a person, the police may consider the totality of the circumstances. Note that the Supreme

Court has ruled that a person's **unprovoked flight** after seeing police in a high crime area gives officers reasonable suspicion for a *Terry* stop.

(2) **Traffic stops**

§182

If police officers have lawfully stopped a vehicle for a traffic violation, they may search the passenger compartment for weapons if they reasonably believe the occupant is dangerous. Police officers may also order occupants out of the vehicle with no additional suspicion and frisk any occupant they reasonably suspect to be armed and dangerous.

(3) **Stop**

§183

A stop occurs when the police conduct is such that a reasonable person would believe that she is not free to leave. To be valid, the stop must be for no longer than necessary to effectuate its purpose. If a stop is unreasonably long, it becomes an arrest and invalid unless there was probable cause for arrest.

(4) **Evidence admissibility standards**

§184

Evidence obtained during a *Terry* frisk will be admissible if, based on its plain feel during the frisk, the officer could reasonably have believed the item to be a **weapon** or has probable cause to believe the item is **contraband**.

(5) **Stop and identify statutes**

§185

As long as police officers have reasonable suspicion to make a *Terry* stop, they may require the detainee to identify himself, and the detainee may be arrested for failing to comply.

e. **Consent exception**

§186

Police may conduct a search without a warrant if the owner (or other person who reasonably appears to have authority) **voluntarily and intelligently** consents to the search (court will consider all of the facts to determine whether consent was given voluntarily). The search may extend to any object or container that a reasonable officer would understand to be within the scope of the consent granted. Note, however, that third party consent is not valid if the suspect against whom the search is directed is present and objects to the search, even if others give consent.

f. **Emergency exception**

§194

No warrant is needed if officers, in good faith, cannot obtain a warrant and need to conduct a search for the protection of themselves or others (*i.e.*, the community caretaker exception) or evidence (*e.g.*, a threat of immediate physical danger exists, police are in hot pursuit of a dangerous suspect, rushing to scene of homicide, etc.).

6. **Electronic Surveillance**

§201

Any form of electronic surveillance, including wiretapping, that violates a **reasonable expectation of privacy** constitutes a search.

a. **Warrant requirement**

§202

To be constitutionally valid, a warrant must describe with particularity