NATIONAL CENTER FOR JUSTICE AND THE RULE OF LAW

University of Mississippi
School of Law

Thomas K. Clancy
Director

www.NCJRL.org
Promotes awareness of search and seizure principles

**National Judicial College**
Specialized training for trial and appellate judges.

**Annual Conferences**
Address important search and seizure issues, published in the *Mississippi Law Journal*.

**James Otis Lecture**
Annual lecture by noted scholar.

**Computer Searches and Seizures**
Judicial and prosecutor training w/ NAAG and *Mississippi State University*

Publications at [www.NCJRL.org](http://www.NCJRL.org)
Annual Fourth Amendment Symposiums

2002: Technology

2003: Race & Ethnicity

2004: "Tools" to Interpret

2005: Computer Searches and Seizures

2006: Role of Objective vs. Subjective Intent

2007: Independent State Grounds

2008: Border Searches -- digital and physical

2009: "Great Dissents"
upcoming events

Comprehensive Search and Seizure for Trial Judges

- OXFORD -- Sept 21-24, 2009
- Reno -- May 18-21, 2009

Computer Searches and Seizures for Trial Judges

- OXFORD, MS -- Feb 26-27, 2009
  - Aug 20-21
  - Nov 3-4

Computer Searches and Seizures for Police Officers

- OXFORD, MS -- May 14-15, 2009
  - Sept 1-2

Scholarships available!
upcoming appellate judge conferences

**Computer Searches and Seizures & Digital Evidence**

RENO -- Oct 5-6, 2009

*Foundational Fourth Amendment Principles and Annual Fourth Amendment Symposium*

Oxford -- March 10-12, 2010

scholarships available!
how many times daily?
2008 S Ct Term

cert grants: memo as handout

1. Qualified immunity
   
   Pearson v. Callahan

2. Exclusionary rule
   
   US v. Herring

3. Frisk of vehicle passengers
   
   Arizona v. Johnson

4. Search incident to arrest of vehicle occupants
   
   Arizona v. Gant

5. Student searches
   
   Safford School Dist. v. Redding
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.
Federal vs. State guarantees

States are free to interpret OWN constitution as providing more protections to individuals

* increasing trend: PA, CT, OR, .....  

* contra   CA, FL, ... prohibited from doing so

Symposium, 77 Miss. L.J. 1 (2007)
Montana constitution

- Mont. Const. art. II, § 11:

The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

- Mont. Const. art. II, § 10:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.
IN EVERY CASE, ....

1. Does the 4th Apply?
   
   A. Gov't activity: "Search" or "Seizure"
   
   B. Protected interest: liberty, possession, privacy

2. Is it Satisfied?
   
   "Reasonable"
   
   Warrant Clause requirements

[3. Remedies?]
Applicability:

Part A

"Search" Defined

"Seizure" Defined

Part B

What does the Amendment Protect:

Liberty, privacy, possession

Limitations: open fields, abandoned property, "Standing"
When does **seizure** occur: two types

**Physical**

1. officer **PHYSICALLY TOUCHES** suspect
2. with **intent to seize person**

   - does **NOT** have to gain control over suspect --- mere physical contact

**Show of Authority**

1. **SHOW OF AUTHORITY** demonstrating person is not free to leave / decline police requests
2. person **SUBMITS** to show of authority
What Constitutes Show of Authority?

TEST: Based on

- *all circumstances* surrounding encounter,
- did police officer's conduct communicate to *reasonable person*
- that person was *not free to decline officer's requests or otherwise terminate encounter*
SHOWS of Authority:

- ordering person to "halt" -- "freeze" -- "stop"
- ordering person to answer questions
- turning on police's car's siren or emergency lights
- pointing weapon at person
- roadblock

NOT SHOWS of Authority:

- merely approaching person in public place
- identifying oneself as police officer
- asking person if willing to answer questions
- merely asking questions
What Constitutes Submission:

*compliance with officer's show of authority*

**submission:**

Motorist stops car in response to police siren or flashing lights of police car following him.

**NO submission:**

Suspect runs away

Active resistance ---- use of physical force by suspect
SUSPECT WHO THROWS EVIDENCE

- If stop occurs **before** evidence thrown, evidence **cannot** be used to justify stop.

- If evidence **thrown before** stop, officer can seize object **and** use object to justify stop

States rejecting *Hodari D*

- CONN
- DEL
- Hawaii
- KY
- MASS
- MINN
- MONT
- NJ
- NH
- NY
- OR
- PA
- TENN
- WASH

**State v. Clayton, 45 P.3d 30 (Mont. 2002)**

* no submission required
* seizure occurs when show of authority made
"Search"

physical intrusions
two sided nature of applicability question

- **Bond**
  
  **physical manipulation of bus passenger's carry-on luggage**

- **Hicks**

  **moving stereo to examine underside**
What about other forms of intrusions?

- **Use of other unaided senses:**
  - sight
  - hearing
  - smell
  - taste

- **Use of technology to aid senses:**
  - chemical tests
  - binoculars
  - flashlights
  - thermo imagers
  - trained dogs
"canine sniff"

... not a search within meaning of F/A

sniff discloses only presence or absence of narcotics

despite fact it tells authorities something about contents of container, info is limited

Montana ....... **IS** a search

State v. Tackitt, 67 P.3d 295 (Mont. 2003)
part B -- protected interests

4th:

"The right of the people to be SECURE in their persons, houses, papers, and effects . . . ."
Applicability detailed

Objects protected:
- People
- Houses
- Papers
- Effects

"Security" of each object implicated:

By "search":
- REP analysis
- REP "'
- REP "'
- REP "'

By "seizure":
- Liberty
- Possession
- Possession
- Possession
objects protected: open fields

4th Amendment does not apply to open fields

Hester v. U.S., 265 U.S. 57 (1924)

Montana constitution:

* may have reasonable expectation of privacy in land outside curtilage

* get REP if fencing, No Trespassing, or similar signs, or “by some other means" that indicates "unmistakably that entry is not permitted" --- if so, need permission or warrant to enter

* no warrant needed for observations of private land from public property

Protected Interests:

1. *Liberty*:

   freedom to go where one chooses

   gov't activity: seizure
2. **Possession**

gov't activity: *seizure*

"meaningful interference with an individual's possessory interests" in property

*Soldal v. Cook County, 506 U.S. 56 (1992)*
3. Privacy

"principal object of the Amendment is the protection of privacy . . . "

Gov't Activity: "SEARCH"

Two part test:

1. person exhibits actual, subjective expectation of privacy

2. society recognizes that expectation as reasonable

*Smith v. Maryland, 442 U.S. 735, 740 (1979)*

*If either prong missing, no protected interest*
**Reasonable expectations**: two prongs --

1) actual EP
2) society recognizes EP as legitimate

**reduced expectations**: apply gov't friendly reasonableness analysis

**no REP**: amendment does not apply as to search
HIERARCHY of privacy analysis example: vehicles

Reasonable expectations → no one has full REP

Reduced expectations → driver/owners -- have reduced REP

Therefore reasonable model changes: no warrant for probable cause based searches

car thief (Rakas)

renter after lease expires (some courts)

passengers (Rakas -- as to glove box, under search)

TH: no standing
Partial List Where NO R.E.P.

- Prison Cells
- Handwriting
- Facial Characteristics
- Movements Outside
- Open Fields
- Bank Records
- Trash
- VIN numbers
- Field testing of suspected drugs

**NO PROTECTED INTEREST and the Amendment does NOT apply** --
Reduced Expectations of Privacy

- automobiles
  
  \[ \text{eliminates warrant requirement} \]

- commercial property
  
  \{\text{especially in highly regulated industries:} \}
  
  gun dealer, coal mine, liquor business, auto junkyard

- some employees at work: (ex) train operators, customs

- children at school

- individuals entering at international border

- probationers

- parolees (maybe none)
What happens if court finds **reduced** expectation of privacy?

*Departs from traditional reasonableness models.*

What happens if court finds **no** reasonable expectation of privacy?

*Amendment inapplicable.*

*No inquiry into "REASONABLENESS" of the police activities.*
How to find "legitimate" expectation of privacy?

look to:

1 real property law

2 personal property law

3 "understandings that are recognized or permitted in society"

in an age where private and commercial flights in public airways is routine, unreasonable to expect privacy from the air.

accord: State v. Cotterell, 198 P.3d 254 (Mont. 2008)
Ciraolo dissent

how to measure reasonableness of expectation of privacy?

give weight to:

* intention of framers

* uses to which person has put location

* societal understanding that certain areas deserve the most scrupulous protection from gov't intrusion

"qualitative difference between police surveillance and other uses of the airspace. ... It is not easy to believe that our society is prepared to force individuals to bear the risk of this type of warrantless police intrusion ...."
Guests in houses

1. Jones
   - stayed in apt while owner away
   - had clothes, key

2. Olson
   - stayed overnight

3. Carter
   - bagged cocaine for a couple hours
Satisfaction:

Reasonableness tests --

attempts to provide overall framework to "Unreasonable"

lots of "satisfaction" issues

- exigent circumstances --
  vehicles – inventories --
  frisks -- plain view --
  consent

- Meaning of Probable Cause

- articulable suspicion

- Warrant Issuance and Review

- Warrant Execution Issues

- Vehicle Searches and Seizures

- Informants
WHAT IS REASONABLE?

The core 4th Amendment concept -- its meaning serves to regulate:

* under what circumstances s/s may occur

* scope of the intrusion
"reasonable" ?

Blondie

By Dean Young & Denis Lebru

 WHY DID YOU PICK ME FOR THE EXTRA SCREENING? 
BECAUSE OF YOUR HAIR 

9/05 Oxford Eagle
NYC begins random searches on subways

"We live in a world where, sadly, these types of security measures are needed."  
NY Mayor Michael Bloomberg
Main Models

#1: Warrant Preference

#2: Totality of the Circumstances

#3: Individualized Suspicion

#4: Balancing Test

#5: Common Law as of 1791 plus Balancing
1st clause recognizes pre-existing right against unreasonable searches and seizures and 2d clause defines reasonableness.

Reasonableness turns on whether officers have valid warrant, which is issued based on probable cause, oath, and particular description.

**BURDEN:** Gov't must justify exception by showing strong need

**EXCEPTIONS:** 22 by Scalia's count

Montana -- seems to take this rule seriously

examples: auto searches
#2. TOTALITY OF CIRCUMSTANCES

"REASONABLENESS": no intrinsic criteria to measure

"total atmosphere"

no factors

case-by-case analysis

if search otherwise R-, don't need warrant

Ex: how long to wait after knocking and announcing?
#3: Individualized Suspicion.

**need Probable cause or articulable suspicion**

**Key concept:**

uses objective criteria outside gov't's control to measure propriety of intrusion.

**Example:**

police investigating rape cannot seize young African-American men and take to headquarters for questioning & fingerprinting simply because assailant described as Negro youth

*Davis v. MS, 394 U.S. 721 (1969)*
Two tiers *only*

1. **Stops:**
   - need **articulable suspicion**
   - person is engaged in criminal activity

2. **Arrests:**
   - need **probable cause**
   - person is engaged in criminal activity

3. **Frisks:**
   - need **articulable suspicion**
   - person is armed and dangerous

4. **Searches:**
   - need **probable cause**
   - object contains evidence of crime
"Unfortunately, there can be no ready test for reasonableness other than balancing the need to search against the invasion which the search entails."

Camara v. Municipal Court, 387 U.S. 523 (1967)
Balancing Test

Factors:

(a) government's interests

(b) individual's interests

* hierarchy of privacy interests

“Practical realities” of balancing test “militate in favor of the needs of law enforcement, and against a personal-privacy interest that is ordinarily weak.”

Balancing frequently used

administrative inspections
- housing
- business
- closely regulated businesses

searches of gov’t workplaces
students

drug testing

vehicle checkpoints

probationers
#5: COMMON LAW as of 1791 plus BALANCING


**step #1**: was action regarded as unlawful s/s under c/l at framing?

- if c/l answers Q, stop; if not, go to step two

**step #2**: apply balancing test

note: ct characterizes this as “traditional std”
remedies: the exclusionary rule

exclusion not constitutional right - sole basis is deterrence of future police misconduct

not “a personal constitutional right of the party aggrieved””

“is neither intended nor able to ‘cure the invasion of the defendant’s rights which he has already suffered’”

“We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.”

new mode of analysis?

_Herring:_ no exclusion for negligent record keeping of another police dep't

future rulings?

although the police officer may have violated the Fourth Amendment, that issue need not be addressed because any such violation was merely a result of negligence
After Herring: a quest for culpability?

Herring:

- suppression “turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct”

- justification of exclusion “varies with the culpability of the law enforcement conduct”

"To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. . . . [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."
additional uncertainties:

1. Kennedy concurring:
   
   attenuation seems to be the key in *Hudson* and *Herring*

2. measuring intent objectively:

   *Herring* emphasized: “the pertinent analysis of deterrence and culpability is objective, not an ‘inquiry into the subjective awareness of arresting officers’”
civil suits: qualified immunity


changed manner to address qualified immunity analysis

**now:** discretion to skip preliminary step of establishing whether 4th violated

increased muddling of F/A and qualified immunity analysis?

**can always be said:** although the police officer may have violated the Fourth Amendment, that issue need not be addressed because any such violation was not clearly established.
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