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High School Legal Curricula: The Fourth Amendment

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THE FOURTH AMENDMENT

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 on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Although this amendment appears to be straightforward, its meaning has been the subject of controversy and debate. Its language raises some important questions. From whom are the "people" protected? What is a "search"? What constitutes "probable cause"? What is the meaning of "unreasonable"? How specific must a "warrant" be to satisfy the phrase "particularly describing the place to be searched, and the persons or things to be seized"? What sanctions, if any, do the "people" have to affirmatively protect their "right"? It is also important to know who effectively decides these issues and what guidelines are used.

FROM WHOM ARE THE PEOPLE PROTECTED?

Before the ratification of the Fourteenth Amendment, the first ten amendments to the Constitution (the Bill of Rights) restricted only the actions of the federal government, its officers and agencies. In 1868, the Fourteenth Amendment was ratified into law. The relevant sentence from that amendment, "No state shall...deprive any person of life, liberty, or property, without due process of law...", was interpreted by several members of the legal profession to mean that the Bill of

Rights was applicable to the states. The majority, however, interpreted it as a vague *due process* standard limiting only state police power. But in 1961, the United States Supreme Court held¹ that the Fourth Amendment protection against unreasonable searches and seizures was applicable to the states through the Fourteenth Amendment.

The courts have never held that the Fourth Amendment applies to infringement upon one's rights by private persons. If a person unlawfully breaks into his neighbor's home and removes some of his possessions, the wronged party may sue for civil trespass and press charges for theft; however, in either action, neither the Fourth nor the Fourteenth Amendments will apply.

REMEDIES FOR AN ILLEGAL SEARCH

Historically, anyone subjected to an illegal search by a governmental agent could sue the government for civil remedies just as he would sue a private citizen. However, because of the courts' reluctance to levy penalties and the government's general immunity from suit in its courts, the remedy proved inadequate. Thus, in 1914, the Supreme Court held² that materials seized in an illegal search could not be introduced as evidence in a criminal trial in a *federal court*. This came to be known as the *exclusionary rule*. The 1961 *Mapp* case made the *exclusionary rule* applicable to *state criminal prosecutions*.

1. *Mapp v. Ohio*, 367 U.S. 643 (1961).
2. *Weeks v. United States*, 235 U.S. 697 (1914).

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In *Wong Sun v. United States*,³ the Supreme Court defined the *scope of the exclusionary rule*. In that case, federal narcotics agents broke into Toy's Laundry in San Francisco during the early hours of the morning. They chased Toy into the back of his shop where he and his family lived. There, in the presence of his wife, they coerced him into making statements that incriminated him and others allegedly involved in obtaining and selling heroin. The agents had no *warrant* and no *probable cause* to make the search without a warrant. During the intensive questioning, Toy told the agents that another man, Yee, had been selling narcotics. The agents located Yee who surrendered heroin to them and implicated still another person, Wong Sun. All the suspects were arrested and released on bail pending trial. Several days after his release, Wong Sun returned and made a voluntary confession to the police.

In the lower federal court, all were convicted of various crimes involving the possession of dangerous drugs. The decision was appealed by Toy and Wong to the Supreme Court which held that Toy's statements were the "fruits" of the agents' unlawful arrest and were thus inadmissible as evidence. The arrests of Yee and Wong Sun were also called "fruits of the poisonous tree," thus invalid, and all of their statements were held inadmissible. The heroin surrendered by Yee was inadmissible in the prosecution of Toy because of its relationship to the information obtained from him illegally. This same heroin was found to be admissible against Wong Sun because its seizure violated none of his personal rights.

3. 371 U.S. 471 (1963).

Wong Sun failed in his appeal because of the confession he had voluntarily returned to make after the lapse of several days. The Supreme Court held that the connection between the arrest and the statement had "...become so attenuated as to dissipate the taint" of illegality.

THE FOURTH AMENDMENT AND WIRETAPPING

In *Katz v. United States*,⁴ the Supreme Court held that wiretapping a public telephone and recording conversations constituted a search and seizure within the scope of the Fourth Amendment. Since the defendant *reasonably relied* upon the privacy of the telephone booth, evidence thus obtained was inadmissible.

The general principle that the *exclusionary rule* can be applied to physical evidence (i.e., papers, contraband, etc.), verbal statements, and information received through the use of "electronic eavesdropping" stems from the *Katz* case. This principle is subject to one qualification: such evidence cannot be gathered without *probable cause* or proper *warrant* by an individual who has his authority from the state or federal government.

PROBABLE CAUSE AND RELATED PROBLEMS

The Fourth Amendment reads in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures, shall not be violated, and no Warrants shall issue, but on

4.389 U.S. 347 (1967).

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probable cause..." The following definition has developed through case law: *probable cause* is the reasonable belief by a police officer that a crime has been committed. Generally, it is not required that the police officer be certain that a crime has been committed, only that any reasonable policeman in the same circumstances would believe that a crime has probably been committed. Just how certain an officer must be is not entirely clear. There exists a broad area of discretion and an area where *probable cause* never exists.

Arrest warrants are seldom issued because it is difficult for the police to show enough probable cause to justify an arrest warrant. Arrests frequently occur while or shortly after the crime has been committed. In those situations, it is impractical for the police to secure an arrest warrant. In contrast, search warrants are issued more frequently.

To obtain an arrest or search warrant, a police officer must appear before a *magistrate* and present facts supporting his belief that a suspect should be arrested or that a locality should be searched. If the magistrate is convinced that the facts presented constitute *probable cause*, he will issue a *warrant*.⁵ The affidavit presented to the magistrate must be based upon facts and not upon the conclusions of the presenting officer. In one case, police officers presented an affidavit stating that a "credible person" had given them information that illegal drugs were kept at a certain

5. If an arrest made without a warrant is challenged as illegal, the arresting officer must be prepared to present the information in court that he would have had to present to a magistrate to obtain the arrest warrant.

residence. The Supreme Court ruled that to obtain a search or arrest warrant, the police officers must present to the magistrate the facts upon which their conclusions concerning the person's credibility are based.⁶ The Court stated that any inferences to be drawn from the facts were to be made by a neutral and detached magistrate rather than an officer "engaged in the often competitive enterprise of ferreting out crime."

From this and other cases, guidelines have been formulated, specifying situations where an informant can provide the information for a probable cause arrest or the issuance of a warrant. In general terms, the guidelines are (1) that the informant must be credible (This requirement is deemed satisfied if the informant's information has led to convictions in the recent past.); (2) that the magistrate must be presented with the facts upon which the informant's conclusions are based and not merely the informant's conclusions; and (3) that the informant need not have his identity revealed if it would reduce his effectiveness in the police informant system.

The latter guideline was the subject of a recent case, *McCray v. Illinois*.⁷ There, Chicago police officers received information that the defendant had been selling heroin to addicts in a particular neighborhood and that he would be in possession of heroin at a particular place and at a particular time. The informant had provided reliable information

6. *Aguilar v. Texas*, 378 U.S. 108 (1964).

7. 386 U.S. 300 (1967).

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in about twenty cases that year. The police officers drove to the area and the informant pointed out the defendant who was arrested. The Supreme Court held that the arrest was valid even though the informant's identity was not disclosed at trial. Justice Douglas (joined by three others) vigorously dissented, stating that "...unless the identity of the informer is disclosed, the policeman himself conclusively determines the validity of his own arrest."

SEARCHES WITH AND WITHOUT WARRANTS

If a search warrant has been issued, the scope of the search is limited by the terms of the warrant. For a search to comply with the Fourth Amendment, the goods seized must be described with such certainty in the warrant that the officer executing the search will be left with no discretion respecting the goods to be taken. Thus a description such as "stolen goods" or "articles of merchandise too numerous to mention" is inadequate. Because of the special nature of the right of free expression, obscene materials must be described with even more specificity. On the other hand, a general description of contraband such as "bootleg liquor and the vessels containing such liquor" would probably be adequate. Practicality is the only limit on the particularity of the description requirement.

Generally, search warrants are valid for a fixed period of time, such as ten days. Unless expressly provided otherwise in the warrant, they may be executed only in the daytime.

Forcible entry is generally not permitted; however, if after notifying the occupants of his authority and purpose, the executing officer is refused admittance, then forcible entry will usually be justified. In narcotics cases, unannounced forcible entry is almost always allowed on the grounds that if violators are alerted to police searches, they may quickly destroy the contraband by flushing it down the toilet or eating it.

The general rule is that there can be no search without a search warrant. This rule is subject to the following exceptions and qualifications:

Exception: Search Incident to a Valid Arrest

Assuming a valid arrest has been made, what kind of a search, if any, may an officer make at that time without a search warrant? In *Chimel v. California*,⁸ officers arrested the defendant in his home pursuant to an arrest warrant, and then searched his home carefully for at least 45 minutes. The Supreme Court held that items found during this search were inadmissible as evidence. *The scope of the search incident to a valid arrest is limited to the person arrested and the area within his reach.* The reason for allowing this limited search is to ensure the safety of the arresting officer by permitting him to remove any weapons the suspect may use to resist arrest or escape.

A search incident to a valid arrest must be made very shortly after

8. 395 U.S. 752 (1969).

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the arrest. Thus, where a defendant was arrested for vagrancy while in a parked car, a later search of the car was "too remote in time or place to have been made as incidental to the arrest."⁹ Obviously, the safety of the arresting officer was not ensured by the later search of the car. When the arrest is for a traffic violation, the only valid search is one directed at finding weapons that may endanger the officer. But where there is a valid reason for a delayed search of a car, these searches have generally been upheld. An example of a valid delayed search is a police inventory. The police usually impound a car after arresting the driver and inventory the contents so as not to be accused of theft while the car is impounded. These situations are closely scrutinized by the courts to make certain that they are not a disguise for violating the accused's rights. The California Supreme Court has said that inventory searches are not valid without a warrant.

Exceptions: Consent Searches and the Plain View Doctrine

Generally speaking, there are two other major exceptions to the rule requiring a search warrant. The first is that a police officer may search anywhere when a party, having the legal right to consent to such a search, does in fact consent.¹⁰

9. *Preston v. United States*, 376 U.S. 364 (1964).

10. Consent in these situations must be freely given. If the consent is in any way coerced, such consent will be negated and the search declared invalid. In addition, the party consenting must have the legal right to consent to the search. Thus, where the consenting party is merely a guest at a home owned by another, the consent he gives for the search will be invalid.

Secondly, a policeman may conduct a limited search any time he sees contraband (illegal material) in a place where he has a legal right to be.¹¹ Thus, a police officer who sees marijuana on the seat of a car stopped for speeding may arrest the occupants and conduct a reasonable search (in the case of a car, generally the entire vehicle).

The Moving Vehicle Exception

Generally, the police have the right to search a moving vehicle (one in which the driver is present) without a warrant when they have probable cause to believe that there is criminal evidence in the vehicle. The exception is based on the theory that the moving vehicle can leave the jurisdiction and thus thwart police seizure. If the police search a vehicle shortly after stopping it (within 30 minutes or so), the search will be valid because they had the right to initially search it.

The "Hot Pursuit" and "Stop and Frisk" Exceptions

Police may validly search without a warrant when in "hot pursuit" of a suspect. In such a case,¹² the Supreme Court validated the search of a house for a robbery suspect who had been seen entering it five minutes earlier. The police were allowed to search the entire house for weapons and the suspect, and all evidence found was admissible. The

11. The "plain view" sighting of the contraband by a police officer is not really a search within the meaning of the Fourth Amendment for there is no invasion of the right to privacy of the accused (i.e., the officer has a legal right to be where he is).

12. *Warden v. Hayden*, 387 U.S. 294 (1967).

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Court stated that the Fourth Amendment did not require police officers to delay in the course of an investigation if doing so would gravely endanger their lives or the lives of others.

When the police are conducting their normal street investigations and questionings, they may generally "stop and frisk" anyone if they have a *reasonable apprehension* that a person is armed and dangerous, even though such apprehension is less than probable cause.¹³ This search is strictly limited to a search for dangerous weapons and may not be used to discover other evidence. Thus, the police are restricted to seizing sharp, hard objects (such as guns and knives) that they come across in the course of a "pat down" weapons search involved in the "stop and frisk" situation.

CONCLUSION

In this constantly changing area, definitive rules are difficult to formulate. As a general guide, one should remember that (1) probable cause is generally necessary for arrests and searches; (2) arrests are usually made without warrants and searches are usually made with warrants subject to certain qualifications and exceptions to the general search warrant rules; (3) the qualifications and exceptions are designed to protect the police and the public, preserve the evidence from destruction, uphold the right of privacy, and ensure the valid consent of the persons being searched.

13. *Terry v. Ohio*, 392 U.S. 1 (1968).

