

Criminal Procedure

**Jeffrey Pavletic
Chief Deputy State's Attorney
Lake County, Illinois
847-377-3030**

The Basis of American Criminal Procedure:

Brown v. Mississippi 297 U.S. 278 (1936)

Facts:

The victim, Raymond Stewart, was murdered on March 30, 1934.

The police first detained a man named Arthur Ellington. Ellington was taken to the victim's home. Ellington was hanged by a rope from a tree multiple times as the police demanded that he confess. He did not. Ellington was released and allowed to go home. Later, an officer picked up Ellington, took him to Alabama, and severely beat him. Ellington then confessed to the murder of Raymond Stewart.

Two additional suspects, Ed Brown and Henry Shields, were then detained. Both suspects were taken to a jail facility, stripped of their clothing, laid over chairs, and beaten with leather straps that contained buckles. As the beatings proceeded, neither confessed. Both suspects were told that the beating would continue until they confessed to the crime. Both eventually confessed.

All three defendants were indicted on April 4, 1934. They were then arraigned and appointed counsel. The trial began the next morning. The confessions were admitted into evidence. The trial concluded the following day. The defendants were found guilty and sentenced to death.

Issue:

Whether the use of the defendants' confessions violated due process of law under the Fourteenth Amendment of the United States Constitution?

Ruling:

Yes.

"Some facts, like these, offend a principle of justice so rooted in the conscience of our people that it is considered fundamental. The freedom of constitutional government is limited by the requirement of due process of law. The State may not permit an accused to be hurried to conviction by mob domination where the whole proceeding is but a mask. There must be a corrective process. That process is called 'Due Process of Law.'"

"Due Process of Law guarantees the fairness of how people are treated. And it guarantees equality among the treatment of all people."

Miranda v. Arizona 384 U.S. 436 (1966)

I. The Facts of Miranda v. Arizona

II. The Two Prerequisites that Trigger Miranda Rights:

1. Custody
2. Interrogation

III. What is meant by “Custody”?

The 13 primary factors that Illinois Courts consider in determining whether a suspect is in “custody”:

1. Was the officer in uniform or soft clothes?
2. Did the officer have a weapon visible to the suspect?
3. Was the interview conducted in a “non-threatening surrounding”?
4. The length of the interrogation.
5. Was the defendant allowed to eat, drink, smoke, and use the restroom facilities?
6. What was the “tone of the interaction”?
7. Was the defendant “handcuffed” or “shackled”?
8. How many officers were present during the interview?
9. Were any threats made to the defendant?
10. Were any promises made to the defendant?
11. Did the defendant ever ask to leave?
12. What time of day was the interview?
13. J.D.B v. North Carolina 564 U.S. 261: What was the defendant’s/minor’s age, educational level, and prior contacts with the police?

IV. What is meant by “Interrogation”?

1. Brewer v. Williams 430 U.S. 387
2. Rhode Island v. Innis 446 U.S. 291

V. United States Supreme Court Updates:

1. What is the purpose of Miranda?

Colorado v. Connelly 479 U.S. 157

2. How long do Miranda Rights last?

Maryland v. Shatzer 559 U.S. 98

The “14-Day Rule”

3. What happens if you give a suspect his Miranda Rights and he does not respond?

Berghuis v. Thompkins 560 U.S. 370

“If an accused makes an ambiguous or equivocal statement or no statement, the police are not required to end the interrogation.”

Under Berghuis v. Thompkins, what does NOT constitute a request for an attorney?

1. "Should I see a lawyer?"

People v. Oaks 169 Ill.2d 409

2. "Maybe I should talk to an attorney?"

People v. Burnfield 295 Ill.App.3d 256

3. "Do I need an attorney?"

In Re Christopher K 217 Ill.2d 348

Under Berghuis v. Thompkins, what DOES constitute a request for an attorney?

1. "I think I should call my lawyer."

Cannady v. Dugger 931 F.2d 752

2. "I have to get me a good lawyer, man."

Robinson v. Borg 918 F.2d 1387

3. [Upon learning that he had a right to counsel]
"Uh, yeah, I'd like to do that."

Smith v. Illinois 469 U.S. 91

VI. The “Public Safety Exception” to Miranda:

New York v. Quarles 467 U.S. 649 (U.S. Supreme Court)

VII. Fact Scenarios Involving Lawyers

VIII. Illinois Juvenile Law Update:

1. Juvenile Miranda Warning and Procedure:

Any minor under 18 years of age must be given his/her Miranda Rights in the following manner:

(1) Continuously reads to the minor, in its entirety and without stopping for purpose of a response from the minor or verifying comprehension, the following statement:

“You have the right to remain silent. That means you do not have to say anything. Anything you do say can be used against you in court. You have the right to get help from a lawyer. If you cannot pay for a lawyer, the court will get you one for free. You can ask for a lawyer at any time. You have the right to stop the interview at any time.”

(2) After reading the statement required by paragraph (1) of this section, the public official or employee shall ask the minor the following questions and wait for the minor’s response to each question:

(A) “Do you want to have a lawyer?”

(B) “Do you want to talk to me?”

705 ILCS 405/5-401.5

2. Juvenile Right to Counsel

In any proceeding under the Juvenile Court Act:

A minor under 15 years of age must be represented by counsel throughout the entire custodial interrogation of the minor for any homicide offense and any sex offense.

The minor may not waive the right to counsel.

705 ILCS 405/5-170

3. Juvenile Videotaping Requirements

If a minor is under 18 years of age, the statements of that minor must be electronically recorded if the statements taken are regarding any felony offense or a misdemeanor sex offense.

705 ILCS 405/5-401.5

IX. Miranda: The Rest of the Story

The Electronic Recording of Custodial Interrogations of a Homicide Suspect

725 ILCS 5/103-2.1

An oral, written, or sign language statement of an accused made as a result of a custodial interrogation at a police station or other place of detention shall be presumed to be inadmissible as evidence against the accused in any criminal proceeding brought under the following offenses: First Degree Murder, Intentional Homicide of an Unborn Child, Second Degree Murder, Voluntary Manslaughter of an Unborn Child, Involuntary Manslaughter and Reckless Homicide, Involuntary Manslaughter and Reckless Homicide of an Unborn Child, Drug Induced Homicide, and Aggravated Driving Under the Influence that results in the death of another person unless: An electronic recording is made of the custodial interrogation; and the recording is substantially accurate and not intentionally altered.

Nothing in this section precludes the admission: 1. Of a statement made by the accused in open court at his or her trial, before a Grand Jury, or at a preliminary hearing, 2. Of a statement made during a custodial interrogation that was not recorded because the electronic recording was not feasible, 3. Of a voluntary statement, whether or not the result of a custodial interrogation, that has a bearing on the credibility of the accused as a witness, 4. Of a spontaneous statement that is not made in response to a question 5. Of a statement made after questioning that is routinely asked during the processing of the arrest of the suspect 6. Of a statement made during a custodial interrogation by a suspect who requests, prior to making the statement, to respond to the interrogator's questions only if an electronic recording is not made of the statement, provided that an electronic recording is made of the statement of agreeing to respond to the interrogator's questions only if a recording is not made of the statement, 7. Of a statement made during a custodial interrogation that is conducted out-of-state, 8. Of a statement given at a time when the interrogators are unaware that a death has in fact occurred, 9. Of any other statement that may be admissible under law.

The Electronic Recording of Custodial Interrogations of a Non-Homicide Suspect

725 ILCS 5/103-2.1

Under the following circumstances, an oral, written, or sign language statement of an accused made as a result of a custodial interrogation conducted at a police station or other place of detention shall be presumed to be inadmissible as evidence against the accused, unless an electronic recording is made of the custodial interrogation and the recording is substantially accurate and not intentionally altered:

Effective June 1, 2014:

Predatory Criminal Sexual Assault of a Child
Aggravated Arson

Effective June 1, 2015:

Aggravated Kidnapping
Aggravated Vehicular Hijacking
Home Invasion

Effective June 1, 2016:

Aggravated Criminal Sexual Assault
Armed Robbery
Aggravated Battery (through the discharge of a firearm)

If, during the electronic recording, the defendant implicates himself for an offense not included on the list of mandatory offenses, you may continue to record the conversation without the defendant's request.

Search and Seizure

United States Constitution 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 upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.”

I. There are Three Sources for Search Warrants

<u>Reliable</u>	<u>Unreliable</u>	<u>Anonymous Tips</u>
Police	John Doe	<u>Illinois v. Gates</u>
Citizens	Jane Doe	
Witnesses	J. Doe	

II. The Concept of “Right to Privacy”

1. Katz v. U.S. 88 S. Ct. 507 (U.S. Supreme Court)

Does a suspect have a reasonable expectation of privacy in a public telephone booth?

2. Florida v. Jardines 569 U.S. 1 (U.S. Supreme Court)

What is “curtilage”?

Does a suspect have a reasonable expectation of privacy in the curtilage of a single-family home?

3. People v. Burns 50 N.E. 3d 610 (Illinois Supreme Court)

Does a suspect have a reasonable expectation of privacy in the curtilage of a locked apartment building?

4. People v. Bonilla 2018 IL 122484 (Illinois Supreme Court)

Does a suspect have a reasonable expectation of privacy in the curtilage of an unlocked apartment building?

5. People v. Lindsey 2020 IL 124289

Does a suspect have a reasonable expectation of privacy in an alcove outside of a hotel room door?

6. Collins v. Virginia 138 S. Ct. 1663

Does a suspect have a reasonable expectation of privacy in the end of his driveway?

7. Byrd v. United States 138 S. Ct. 1518

Does a suspect have a reasonable expectation of privacy in a rental car where he is not the renter of the car and is not listed as an authorized driver in the rental agreement?

III. Exigent Circumstances

The Fourth Amendment establishes two requirements:

1. All searches and seizures must be reasonable, and
2. A warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity.

The United States Supreme Court has established certain reasonable exceptions to the warrant requirement, including “exigent circumstances”.

“Exigent circumstances” applies “when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the fourth amendment.”

In Missouri v. McNeely 569 U.S. 141, The U.S. Supreme Court stated: “A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including (but not limited to) law enforcement’s need to provide emergency assistance to an occupant of a home....engage in “hot “pursuit” of a fleeing suspect....or enter a burning building to put out a fire and investigate its cause.”

The courts look at the specific circumstances involved: whether a reasonable officer would believe his/her safety or the safety of others was threatened, whether a suspect was currently involved in a crime of violence, or whether a suspect was armed and about to inflict violence upon another. Ultimately, the courts evaluate the situation to determine whether a reasonable officer at the scene would believe it is urgent to act and impractical to secure a warrant.

3. Kentucky v. King 563 U.S. 452

Can the police create the “exigent circumstance” to justify a warrantless search?

IV. The Law of Search Techniques

1. Technologically Assisted Matters Carried on in Private

Kyllo v. United States 121 S.Ct. 2038

The police used a thermo-imaging device to detect heat being generated from within a house.

The U.S. Supreme Court ruled that the use of a device, not in general public use, to explore details of a building previously unknowable without entry, is a search. To do so, the police would need a search warrant in order to utilize that device.

2. Tracking Devices

U.S. v. Jones 565 U.S. 400

The defendant owned a night club in Washington D.C. and was suspected of drug trafficking. The police installed a GPS device on his car without court authority. The police tracked the car for four weeks and, based on the investigation, charged the defendant with a series of drug trafficking offenses.

The Supreme Court said that the act of attaching the device to the car without court permission was a search and illegal under the Fourth Amendment.

3. Non-Inventory Searches of Vehicles

Arizona v. Gant 556 U.S. 332

The defendant was arrested for Driving While License Suspended. The defendant and his companions were secured in police squads. The car was searched and a gun and drugs were located.

The U.S. Supreme Court ruled this to be an illegal search. "The police can search the care if (1) the defendant might have access to the car or (2) There might be evidence of the offense for which defendant was arrested. Neither circumstance existed here.

4. Canine Searches and Odor of Cannabis

U.S. v. Place 462 U.S. 696

A defendant has no legitimate expectation of privacy in contraband in luggage at an airport. Due to that, the police can use devices, including canines, to expose its presence.

U.S. v. Jacobsen 466 U.S.109

A package was damaged during shipment by a common carrier. Four bags of white powder were exposed. Agents were contacted, a field test was performed, and the test indicated the presence of cocaine. The U.S. Supreme Court said this was not a search. The test simply reacted to the narcotics present in the powder.

Illinois v. Caballes 543 U.S. 405

Illinois State Police stopped a car for speeding. During the stop, a second officer arrived and walked a canine around the car. The dog alerted on drugs and marijuana was discovered inside the vehicle. The U.S. Supreme Court stated: "A dog sniff conducted during a concededly lawful traffic stop that simply reveals the location of a substance that no individual has a right to possess does not violate the fourth amendment protection against unreasonable searches and seizures."

Under Illinois' statute of decriminalizing marijuana, can the odor of marijuana during a traffic stop establish probable cause?

Yes.

Under the Illinois statute, use is still prohibited in:

1. Any public place
2. Any motor vehicle
3. School grounds
4. Near someone under 21 years of age
5. Near an on-duty school bus driver, police officer, and firefighters

People v. Hill (2020, Illinois Supreme Court docket no. 124595)

A police officer stopped a car under the belief that a passenger had a warrant for his arrest. The driver had been very hesitant in stopping his car for the officer. The officer noted an odor of raw cannabis. The passenger admitted to smoking cannabis earlier in the day. The officer also saw “loose bud” on the backseat. The car was later searched and cocaine was found.

The Illinois Supreme Court stated that the officer had probable cause that there was evidence of a crime in the car. The Court relied heavily on two Illinois statutes:

625 ILCS 5/11-502.1 which states “medical cannabis cardholders may not possess cannabis within an area of a car unless it is in a “sealed, tamper-evident, medical cannabis container.”

625 ILCS 5/11-502.15 which states that no driver or passenger may possess cannabis within any area of a motor vehicle on a highway unless it is in a “sealed, odor-proof, child-resistant cannabis container.”

Note: The Court never said that odor alone is sufficient to justify a search. But the officer nicely articulated all the circumstances confronting him to justify the search.

5. Drones

Freedom From Drone Surveillance Act

725 ILCS 167/1

Rule:

Law Enforcement may not use a drone to gather information.

Exceptions:

This Act does not prohibit use of a drone by law enforcement:

1. To counter a high risk of a terrorist attack as determined by Homeland Security.
2. If a law enforcement agency first obtains a search warrant based on probable cause. The warrant is limited to a period of 45 days. If “good cause” is shown, a judge can enter the warrant for subsequent periods of 45 days.

3. If law enforcement has reasonable suspicion that swift action is needed to prevent imminent harm to life or to forestall the imminent escape of a suspect or prevent the imminent destruction of evidence. This time period is limited to 48 hours. Within 24 hours of this use, the State's Attorney must be notified in writing.
4. If law enforcement is attempting to locate a missing person (and is not part of a criminal investigation).
5. If law enforcement is using a drone solely for crime scene and traffic crash scene photography.
 - a. If you are on public lands, highways, roadways, or areas belonging to the state/local government, you do not need a search warrant or consent to search.
 - b. The use of a drone on private property requires either a search warrant based upon probable cause or a lawful consent to search.
Crime scene or crash scene photography must be geographically confined and in a time-limited manner.
6. If law enforcement is using a drone during a disaster or public health emergency and during subsequent response and recovery efforts.

6. Personal Electronic Devices

Riley v. California 573 U.S. 373

During a search incident to arrest, an officer seized a defendant's phone from his pants pocket. The officer accessed the phone and saw terms related to gang activity. Later, a gang detective examined the phone contents including photos and videos. This information allowed the police to charge the defendant with a shooting that occurred two weeks earlier.

The U.S. Supreme Court ruled that police may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

People v. Shinohara 872 N.E.2d 498

Police were called to a domestic disturbance. The defendant's computer was seized based on evidence that the defendant was having sexual relations with the underaged complainant. A judge signed a search warrant to examine the computer. A mirror image of the hard drive was taken within 96 hours. The police did not search the contents until 78 days later.

The defense argued that this violated the Illinois statute requiring execution of a search warrant within 96 hours of its being signed. The Illinois Supreme Court ruled that this was a valid search. Since the mirror image was taken within 96 hours, there was no mandate to review that material within 96 hours.

V. The Process of Search and Seizure

1. Knock and Announce

Wilson v. Arkansas 115 S. Ct. 1914

"The fourth amendment protects citizens from unreasonable searches. Knocking and announcing forms a part of being reasonable."

- a. Exceptions to "Knock and Announce"
- b. Hudson v. Michigan 547 U.S. 586
- c. Circumstances where a "No Knock" may issue:
 - i. Threat of violence to officers
 - ii. Evidence may be destroyed
 - iii. Prevent escape of the suspect

2. Securing the Premises

When executing a search warrant, you can reasonably detain any person in the place at the time in order to (1) protect the officer from attack and (2) prevent the disposal or concealment of evidence.

3. Searching Persons on the Premises

You may not search persons (other than those named in the search warrant) absent “independent probable cause.”

What establishes “independent probable cause”?

- a. An individual trying to prevent entry
- b. An individual attempting to aid another
- c. Furtive movements
- d. An individual signaling to another

4. “Scope” of the Search Warrant

When executing the search warrant, the “scope” of the search is determined by what is being sought in the search warrant.

5. Franks v. Delaware 438 U.S. 154

Although a signed search warrant is presumed valid, the evidence may be suppressed if the defense can make a substantial showing that the affiant made a deliberate false statement in the search warrant affidavit or made a statement in the affidavit with a reckless disregard for the truth.

6. Terry v. Ohio 392 U.S. 1

Temporary Questioning Without Arrest

725 ILCS 5/107-14

A peace officer, after having identified himself as a peace officer, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit, or has committed an offense and may demand the name and address of the person and an explanation of his actions. Such detention and temporary questioning will be conducted in the vicinity of where the person was stopped.

Search During Temporary Questioning

725 ILCS 5/108-1.01

When a peace officer has stopped a person for temporary questioning under 725 ILCS 5/107-14 and reasonably suspects that

he or another is in danger of attack, he may search the person for weapons. If the officer discovers a weapon, he may take it until the completion of the questioning at which time he shall either return the weapon, if lawfully possessed, or arrest the person so questioned.

People v. Thornton 2020 Ill. App. 170753

Two violent offenses occurred in a neighborhood. A 911 call was made giving a description of the suspect and the suspect's location. Officers arrived and found the defendant in the same general location matching the description given by the caller.

The Court said:

This was not a report of a crime in progress where officers could view, first-hand, an incident taking place. Rather, this was a report locating a suspect for two felonies that had already occurred.

Officers thus had a strong interest in solving the reported crimes and bringing the offender to justice. The officers' interest outweighed the narrowly tailored intrusion.

7. Consent to Search

Does a homeowner have the right to consent to the search of areas where a guest is staying?

Does a guest have a reasonable expectation of privacy in the living quarters of the home in which he is staying?

VI. Illinois Legislation For Physical and Photographic Line-ups 725 ILCS 5/107A-2

Procedure for Conducting a Lineup:

All lineups shall be conducted using one of the following methods:

1. An independent administrator, unless it is not practical.
2. An automated computer device that can automatically display a photo lineup to a person that prevents the administrator from seeing which photograph or photographs the eyewitness is viewing until the lineup is

- completed. The device may present the photographs simultaneously or sequentially.
3. A procedure in which photographs are placed in folders, randomly numbered and shuffled, and then presented to an eyewitness such that the lineup administrator cannot see or know which photographs are being presented.
 4. Any other procedure that prevents the lineup administrator from knowing the identity of the suspected perpetrator or seeing or knowing the persons or photographs being presented to the eyewitness.

Advisements to All Potential Eyewitnesses Prior to Viewing:

1. [If recording the lineup is practical]
That an audio and video recording of the lineup will be made to accurately document all eyewitness statements, unless the eyewitness refuses to the recording of the lineup, and that if a recording is made it will be of the persons in the lineup and the eyewitness;
2. The perpetrator may or may not be presented in the lineup;
3. If an independent administrator is conducting the lineup, that the independent administrator does not know the suspected perpetrator's identity. If the administrator is not independent, that the eyewitness should not assume that the lineup administrator knows which person in the lineup is the suspect;
4. The eyewitness should not feel compelled to make an identification;
5. It is as important to exclude innocent persons as it is to identify a perpetrator; and
6. The investigation will continue whether or not an identification is made.

The eyewitness shall acknowledge in writing the receipt of the instructions required above and, if applicable, the refusal to be recorded. The administrator shall document on the Lineup Advisement Form the reasons for the eyewitness's refusal to sign the acknowledgement and/or the refusal of the eyewitness to be audio or video recorded.

How to Conduct a Photographic or Physical Lineup:

1. The lineup administrator shall separate all eyewitnesses in order to prevent the eyewitnesses from conferring with one another before or during the lineup.
2. Each eyewitness shall perform an identification without any other eyewitness present.
3. The lineup shall be composed to ensure the suspect does not unduly stand out from the fillers.
4. Only one suspect shall be included in a lineup.
5. At least 5 fillers shall be included in a lineup.
6. If the eyewitness has previously viewed a lineup in connection with the same offense, the fillers in the lineup in which the current suspected perpetrator participates shall be different from the fillers used in the prior lineups.
7. If there are multiple eyewitnesses, the suspected perpetrator shall be placed in a different position in the lineup for each eyewitness.
8. Nothing shall be communicated to an eyewitness, including verbal or non-verbal cues, that may influence the eyewitness's identification.
9. In a live lineup, any identifying actions such as speech, gestures, or other movements, shall be performed by all lineup participants.

**VII. Law Enforcement Officer-Worn Body Camera Act
50 ILCS 706/10-20**

If a department utilizes body cameras, it must comply with the following:

1. Cameras must be equipped with a minimum 30 second pre-event recording.
2. Cameras must record for a period of 10 hours or more.
3. Cameras must be turned on at all times when the officer is in uniform and responding to calls for service or is engaged in any "law enforcement related encounter."
4. The recordings must be retained for a minimum of 90 days.
5. If an encounter is "flagged", the video must be retained for at least 2 years. If the video was used in a criminal, civil, or administrative proceeding, it shall not be destroyed until final disposition and written order from the court.

An encounter is “flagged” when:

1. A formal complaint has been filed.
2. The officer discharged his/her firearm.
3. The encounter resulted in a detention or arrest (excluding minor traffic offenses or business offenses).
4. Death or great bodily harm occurred.
5. The officer is subject to an internal investigation or being investigated for possible misconduct.
6. A supervisor of the officer, prosecutor, defendant, or court determines the encounter has evidentiary value.
7. The recording officer requests the video be flagged for official purposes.

VIII. The Fifth Amendment

“No person shall be compelled in any criminal case to be a witness **against himself.**”

Can you compel a defendant to submit to:

1. Gunshot residue tests?
2. Speaking words in a lineup?
3. Walking in front of a witness in a lineup?
4. Collection of trace evidence?

IX. The Police Community Improvement Act

The Police Community Improvement Act addresses 7 primary topics as it applies to Criminal Procedure:

1. Stop and Frisk
Requires the documentation of detailed “receipts” for those stopped and frisked by law enforcement.
2. Chokeholds
Prohibited unless deadly force is warranted.
3. Officer-Involved Deaths
Requires an independent investigation conducted by two investigators who are Lead Homicide certified and who are not currently or formerly employed by that law enforcement agency. If the officer-involved death

involved a motor vehicle accident, at least one officer must be a certified Crash Reconstruction Specialist.

4. Public Videotaping

A citizen may not be hindered from videotaping an officer if the officer has no reasonable expectation of privacy.

5. Body Cameras

Mandated guidelines have now been implemented by statute (as discussed).

6. Training

Training must now include cultural competency, implicit bias, and dealing with certain categories of disadvantaged or handicapped individuals.

7. Police Misconduct Database

Identifies officers who have been dismissed for misconduct.

