SEARCH AND SEIZURE:

CAN THEY DO THAT?

ANSWERING THE FOURTH AMENDMENT QUESTION

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The government considers it an intrusive barrier to catching bad guys, the judges wish that they didn't have to be the ones asked to enforce it, and the public thinks it's a way to get people off on a technicality. It is the Fourth Amendment to the United States Constitution, and the only good friends it really has these days are criminal defense lawyers…and you thought **you** had it bad.

Yet, despite being attacked by a hostile Supreme Court for the last three decades, ignored by the government and misunderstood by the public, the Fourth Amendment still stands with honor. It remains the ultimate authority on answering the question of whether the cops can do what they did do in your case. And it isn't going away, so learn to love it and to wield it as a weapon.

I. The Defense Perspective

The first step to wielding the Fourth Amendment as a weapon is to understand the Fourth Amendment. A working understanding of the Fourth Amendment will put you ahead of the cops, the DA's and the judges that you have to fight in order to win motions. Demonstrate your comfort and knowledge when you litigate your motions and you'll be a step ahead every time.

A. Stick to a Basic View or Framework

Don't worry so much about keeping up on all the advance sheets on search and seizure cases; it's more important to apply your basic understanding of Fourth Amendment restrictions to the facts of your case. Once you accept the centrality of the warrant requirement of the Fourth Amendment and the six

classic exceptions to that requirement, the new case law simply adds different fact situations to the framework.

B. Tell Your Client's Story During the Motion Hearing

It's your chance to persuade. The judge is more likely to grant your motion if you can provide the details and setting of the search/seizure complete with an emotional hook. The defense should have an advantage here. The emotional hook should work for us rather than the prosecutors because Americans worship privacy. We build fences, move to the burbs, install car alarms, tint windows, and protect our "personal space" more than people of any other culture. Nobody wants somebody looking through their stuff, patting down their person, or rummaging through their car, *even if the intruder is a cop and especially if that intrusion is illegal*. That's the hook: cops abuse their power, and **they can't do that**.

II. The Nuts & Bolts

A. The Preliminary Questions: Does the Fourth Amendment Apply?

If defense counsel can answer "yes" to each of the three preliminary questions, the restrictions of the Fourth Amendment apply. These questions must be asked and answered before defense counsel can even get into discussing whether the search was legal:

1) Is there state action? The person doing the searching and seizing must be a government actor. Since this is almost always a cop, this is not often a problem.

2) Is there standing? The client objecting to the search must be the person whose right to privacy was violated. (This issue can come up in cases involving multiple defendants where police search a private area, but only one defendant had the privacy interest in that area, and standing to object.)

3) Is there a reasonable expectation of privacy?
A lot of the action is here these days. A smart DA will insist that the defense demonstrate a reasonable expectation of privacy in what was searched or seized prior to any evidence being taken from the cops. This throws off defense lawyers sometimes, because we get trained into thinking that the state always has the

burden and always goes first. Once a reasonable expectation of privacy is demonstrated, the burden then shifts to the state to show a warrant, or a valid exception to the warrant requirement. See e.g., State v. Rewolinski, 59 Wis. 2d 1, 12-13 (1990).

So what is a reasonable expectation to privacy? The classic U. S. Supreme Court case in this area is Katz v. United States, 389 U.S. 347 (1967). In that case, the court stated:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Did the client want to keep what was searched or seized private, and was he justified in wanting to keep it private? If so, there is a reasonable expectation of privacy.

A client always has a reasonable expectation of privacy in keeping his person from being seized. See State v. Harris, 206 Wis. 2d 242 (1996) (a passenger in a car has an expectation of privacy to travel free from intrusion and always has standing to object to the legality of the seizure when police stop the car).

If the answer to all these questions is yes, there is state action, standing, and a reasonable expectation of privacy. The government must then demonstrate that the search or seizure was reasonable under the Fourth Amendment.

B. The Terminology

There is a trap that prosecutors set for judges: they tell the judges not to get all caught up in some debate about warrants, and exceptions and all that, and instead to simply decide "whether the officers' actions were reasonable." It has a simple appeal to the judges, and this approach follows from the language of the Rehnquist Supreme Court in recent search and seizure cases. However, it is still a trap. Once the judge falls for it, a defense motion to suppress is denied much more easily.

Defense counsel can thwart the trap by insisting on the standard set in the U.S. Supreme Court case Coolidge v. New Hampshire, 403 U.S. 443, 445-455 (1971):

> The most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions.

Strong stuff. It's a famous quote in search and seizure law. The importance of it cannot be overlooked. The prosecutor says that what really counts is that the officer's actions are reasonable? Good. What is reasonable? The existence of a warrant. No warrant exists in this case? Then what exception to the warrant requirement applies? There are six exceptions. Enough "reasonable" talk.

A trap that defense lawyers can fall into is a debate about whether a client was under arrest, or Terry-stopped, or under a traffic stop, blah, blah, blah. It's usually a debate that takes place while the cop is on the stand, and defense counsel is trying to persuade the judge with effective cross-examination. Don't go there. This is cop/DA terminology, and defense counsel will never win the debate. What really matters are two words: search and seizure. Was something searched? Was something or *someone* seized? When a person is seized, he or she is not free to leave. Don't worry about whether it was an arrest, a Terry-stop, or whatever. What matters is that the client was not free to leave. The cop will usually admit that but if not, the court applies an objective standard in answering this question: would a reasonable person, under the circumstances, feel free to leave? Once a search or seizure is shown, a warrant had better be there, or it must fall under an exception.

C. The Warrant Requirement and the Exceptions.

The Fourth Amendment protects the people from the government. Everyone knows this. Protects the people from what? From having their persons, houses, papers and effects unreasonably searched or seized. The people have

the right, and the government is restricted. So what is reasonable? Coolidge. Searches and seizures with a warrant. No warrant? Let's go to the exceptions. Each exception has a constitutional justification for not requiring a warrant. Each exception also has requirements that must be met for the exception to be valid. And each exception has a requisite quantum of proof. They are outlined below.

1. SEARCH INCIDENT TO LAWFUL ARREST

CLASSIC CASE: CHIMEL V. CALIFORNIA, 395 U.S. 752 (1969).

JUSTIFICATION: protection of officer's safety when making arrests and protection of evidence from destruction when making arrests.

REQUIREMENTS:
a) lawful arrest
b) search only of the area within the arrestee's immediate control.
See §968.11, Wis. Stats.

REQUISITE QUANTUM OF PROOF: arrest warrant, or probable cause for a warrantless arrest. See §968.07, Wis. Stats.

NOTE –

•this search always involves a complete search of the arrestee's person. See United States v. Robinson, 414 U.S. 218 (1973).

•Chimel contemplates a "protective sweep" of the premises where arrest is made, or of the areas from which the arrestee could grab a weapon or evidence

•this search always includes a search of the entire passenger compartment of a car, including containers in the passenger compartment, but not a closed trunk. See New York v. Belton, 453 U.S. 454 (1981); State v. Fry, 131 Wis. 2d 153 (1986).

2. CONSENT

CLASSIC CASE: SCHNECKLOTH V. BUSTAMONTE, 412 U.S. 218 (1973).

JUSTIFICATION: constitutional rights can be waived

REQUIREMENTS:

a) search must be limited in scope to the consent given. See State v. Johnson, 187 Wis. 2d. 237 (1994).

b) search must take place at the time consent is given, not later. See State v. Douglas, 123 Wis. 2d 13 (1985), State v. Mazur, 90 Wis. 2d 293 (1979).

REQUISITE QUANTUM OF PROOF:
Voluntariness—the consent must be given voluntarily.

NOTE --

•voluntariness is a question of fact to be determined from the totality of the circumstances. Schneckloth.

•consent may be express or implied. Schneckloth.

•the state of the defendant's mind, and the failure of police to advise the defendant of his rights, are factors to be evaluated in assessing voluntariness, Schneckloth.

•consent granted during an unlawful seizure of the person is not valid consent. See Florida v. Royer, 460 U.S. 491 (1983).

3. STOP & FRISK – TERRY STOP

CLASSIC CASE: TERRY V. OHIO, 392 U.S. 1 (1968).

JUSTIFICATION: police investigation of possible criminal activity in public encounters, and officer safety during those encounters.

REQUIREMENTS:
a) *temporary* detention if person is seized
b) *limited* pat-down for weapons if person is searched

REQUISITE QUANTUM OF PROOF: reasonable suspicion—it is a two-step process: the officer must have reasonable suspicion to believe the subject is engaging in a crime in order to detain. Once detained, the officer must have reasonable suspicion to believe the person is armed and dangerous in order to frisk for weapons.

Reasonable suspicion is a standard based on articulable facts, not the officer's hunch.

See §968.24 & 968.25, Wis. Stats.

NOTE --

•don't fall into the trap of skipping the two-step nature of the requisite quantum of proof

•the stop does not automatically justify the frisk—you can have a valid stop without reasonable suspicion to frisk

•some judges think that a Terry-stop requires the stopping of the subject's physical motion—i.e. you can't Terry-stop a person who is already not moving—this is wrong. A person is Terry-stopped, or *seized*, when the police make a show of authority, to which the subject submits. See California v. Hodari D., 499 U.S. 621 (1991).

It doesn't matter whether the person was moving or not when Terry-stopped, or *seized*

4. PLAIN VIEW

CLASSIC CASE: COOLIDGE V. NEW HAMPSHIRE, 403 U.S. 443 (1971).

JUSTIFICATION: investigation and collection of items discovered by the police while performing lawful duties

REQUIREMENTS:
a) officer must be in a place where he has a right to be
b) the contraband must be in plain view and immediately apparent as contraband

REQUISITE QUANTUM OF PROOF:

probable cause—the officer must have probable cause to believe that the item in plain view is contraband. See Arizona v. Hicks, 480 U.S. 32 (1987).

NOTE --

•the US Supreme Court is weakening the standard on plain view searches—the court has held that the officer cannot search while he is in the area where evidence is seen, but also that he need not necessarily discover the contraband "inadvertently"
See Horton v. California, 496 U.S. 128 (1990)
•the "plain feel" doctrine is outlined in Minnesota v. Dickerson, 113 S.Ct. 2130 (1993), and is a combination of a Terry Search and Plain View—If a cop is legally patting someone down—and feels something that is immediately apparent as contraband, the item may be seized—

5. EXIGENT CIRCUMSTANCES—HOT PURSUIT

CLASSIC CASE: WARDEN V. HAYDEN, 387 U.S. 294 (1967).

JUSTIFICATION: protection of police and public from danger, and from destruction of evidence

REQUIREMENTS:

a) police must believe that aid is necessary
b) search/seizure is limited in scope to the extent and duration of the emergency

REQUISITE QUANTUM OF PROOF:

reasonable belief—both objectively and subjectively, that aid is necessary

NOTE –

•when an armed felon flees into house immediately before police arrive, police may search as broadly as reasonably necessary to prevent escape—Warden.
•warrantless entry of suspect's home for civil non-jailable traffic offense not legal under the 4th Amendment/Exigent Circumstances. See Welsh v. Wisconsin, 466 U.S. 740 (1984).

6. AUTOMOBILE EXCEPTION

CLASSIC CASE: CARROLL V. U.S., 267 U.S. 132 (1925).

JUSTIFICATION: the lessened privacy interest that people have in their cars, and the inherent mobility of cars

REQUIREMENTS:
a) information,
b) to believe that the *car* contains contraband

REQUISITE QUANTUM OF PROOF: probable cause

NOTE –

•the search under this exception is of the *entire* car, including containers within the car. See United States v. Ross, 456 U.S. 798 (1982).

•this exception allows a broader search than a search incident to an arrest of a person in car—the automobile exception includes a search of the trunk

•police can remove the car from the scene and search it later. See Chambers v. Maroney, 399 U.S. 42 (1970).

•if the police have probable cause to believe that a container in a car contains contraband, they may search the container without a warrant. See California v. Acevedo, 111 S.Ct. 1982 (1991).

•a mobile home is a car. See California v. Carvey, 471 U.S. 386 (1985).

D. No Other Exceptions.

If the judge falls for a prosecutor's insistence that the search was valid under another exception to the warrant requirement, then the judge is creating new law. Make the judge scared of this. No judge wants to be out on a branch alone, ripe for being overturned. Prosecutors try many new justifications for warrantless searches these days, for example, the *community caretaker* function of police. Courts in Wisconsin are not accepting this as an exception justifying police searches and seizures. See State v. Dull, 211 Wis. 2d 652 (1997). Now, of course there are cases out there where courts uphold warrantless searches and seizures without applying one of the six exceptions outlined above, but they are rare, and very fact-specific. Stick with the classics, and you'll usually be ok.

III. The Story, or Telling the Court How Your Client Was Violated

To persuade the judge or appellate court to grant Fourth Amendment challenge, defense counsel must convince the Court that the cops abused their power. At the trial level, this persuasion occurs at the motion hearing. Though the hearing is evidentiary, both judges and lawyers often "cut to the chase" at these hearings and defense counsel

often forgets about the persuasive skills and tactics employed at a jury trial. To a certain extent, this is understandable: judges don't want to sit through an opening statement, in storytelling fashion.

But persuasive skills are still important at the motion hearing, and most of those skills are used during the direct and especially cross-examination of the witnesses. Outlined below are a few things to keep in mind:

A. This is not just about your client, but society.

How many times did the cops do this type of search or seizure, but found no evidence of a crime? Courts only review the case after police find evidence, the DA files a criminal complaint, and defense counsel files a motion. That provides an awful lot of room for the cops to do the same thing to another person, with no review by a court. Make this point with the judge, and the court won't fall for a hindsight justification that the police found evidence in *this* case, so the search or seizure was ok. There are different ways of driving this point home. Perhaps the best way is to ask the officer, "Is this a routine practice in performing your duties?"

B. Impeachment is *Key*.

Impeachment by prior inconsistent statement is more important here than during any other evidentiary process. Why? Because a motion hearing provides a better opportunity for lying, stretching the truth or "adding things," than a jury trial. Police witnesses can read where defense lawyers are going in challenging the search and may try to protect their actions. If information is added to the information in the police report, the witness must be impeached. Use the three-step process:

1. RECOMMIT the witness to the new inconsistent statement;
2. ACCREDIT the prior source; and,
3. EXPOSE the inconsistency.

The judge and/or reviewing court should see that the officer is being a weasel by adding things. If defense counsel does not relax these impeachment techniques at the motion hearing, the point will come across.

C. Police Officers Don't Have Constitutional Privacy Rights, Clients Do.

Prosecutors are often fond of suggesting to the court that the cop had the "right" to perform a search or seize a person. Courts need to be reminded that the constitution *limits* the government's authority *in favor* of citizens' rights. In the Fourth Amendment motion hearing setting, this distinction is subtle, but effective in driving home the point that police don't have *rights* in this setting. The police may or may not have *authority* to act, but that is a different thing. The constitution *limits* authority and *protects* rights. The only one with rights at the motion hearing is your client.

D. Objective v. Subjective Standard.

An objective standard asks whether the officer's acting were reasonable. A subjective standard asks whether the officer *thought* his actions were reasonable. Courts apply an *objective* standard at Fourth Amendment motion hearings.

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