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LAW OF ARREST, SEARCH AND SEIZURE

An examination of the Fourth, Fifth, and Sixth Amendments to the United States Constitution.

BY

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Sir Thomas More: What would you do? Cut a great road through the law to get after the devil?

Roper: (More's son-in-law) I'd cut down every law in England to do that!

Sir Thomas More: Oh? And when the last law was down, and the devil turned round on you - where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast - man's laws, not God's - and if you cut them down . . . do you really think you could stand upright in the winds that would blow them? Yes, I'd give the devil benefit of law, for my own safety's sake.

A Man for All Seasons
Robert Bolt 1960

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PREFACE

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It is recommended that law enforcement officers and prosecutors alike keep these materials current by supplementing the materials with recent decisions or principles. Although the basic building blocks in this area of the law should remain for the most part unchanged, the process of refinement will continue.

Bruce D. Quick

THE BILL OF RIGHTS

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

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.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when an actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

THE THREE SUPPRESSION RULES

CONSTITUTIONAL AMENDMENT	Leading Case	Purpose	What is Protected?	What is Suppressed?
Fourth Amendment guarantee against unreasonable searches and seizures	Mapp v. Ohio	To reduce police incentive for unlawful searches and seizures and to preserve the integrity of the courts	A citizen's right to privacy and his reasonable expectations of privacy	Evidence and the fruits of evidence unconstitutionally seized
Fifth Amendment privilege against self-incrimination	Miranda v. Arizona	To guarantee full effectuation of the privilege against self-incrimination, and to preserve the integrity of the judicial fact-finding process	An accused's right not to be compelled to testify against himself	Admissions, statements or confessions and their fruits if they have been unconstitutionally obtained
Sixth Amendment right to counsel	U.S. v. Wade; Gilbert v. California	To protect an accused's right to a fair trial by providing the assistance of counsel at every "critical stage" of a criminal proceeding	An accused's right to counsel at every critical stage of a criminal proceeding	In-court identifications based on improperly conducted line-ups or photographic displays

TABLE OF CONTENTS

FOURTH AMENDMENT

LECTURE NO. 1

PERIMETERS, SPIRIT, AND HISTORY OF 4TH AMENDMENT; EXCLUSIONS -- WHAT IS COVERED BY 4TH AMENDMENT AND WHAT IS NOT; OPEN FIELDS DOCTRINE; ABANDONED PROPERTY; FOREIGN COUNTRIES

I. 4th Amendment Perimeters

A. Language of Amendment

1. Prohibits "unreasonable searches and seizures" only

2. Warrantless searches and seizures not mentioned

3. No distinction made between arrests and searches and seizures

4. Automobiles, electronic bugging, and privacy also not mentioned

B. Extent of Coverage -- e.g.'s

1. Seizure of person -- arrest

2. Recording device on outside of public telephone booth

3. Taking of blood after DWI arrest

4. Car stop

5. Street stops and detentions

C. Significance -- 4th Amendment covers the spectrum from routine traffic stop to murder scene investigation

II. Spirit and History of 4th Amendment: The Right of the People to be Secure

A. 4th Amendment (& Bill of Rights) Added Before Constitution Ratified in 1791

B. Historical Reasons for 4th Amendment -- see generally Boyd v. U.S., 116 U.S. 616 (1886)

1. Writs of assistance -- revenue officer searches

2. General warrants by secretary of state -- treason to crown

C. What is Protected -- Privacy Rights

III. Exclusionary Rule

A. What is Excluded?

1. Tangible evidence searched or seized in violation of 4th Amendment

2. "Fruits" of evidence

3. May include overheard verbal statements and testimony by police as to matters observed during unlawful invasion -- see generally Wong Sun v. U.S., 371 U.S. 471 (1963)

B. History of Exclusionary Rule

1. Applied to Federal Court -- Weeks v. U.S., 232 U.S. 383 (1914)

2. "Silver platter doctrines" -- evidence admissible in state courts or in federal courts if seized by state agents

3. Mapp v. Ohio, 367 U.S. 643 (1961) -- 4th Amendment exclusionary rule made applicable to states through 14th Amendment

C. Purpose of Exclusionary Rule

1. Deter overzealous law enforcement by not allowing unlawfully seized evidence at trial

2. Preserve integrity of courts -- government be destroyed if not obey its own laws -- (eroded by recent cases)

D. Exclusionary Rule -- Pro and Con

1. Pro-exclusionary Rule

a. Oliver Wendall Holmes (1928): "It is a less evil that some criminals should escape than that the gov't should play an ignoble part."

b. Louis Brandeis (1928): "Gov't becomes law-breaker, breeds contempt for the law; invites every man to become law unto himself."

2. Con-exclusionary Rule

a. Judge Cardozo (1926): "The criminal is to go free because the constable has blundered."

b. Wigmore (1940): "The way of upholding Constitution is not to strike at man who breaks it, but to let off somebody else who broke something else."

E. Future of the Exclusionary Rule -- Good Faith Exception/ Exclusion

1. Stated -- If the primary purpose of the exclusionary rule (to deter unlawful police conduct) is not served, e.g., in cases where the police actions are reasonable and in good faith, the exclusionary rule itself should not be applied to suppress otherwise valid evidence.

2. Good Faith Exception -- U.S.Sp.Ct.

a. Reserved deciding issue -- Illinois v. Gates, 462 U.S. 213 (1983)

b. U.S. v. Leon, 468 U.S. 897 (1984); Mass. v. Sheppard, 468 U.S. 981 (1984) -- exclusionary rule not apply to law enforcement officer conducting search in good faith objectively reasonable reliance upon search warrant later determined to be invalid

(1) Limitations -- search warrant cases only

(2) Exceptional circumstances:

(a) Affidavit false -- Franks v. Delaware, 438 U.S. 154 (1978)

(b) Magistrate abandons judicial role

(c) Affidavit "so lacking. . .probable cause. . .belief in its existence entirely unreasonable"

(d) Facially deficient, e.g., place to be searched or things to be seized omitted

3. North Dakota Supreme Court -- reserved issue -- State v. Metzner, 338 N.W.2d 799 (N.D. 1983); State v. Ronngren, 361 N.W.2d 224 (N.D. 1985) (n.1); State v. Thompson, 369 N.W.2d 363 (N.D. 1985) (n.5)

4. Other courts:

a. Some courts refuse to adopt relying upon state Constitution -- see, e.g., Stringer v. State, 477 So.2d 1335 (Miss. 1985)

b. Compare U.S. v. Little, 735 F.2d 1049 (8th Cir. 1984)

F. Future of the Exclusionary Rule -- Attenuation Doctrines

1. Stated -- by a number of doctrines, including derivative evidence ("fruit of the poisonous tree"); independent source; and inevitable discovery, the scope of the exclusionary rule has been limited to avoid the unnecessary exclusion of evidence.

2. Application -- U.S. Supreme Court

a. Wong Sun v. U.S., 371 U.S. 471 (1963) -- not all evidence is "fruit of the poisonous tree" (following the initial illegality); but test is whether evidence was obtained by exploitation of illegality or by means "sufficiently distinguishable to be purged of the primary taint"

b. Nix v. Williams, 467 U.S. 431 (1984) -- "inevitable discovery" exception adopted -- evidence of body discovered by violation of Sixth Amendment right to counsel admissible if prosecution proves by preponderance that its discovery inevitable (even though officer's actions were in bad faith)

c. Segura v. U.S., 468 U.S. 796 (1984) -- evidence seized under a valid search warrant, based on evidence obtained before illegal entry into defendant's home and securing of premises while awaiting warrant, admissible pursuant to independent source rule

d. U.S. v. Havens, 446 U.S. 620 (1980) -- use of illegally seized evidence allowed to impeach statement by defendant in direct examination; see also Walder v. U.S., 347 U.S. 62 (1954)

e. See also Erosion of Miranda discussion, infra, Lecture #7

3. Application -- North Dakota

a. State v. Saavedra, 396 N.W.2d 304 (N.D. 1986) -- illegal car search superseded by defendant's disorderly conduct of leaving squad car and fighting with the officer

b. State v. Indvik, 382 N.W.2d 623 (N.D. 1986) -- insufficient grounds for car stop overcome by "independent and intervening acts of high-speed chase, running away into woods, and firing at officer

c. State v. Phelps, 297 N.W.2d 769 (N.D. 1980) -- pre-Nix v. Williams, supra, case in which North Dakota Supreme Court adopted inevitable discovery doctrine with two limitations: (1) police not act in bad faith to accelerate discovery of evidence and (2) evidence would have been discovered without illegality; see also State v. Klevgaard, 306 N.W.2d 185 (N.D. 1981); State v. Johnson, 301 N.W.2d 625 (N.D. 1981) [bad faith of officer found; inevitable discovery inapplicable]; State v. Skjonsby, 319 N.W.2d 764 (N.D. 1982)

d. State v. Nagel, 308 N.W.2d 539 (N.D. 1981) -- pre-Segura v. U.S., supra, decision with similar result

e. State v. Skjonsby, supra, at 793 -- U.S. v. Havens, supra, issue with similar result

IV. 4th Amendment Does Not Apply -- Exclusions

A. 4th Amendment only protects against "searches and seizures" by "agents of the gov't." "in this country" against someone "who has reasonable expectation of privacy."

B. If arguable 4th Amendment problem, ask following:

1. Is 4th Amendment applicable?

a. Unless answer to #1 is yes, do not go to question #2

2. Has 4th Amendment been satisfied?

a. Legitimate search or arrest warrant

b. Warrant unnecessary, i.e., exception applies

C. Exclusions:

1. Open fields

2. Abandoned property

3. Foreign countries

4. Private party searches

5. Consent search -- 4th Amendment protection waived

6. Miscellaneous exclusions -- Katz v. U.S., 389 U.S. 347 (1967) -- no reasonable expectation of privacy

a. Pen registers

b. Third party bugging

c. Exterior of automobile

d. Things exposed to public view

e. Grand jury subpoena for handwriting & voice samples

f. Bank, telephone and other records

g. Dog sniffs of luggage

h. Beeper cases

i. Controlled delivery following private party search

j. "Contraband" exception

k. Stopping of vessels

l. Inventory search of arrestee's possessions at jail

m. Searches of prisoner's cells

n. Field test lawfully seized contraband

o. VIN number in automobile

7. Plain view doctrine (often viewed as exception v. exclusion)

8. Standing

V. "Open Fields" Doctrine

A. Stated -- 4th Amendment limited to "persons, houses, papers, and effects," and does not extend to open fields

B. Open fields defined -- includes anything outside home or "curtilage"

1. "Curtilage" -- zone of habitation -- any fenced-in area near or adjacent to a dwelling

2. Scope of protection is redefined following test in Katz v. U.S., supra, of "reasonable expectation of privacy," i.e., may be reasonable expectation of privacy outside of curtilage; U.S. v. Dunn, 766 F.2d 880 (5th Cir. 1985), or it may not extend to

curtilage; California v. Ciraolo, infra; curtilage is still relevant, however

C. Authority -- Hester v. U.S., 265 U.S. 57 (1924); Air Pollution Board v. Western Alfalfa Corp., 416 U.S. 861 (1974); Oliver v. U.S., 466 U.S. 170 (1984); California v. Ciraolo, ____ U.S. ____, 106 S. Ct. 1809 (1986); Dow Chemical Co. v. U.S., ____ U.S. ____, 106 S. Ct. 1819 (1986)

D. Rationale for Doctrine -- No expectation of privacy

E. Application

1. No expectation of privacy in open area from aerial surveillance even though within curtilage -- California v. Ciraolo, supra

2. Plain View Doctrine compared -- observations from inside constitutionally protected area -- see Lecture #2

3. Pre-intrusive "plain view" compared -- outside of constitutionally protected area "looking in"

a. U.S. v. Johnson, 561 F.2d 832 (D. Col. Cir. 1977), cert. denied, 432 U.S. 907 (1977) [see problems]

b. Peering over curtained window -- bad search -- State v. Jordan, 631 P.2d 989 (Wash. App. 1981)

c. Entry into curtilage before observation may require suppression -- U.S. v. Whaley, 781 F.2d 417 (5th Cir. 1986) [driveway]; contra U.S. v. Smith, 783 F.2d 648 (6th Cir. 1986); and U.S. v. Johnson, supra

4. Sense Enhancing Devices should be allowed but may depend upon location and device -- U.S. v. Knotts, 460 U.S. 276 (1983)

a. If truly open fields -- device likely not matter -- U.S. v. Knotts, supra

b. If "pre-intrusive" view -- may depend upon device -- "expectation of privacy" is test

(1) Unsophisticated devices -- flashlight, searchlights -- usually okay -- see, e.g., U.S. v. Lee, 274 U.S. 559 (1927)

(2) Sophisticated -- may be invalid

5. For good survey of law of open fields and application of Katz in North Dakota, see State v. Larson, 343 N.W.2d 361 (N.D. 1984)

VI. Abandoned Property

A. Stated -- if property or place is abandoned (based upon actual or presumed intent), property can be searched and seized even though property or place previously protected

B. Authority -- Abel v. U.S., 362 U.S. 217 (1960)

C. Rationale -- No reasonable expectation of privacy

D. Application:

1. Cases in five categories:

a. Abandoned premises, e.g., motel rooms, apartments -- rent overdue, suspect left -- search okay -- see, e.g., U.S. v. Larson, 760 F.2d 852 (8th Cir. 1985); compare U.S. v. Owens, 782 F.2d 146 (10th Cir. 1986)

b. Abandoned autos

(1) Chapter 39-26, N.D.C.C. -- auto presumed abandoned after 48 hours if certain conditions met [on public property, government can impound, public sale, etc.]

(2) State v. Klodt, 298 N.W.2d 783 (N.D. 1980) [see problems]

(3) Vehicle ditched in flight -- likely not abandoned -- State v. Stockert, 245 N.W.2d 266 (N.D. 1976)

c. Trash cases

(1) Location of garbage can

(a) Katz implications

(b) May need warrant if trash can not in open fields or defendant has reasonable expectation of privacy but see U.S. v. Alden, infra

(2) California rule -- exp. of privacy until garbage mixed with other garbage -- rejected U.S. v. Alden, 576 F.2d 772 (8th Cir. 1978); State v. Ronngren, 361 N.W.2d 224 (N.D. 1985)

d. Dropsy cases

(1) Defined -- defendant drops contraband when see police

(2) Caveat -- must be legitimate police confrontation

(3) Effort at concealment -- usually not abandoned property

e. Airport luggage cases

(1) U.S. v. Tolbert, 692 F.2d 1041 (2nd Cir. 1982) -- luggage left at airport by drug courier not abandoned until denied ownership

(2) Compare U.S. v. Sanders, 719 F.2d 882 (6th Cir. 1983) -- no abandonment where suspect "forgot" luggage

2. Test -- person intend to permanently divest himself of property

3. Caveat -- if question, get warrant or wait

VII. Foreign Countries

A. Stated -- Fourth Amendment only applies to federal or state (through 14th Amendment) Government and not to foreign countries or their law enforcement agencies

B. Rationale

1. History of 4th Amendment (and Bill of Rights) limitation upon government action

2. 4th Amendment (Bill of Rights) not binding in other countries; deterrence purpose of exclusionary rule not served

C. Application -- See, e.g., U.S. v. Tirinkian, 502 F. Supp. 620 (D.N.D. 1980); U.S. v. Hawkins, 661 F.2d 436 (5th Cir. 1981)

1. If conduct of foreign authority "shocks the conscience" exclusion sanction may apply

2. American officials cannot participate (i.e., act as agent)

LECTURE NO. 1

PROBLEMS

A. On the night of September 28, 1963, a young boy who was walking along the highway near Emerado, North Dakota, was struck by an automobile, fatally injuring him. No automobile or driver was found near the scene. The investigation almost immediately focused on Capt. Manning with the United States Air Force who was stationed at the Grand Forks Air Force Base. Law enforcement officials went to the suspect's home and entered his garage which was attached to the house. Although the suspect was not at home, the suspect's wife opened the garage door allowing the officers to enter. She also, however, threw a pillow at the officer and told the officer to leave as he "didn't have authority to be there." Photographs were taken of the automobile and other physical evidence was obtained off the bumper of the car. The suspect was not in custody at the time and all of the police activity was done warrantlessly and arguably without the suspect's consent.

Is the evidence seized from the defendant's garage admissible in a subsequent negligent homicide or leaving the scene of an accident trial? [State v. Manning, 134 N.W.2d 91 (N.D. 1965)]

B. In December, 1978, a blue, portable air compressor belonging to Marc Nelson was stolen from Nelson's garage in Bottineau, North Dakota. Sometime in October, 1979, a neighbor of the eventual defendant, Johnson, notified Nelson that she had observed a blue air compressor outside a mobile home rented by Johnson. On October 27, 1979, Nelson went to the defendant's home by himself and identified the air compressor as the one taken from his garage. Nelson subsequently notified the sheriff's office and the next day, Nelson and the sheriff returned to the mobile home. Nelson identified the air compressor to the sheriff but the defendant was not at home and nothing further was done at this time.

The sheriff returned to the mobile home a day later and although the defendant was still not present, the sheriff seized the air compressor. All of the activity was done without the benefit of a warrant. The air compressor in question was directly adjacent to the enclosed entryway to the mobile home. The air compressor was observable from the neighbor's mobile home, approximately 25 feet east, but the compressor was not observable from the main road.

Warrantless seizure of the air compressor violate 4th Amendment rights? [State v. Johnson, 301 N.W.2d 625 (N.D. 1981)]

C. On October 20, 1979, the sheriff of Billings County, at the request of the owner of a grocery store and post office building located between Watford City and Dickinson, moved a pickup truck which was parked near the entrance of the store.

This request by the store owner was made when after several days no one came to move or claim the truck. Unable to start the pickup, the Billings County sheriff received assistance from a local county commissioner and the pickup was moved to the county road shed. The pickup was subsequently repaired and three or four weeks later was moved to Medora, North Dakota, and parked near the sheriff's own garage. In the back of the pickup were a number of items including a barrel of oil, barrel of gas, junk items, and some old dirty and greasy clothes. The wind had dislodged some of the clothes in such a way that the sheriff was able to determine that underneath there were air tanks and masks customarily used in the oil well drilling industry. With the aid of a flashlight the sheriff took the serial numbers off the tanks and masks in question and notified the North Dakota Crime Bureau who in turn advised the sheriff that the property should be seized for safekeeping. The property was subsequently determined to have been stolen from an oil well drilling site. Defendant was subsequently charged with theft of property.

Search of the pickup truck under these circumstances violate defendant's 4th Amendment rights? [State v. Klodt, 298 N.W.2d 783 (N.D. 1980)]

D. On April 20, 1975, a person in a ski mask approached an employee at A & W Restaurant in Dickinson, North Dakota, and requested all of their money. The employee informed the would-be robber that the money was put away for the evening to which he replied, "Okay," and the suspect ran away in a northeasterly direction. The incident was immediately reported to the Dickinson Police and an officer arrived approximately 1:00 a.m. Due to darkness investigation was discontinued until the following morning about 6:00 a.m.

Two officers then followed footprints from the scene of the attempted robbery to a grove of trees where they found a rifle, a pair of coveralls, and a ski mask thrust into the branches of an evergreen tree. Two other officers followed another set of tracks which led to an automobile stuck in a large bank of snow on a private roadway a substantial distance from any buildings. The driver's door was locked and the passenger's door was blocked with snow. One of the officers entered the vehicle through an unlocked rear door and a subsequent search of the glove compartment revealed a driver's license, a vehicle registration card, and a plastic bag containing green plant material. At a subsequent trial for attempted robbery the driver's license found in the wallet in the glove compartment was introduced into evidence.

Any 4th Amendment problem? [State v. Stockert, 245 N.W.2d 266 (N.D. 1976)]

E. In July, 1980, narcotics agents of the Kentucky State Police received an anonymous tip that marijuana was being grown and cultivated on the farm owned by Oliver, a 62-year-old retired farmer. The agents had earlier heard rumors to this effect and at this time decided to investigate. Officers approached the Oliver farm on a state highway and gained access to the farm by turning off the highway onto a gravel, private road on Oliver's land. No trespassing signs were posted along the gravel road in at least four locations. The officers saw the signs but ignored their warning. The officers drove past the signs and travelled several hundred yards before passing the Oliver home. The gravel road became narrower after it passed the home. The agents proceeded an additional 3/4 of a mile at which time they were confronted by a locked metal gate which also included another no trespassing sign.

The officers followed a path through a gap in the fence and continued their journey on foot. A barn and truck camper were located several hundred yards beyond the gate and as the detectives approached the barn they did not see any persons. The detectives continued their search and approximately an additional 1/4 of a mile through fields in a wooded area the officers discovered a secluded field of marijuana. The field was located a mile and 4/10 from the Oliver home. The marijuana fields were "highly secluded" and were bounded on all sides by woods, fences and embankments. In fact, the fields were not visible from the barn, the locked metal gate, the Oliver home, the public highway, the lands owned by Oliver's neighbors, or the nearest point of public access. Furthermore, the Oliver farm was posted and fenced.

Did the Kentucky narcotics agents violate Oliver's 4th Amendment rights? [United States v. Oliver, 466 U.S. 170 (1984)

F. A number of bank robberies occurred in the St. Louis area that generated much interest because the robber often performed feats requiring strength and agility. Wielding a sawed-off shotgun, the bandit would customarily vault over the teller's counter to effect the theft and escape. On one occasion, the robber was shot in the side at close range by an off-duty policeman, but completed the hold-up unhindered. As a result of these exploits, the media dub ed the robber the "athletic or bionic bandit." The police and FBI conducted an intensive investigation. Acting on an informant's tip, two St. Louis detectives ran a check on two suspects: John Givens and Robert Taylor. While watching Givens' residence, the detectives saw the eventual defendant (Alden) accompanied by Givens, drive up in an auto registered to Taylor's wife. Both detectives recognized Alden from witnesses' descriptions and bank photographs as the robber.

After the suspects parked the Taylor vehicle, the detectives watched Alden furtively take a handgun from the Taylor auto and give it to Givens, the parties then leaving in Givens' Chrysler. The officers stopped the car, disarmed Givens,

and requested identification of Alden. Alden presented a driver's license belonging to Robert Taylor but containing Alden's photograph. As a patrol car approached to assist, Alden bolted and ran, vaulting a car and fence in his escape. Alden was eventually captured after a several block chase. The officers conducted a warrantless search of both autos -- Givens' Chrysler and the Taylor auto left at the Givens' residence. The latter search was made after Alden was allowed to make a phone call -- content unknown. Subsequent to the arrest, law enforcement officers went to Alden's residence in an attempt to locate and interview Mrs. Taylor. Officers warrantlessly seized some items from a pile of partially burned trash adjacent to the defendant's residence (concededly within the curtilage).

Search of trash violate defendant's 4th Amendment rights? [U.S. v. Alden, 576 F.2d 772 (8th Cir. 1978)]

G. Approximately 1:00 a.m. on January 4, 1973, Washington, D.C., narcotics officer received anonymous phone tip that a large quantity of narcotics were present at a certain address and that it was visible through a lighted basement window on the right hand side of the front of the house. Two officers investigated the report and being unfamiliar with the area, arrived about 2:00 a.m. The officers approached the residence on the sidewalk and although the rest of the house was dark, the officers observed a light in the basement in the area reported in the phone call. The officers stepped off the sidewalk, approximately 2-3 feet, and looked through the (apparently) uncurtained window, observing three men sitting at a table with a "cutting mirror," containing several piles or pyramids of a white powder -- 8-10 inches high. The officers decided it was unwise to make an entry at this time and returned to the station for assistance. The officers also called an Assistant U.S. Attorney about a search warrant, explaining the situation. The attorney stated that a warrant would take at least two hours and a warrantless entry should be made. Several officers returned (about 30 minutes after initial observations) and made warrantless entry.

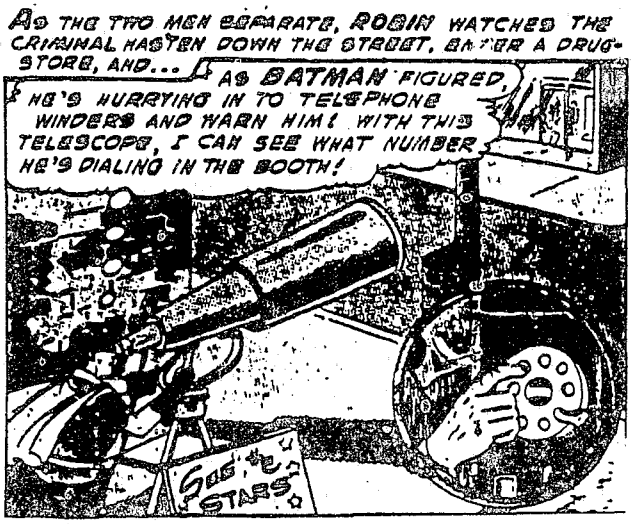
Officers' initial observation valid for search warrant or warrantless entry? [U.S. v. Johnson, 561 F.2d 832 (D. Col. Cir. 1977), cert. denied, 432 U.S. 907]

H. In October, 1982, Larson, Johnson, and their sons were waterfowl hunting from a camp on Larson's land in Sheridan County. Unknown to Larson and Johnson, state and federal game wardens were watching them from nearby hills from early in the morning until late afternoon. The game wardens stated that they saw the hunters shoot 18 to 20 ducks and that they were taken to several locations in the camp including a trailer house, vehicle, an outbuilding, an abandoned shed, and some brush near the shed. Johnson and his son left the camp in the late afternoon. Shortly thereafter, the game and fish personnel entered the camp, questioned the hunters, and checked their

licenses and guns. At no time were Miranda warnings given to Larson or any other party. Furthermore, no arrest or search warrants were obtained. One of the wardens conducted a preliminary search for the ducks and after finding none, another game warden who was six foot, five inches tall and weighed approximately 280 pounds stated to Larson: "We have spotters on the hillside, before daylight they saw you got more birds stashed down here. I will give you one chance, and one chance only to show me or we will bring down six wardens and four dogs." Larson subsequently took the game warden to several locations where the ducks had been placed and admitted shooting more ducks than permitted by law. Johnson subsequently returned and made a similar admission.

Did the game warden's search or questioning violate either the Fourth or Fifth Amendments? [State v. Larson, 343 N.W.2d 361 (N.D. 1984)]

I.



FOURTH AMENDMENT

LECTURE NO. 2

EXCLUSIONS (CONT'D): PRIVATE PARTY SEARCHES, CONSENT SEARCHES, MISCELLANEOUS EXCLUSIONS; PLAIN VIEW DOCTRINE -- FACT AND FICTION

VIII. Private Party Searches

A. Stated -- 4th Amendment only applies to governmental action; private citizen, not acting as agent of government, may search or seize evidence and turn it over to government without 4th Amendment violation regardless of unlawful manner in which the search was conducted

B. Authority -- Burdeau v. McDowell, 256 U.S. 465 (1921); Walter v. U.S., 447 U.S. 649 (1980); U.S. v. Jacobsen, 466 U.S. 109 (1984)

C. Rationale

1. History of 4th Amendment (Bill of Rights) limitation upon government as government

2. Deterrence purpose of exclusionary rule not served

3. Aggrieved party has other remedy

a. Civil suit

b. Criminal action

D. Application

1. Who is private party?

a. Governmental action not limited to law enforcement officers only, may include other "government employees"

b. Public school teachers -- majority find not private party, i.e., 4th Amendment applies

c. Security guards -- majority finds private party

(1) Part-time policemen and part-time security guard -- not recommended

(2) Supermarket, drug store, western protection, Target Stores -- usually private party unless agency

(3) Off-duty policemen -- not recommended

d. Airline employee -- cases go both ways

(1) If not acting pursuant to government direction -- may be okay -- see, e.g., U.S. v. Edwards, 602 F.2d 458 (1st Cir. 1979)

(2) Minority -- government agent because of government regulations

(3) Distinguish airport search exception

e. Foster parent -- usually private party even though child placed by state

f. Probation officer -- no consensus, compare State v. Murphy, 324 N.W.2d 340 (Minn. 1980), aff'd on other grounds, Minn. v. Murphy, 465 U.S. 420 (1984), with Alspach v. State, 440 N.E.2d 502 (Ind. App. 1982)

g. Postal authorities -- North Dakota reserved issue -- State v. Kesler, ____ N.W.2d ____ (N.D. 1986) [n.4]

2. Motel searches

a. Search by cleaning personnel okay even if express order not to clean room

b. Distinguish "consent search" by motel employee -- motel personnel cannot consent to search unless abandonment or common areas

3. Caveat: private party cannot act at direction of government or considered government agent -- State v. Matthews, 216 N.W.2d 90 (N.D. 1974); State v. Ronngren, 361 N.W.2d 224 (N.D. 1985)

4. Distinguish private party "search" and government "seizure" -- may need warrant for latter -- e.g., films, resealed packages -- see, e.g., U.S. v. Jacobson, 683 F.2d 296 (8th Cir. 1982), rev'd, U.S. v. Jacobsen, 466 U.S. 109 (1984), compare Ill. v. Andreas, 463 U.S. 765 (1983), with Walter v. U.S., 447 U.S. 649 (1980)

5. Distinguish private party search and consent search, i.e. Although private party and 4th Amendment inapplicable may not be proper party to give consent to search

IX. Consent Search -- 4th Amendment Protection Waived

A. Stated -- 4th Amendment protections can be waived by a voluntary consent either by the party who is aggrieved by the search or an appropriate third party

B. Rationale

1. 1st party consent -- party can waive his own constitutional rights

2. 3rd party consent -- party has enough of an interest in the place searched or property seized to waive his own 4th Amendment protection

C. Authority -- Schneckloth v. Bustamonte, 412 U.S. 218 (1973); U.S. v. Matlock, 415 U.S. 164 (1974)

D. What constitutes voluntary consent?

1. Test -- question of fact depending upon "totality of circumstances," must be freely and voluntarily given and burden to prove on state

2. Considerations

a. Knowledge of right to refuse consent and other 4th Amendment rights -- not per se involuntary -- Schneckloth v. Bustamonte, supra

b. Threat to get warrant -- cases go both ways, not recommended -- but N.D. has allowed -- State v. Lange, 255 N.W.2d 59 (N.D. 1977); but compare State v. Larson, 343 N.W.2d 361 (N.D. 1984)

c. Deception, threats -- usually negates consent; exception -- undercover agent as invitee

d. Request for counsel -- if not honored, negate consent

e. Consenting party's state of mind -- age, mental condition

f. Custody -- not per se involuntary

g. Acquiescence to show of authority, i.e., "I have warrant" -- not valid (unless warrant is good)

h. Lack of probable cause -- irrelevant, if proper consent

i. Lack of Miranda warning/improper arrest -- strong considerations but may still be voluntary consent -- U.S. v. Cherry, 794 F.2d 201 (5th Cir. 1986); see also U.S. v. Carson, 793 F.2d 1141 (10th Cir. 1986) [illegal search "purged" by subsequent consent]

E. Implied consent

1. Affirmative waiver (express consent) usually required -- see, e.g., State v. Manning, 134 N.W.2d 91 (N.D. 1965)

2. Application

a. Party turned over keys in response to request to search -- consent found

b. Officer asked to talk to suspect; "Yes," No consent to enter apartment

c. Silence, nonresistance -- no consent

F. Scope of consent can be limited by consenting party; consent may also be withdrawn after given -- compare People v. Torand, 622 P.2d 562 (Colo. 1981)

G. Undercover agent as invitee -- see also Katz discussion infra

1. Entry into home valid per "misplaced reliance" rule, see State v. Poland, 645 P.2d 784 (Ariz. 1982); State v. Goeller, 264 N.W.2d 472 (N.D. 1978)

2. Agent carries hidden recorder -- also okay, see State v. Goeller, supra

3. Entry into business or places open to public -- okay, see Comm. v. 9 Slot Machines, 437 A.2d 67 (Pa. 1981); State v. Dahms, 310 N.W.2d 479 (Minn. 1981); compare State v. Pi Kappa Alpha Fraternity, 491 N.E.2d 1129 (Ohio 1986) [state liquor control agent entry as prospective recruit found nonconsensual]

4. Caveat: Entry and plain view seizures okay, but may need warrant for complete search following arrest and/or initial seizures

H. State has burden of proving voluntary consent; failure to consent probably inadmissible at trial -- Garcia v. State, 712 P.2d 1375 (N.M. 1986)

I. Third Party Consent

1. Caveat -- cases go both ways

2. Landlords/motel personnel -- no, except common areas -- Stoner v. Calif., 376 U.S. 483 (1964)

3. School officials -- no, except common areas

4. Co-tenants -- yes, but not of other tenant's private property or areas of "exclusive use"

5. Spouses, lovers, mistresses

   a. Spouse -- jointly owned property and areas of shared living space -- not areas of "exclusive use"

   b. Mistress or lover -- depend upon extent of relationship

      (1) Lee Marvin situation -- yes

      (2) One-night stand -- no

   c. Separated spouse -- usually not, but see U.S. v. Crouthers, 669 F.2d 635 (10th Cir. 1982)

6. Parents -- yes unless child has exclusive use of room -- consent found in State v. Swenningson, 297 N.W.2d 405 (N.D. 1980)

7. Informant -- doubtful, but see U.S. v. Schuster, 684 F.2d 744 (11th Cir. 1982)

8. Merchant

   a. Dry cleaning business -- State v. Howe, infra

   b. Also -- Katz exclusion likely, i.e., no expectation of privacy

J. Apparent authority doctrine

1. Stated -- unknown to law enforcement officer, consenting party did not have authority to consent -- some courts have upheld -- see generally Nix v. State, 621 P.2d 1347 (Alaska 1981)

2. Very limited applicability

K. Form of consent

1. May be oral or written

2. Written consent preferred

L. Consent to accompany officer cases -- see generally U.S. v. Mendenhall, 446 U.S. 544 (1980); Lecture #3

M. If consent questionable, either because of voluntariness or party's ability to consent, get warrant

X. Misc. Exclusion -- Katz v. U.S. -- No Expectation of Privacy

A. Stated -- Growing number of cases, relying upon the history and purpose of 4th Amendment and Katz v. U.S. are finding 4th Amendment inapplicable

B. Rationale -- No expectation of privacy

C. Authority -- Katz v. U.S., 389 U.S. 347 (1967)

D. Examples

1. Pen registers -- Smith v. Maryland, 442 U.S. 735 (1979)

2. Third party bugging cases -- Hoffa v. U.S., 385 U.S. 293 (1966); State v. Goeller, 264 N.W.2d 472 (N.D. 1978)

3. Exterior of automobile -- Cardwell v. Lewis, 417 U.S. 583 (1974)

4. Things exposed to public view -- Katz v. U.S., supra; U.S. v. Knotts, 460 U.S. 276 (1983); State v. Howe, 182 N.W.2d 658, cert. denied, 403 U.S. 923 (1971); Maryland v. Macon, 472 U.S. 4630 (1985) [undercover agent allowed to purchase magazine from adult bookstore]

5. Grand jury subpoena for handwriting and voice samples -- U.S. v. Mara, 410 U.S. 19 (1973); U.S. v. Dionisio, 410 U.S. 1 (1973)

6. Bank records -- U.S. v. Miller, 425 U.S. 435 (1976); telephone records -- State v. Lind, 322 N.W.2d 826 (N.D. 1982); union records -- U.S. v. Synder, 668 F.2d 686 (2d Cir. 1982)

7. Dog sniffs of luggage -- U.S. v. Place, 462 U.S. 696 (1983); U.S. v. Jacobsen, 466 U.S. 109 (1984) -- caveat -- if necessary to detain traveler and luggage -- need 4th Amendment satisfaction; compare State v. Kesler, ____ N.W.2d ____ (N.D. 1986) [34-hour detention of package to allow dog sniff reasonable when addressee unaware]

8. Beeper cases -- U.S. v. Knotts, 460 U.S. 276 (1983) -- monitoring beeper likely no problem if remain in open fields, installation may involve the 4th Amendment

9. Controlled delivery following private party search -- Illinois v. Andreas, 463 U.S. 765 (1983)

10. "Contraband" exception -- State v. Planz, 304 N.W.2d 74 (N.D. 1981)

11. Stopping and boarding of vessels on waters accessible to the open sea for purposes of checking documentation -- U.S. v. Villamonte-Marquez, 462 U.S. 579 (1983)

12. Inventory search of possessions upon incarceration -- Illinois v. LaFayette, 462 U.S. 640 (1983); see discussion in Lecture #3 re: search incident to arrest

13. Searches of prisoners' cells -- Hudson v. Palmer, 468 U.S. 517 (1984)

14. Field test lawfully seized contraband -- U.S. v. Jacobsen, 466 U.S. 109 (1984)

15. VIN number in automobile -- New York v. Class, ____ U.S. ____, 106 S. Ct. 960 (1986)

XI. Plain View Doctrine

A. Stated -- items in plain view of a law enforcement officer inside of a constitutionally protected area may be seized if they are evidence of a crime

B. Elements

1. Prior valid intrusion into constitutionally protected area

2. Inadvertence

3. Probable cause to believe that item is evidence of a crime

C. Rationale -- 4th Amendment protects person's privacy rights from intrusions not based on probable cause and the general warrant; the plain view doctrine does not offend either objective

D. Authority -- Coolidge v. New Hampshire, 403 U.S. 443 (1971); Texas v. Brown, 460 U.S. 730 (1983)

E. Prior valid intrusion

1. Pursuant to warrant to search for other items -- State v. Metzner, 338 N.W.2d 799 (N.D. 1983); State v. Loucks, 209 N.W.2d 772 (N.D. 1973)

2. Pursuant to valid warrantless search for other items -- State v. Goeller, 264 N.W.2d 472 (N.D. 1978)

3. Search incident to arrest or inventory search -- State v. Gelvin, 318 N.W.2d 302 (N.D. 1982)

4. Any other valid intrusion

a. E.g., consent entry -- State v. Page, 277 N.W.2d 112 (N.D. 1979)

F. Inadvertence requirement

1. Limited to availability of probable cause -- People v. Stoppel, 637 P.2d 384 (Colo. 1981); State v. Riedinger, 374 N.W.2d 866 (N.D. 1985); State v. Halczyszak, 496 N.E.2d 925 (Ohio 1986)

2. Purpose -- prevent general search or circumventing constitutional protection favoring warrants

3. Questioned -- Texas v. Brown, supra

G. Probable cause to believe item is evidence of crime

1. Film cases -- usually require warrant to view -- Stanley v. Ga., 394 U.S. 557 (1969); Walter v. U.S., 447 U.S. 649 (1980); tape recordings may need warrant also

2. Drug cases

a. Not necessary to prove controlled substances beyond reasonable doubt -- State v. Gelvin, supra; Texas v. Brown, supra [seizure of tied-off, opaque balloon from car seat upheld]

b. If container involved -- should insure contents visible; "single purpose container" -- Arkansas v. Sanders, 442 U.S. 753 (1979); or Texas v. Brown, supra, situation -- if question -- get warrant -- see, e.g., State v. Matthews, 216 N.W.2d 90 (N.D. 1974); see also Lecture #4, infra, re separate container discussion

H. What plain view doctrine is not

1. Not applicable to non-intrusive open views -- open fields doctrine -- see Lecture #1, supra; State v. Klodt, 298 N.W.2d 783 (N.D. 1980)

2. Not applicable to pre-intrusive open views (outside looking in) -- see generally Brown v. State, 292 A.2d 762 (Md. App. 1972); Scales v. State, 284 A.2d 45 (Md. App. 1971); State v. Planz, supra; Lecture #1

I. Misc. "plain view" questions

1. How close may officer look? -- Serial # cases -- usually upheld, see, e.g., People v. Torand, 633 P.2d 1061 (Colo. 1981); State v. Riedinger, 374 N.W.2d 866 (N.D. 1985)

2. "Plain smell doctrine" -- Johnson v. U.S., 333 U.S. 10 (1948) -- smell of burning narcotics to trained officer (or dog) will supply probable cause but warrant or exception necessary for search

LECTURE NO. 2

PROBLEMS

A. Airline Agent Smith in moving luggage from plane to plane dropped a package that broke open, revealing a green vegetable like material, the agent called the local DEU who quickly responded. The drug agents seized the green vegetable like material without a search warrant.

Any 4th Amendment problem? What if the agent decided he would search every third package for something to do, same result? What if Agent Smith was one of the drug agent's brother who is instructed by his brother to search every package from Miami (because of high drug traffic in that area) and then call the police if he found anything?; what if package resealed before police arrive? [See generally People v. McKinnon, 103 Cal. Rptr. 897, 500 P.2d 1097 (1972)]

B. A crime bureau agent learned that two packages containing marijuana were being shipped from Phoenix, Arizona, to Jamestown, N.D., from a Greg Anderson to two unidentified persons. The agent subsequently notified the Jamestown Police Department of the anticipated shipment. A couple days later the Jamestown Police Department notified the crime agent that the two packages had arrived at the bus depot. The law enforcement agents conducted surveillance of the bus depot. During the surveillance, the law enforcement officials opened one of the packages and examined its contents, discovering marijuana. The crime bureau agent directed the bus official to open the other package, which also contained marijuana. Both packages were then resealed and the surveillance continued until the person who picked up the packages was arrested. No search warrants were obtained at any time and the packages were in law enforcement possession for approximately 22 hours.

Any Fourth Amendment problem? [State v. Matthews, 216 N.W.2d 90 (N.D. 1974)]

C. A Federal Express (private freight carrier) employee discovered a damaged package and examined the contents pursuant to company policy. The package consisted of a cardboard box wrapped in brown paper. Inside the box, five or six pieces of crumpled newspaper covered a tube of duct tape. Inside the tube were four clear plastic bags, one inside the next, the innermost containing white powder. The employee placed the bags back in the tube, leaving them visible from the tube's end, and placed the tube and newspapers back in the box. DEA agents were notified, appeared, and warrantlessly removed the tube from the open box and conducted a test on the sample of the powder. The field test disclosed cocaine,

the substance was resealed and delivered to its addressee by Federal Express. DEA agents obtained a search warrant and subsequently searched the arrestee's residence discovering traces of cocaine.

Warrantless search by DEA agents proper? Matter if box resealed before agent arrived? [U.S. v. Jacobson, 683 F.2d 296 (8th Cir. 1982), rev'd, U.S. v. Jacobsen, 466 U.S. 109, 104 S. Ct. 1652 (1984)]

D. A Jamestown Police Department officer, who was responding to a call from North Dakota Highway Patrol regarding possible DWI driver on Interstate, observed the defendant's car and followed it for five city blocks. The officer observed car weaving in its lane of traffic and stopped the car. The officer observed within the vehicle a couple of empty brown paper bags of the type used to dispense liquor. The officer observed a small pipe in the ashtray and in response to a question by the police officer, the driver admitted to drinking approximately ½ bottle of wine. The defendant was arrested, advised of his Miranda rights, and transported to the police station. At no time was he advised of the cause of his arrest. The car was locked and left at the scene of the arrest.

At the station, the officer did not feel that there was sufficient evidence to justify the driver's arrest for DWI but the driver was placed under arrest for open bottle after the driver said at the station there was a half bottle of wine under the front seat. The officer then requested permission to search the vehicle. The driver initially gave consent but then asked the officer, "what if I say no?" The officer informed the driver that the vehicle would be impounded and searched anyway. This exchange occurred at the police station and the defendant was not informed of his right to refuse consent. The driver then consented to the search and a number of LSD tablets were found which led to the defendant's conviction for possession with intent to deliver.

Valid consent? [State v. Lange, 255 N.W.2d 59 (N.D. 1977)]

E. North Dakota Crime Bureau agent in his undercover capacity purchased a controlled substance from a third party and at the same time he was invited to return that night for a party. As a result two agents returned to the residence for the party and observed marijuana on the kitchen table. The entry was made without an arrest or search warrant, but surveillance officers that remained outside the residence had a search warrant in their possession.

Any Fourth Amendment problem? [State v. Goeller, 264 N.W.2d 472 (N.D. 1978)]

F. In January, 1979, a burglary occurred in Bismarck. Jewelry and silverware were reported missing. During the course of the investigation, a juvenile was questioned who informed

police that the burglary was performed by a nineteen-year-old male named Gerald. The juvenile also stated that the stolen property was probably at Gerald's residence. Armed with this information, the police went to Gerald's residence which was also his father's home. Although Gerald was not present, Gerald's father gave the police written consent to search the home. The stolen property was found in Gerald's bedroom. At the suppression hearing, testimony established that Gerald was emancipated and 19 years old. Gerald had moved out but asked his father to be allowed to return home. With his father's permission, Gerald returned home for a short time and left again. Gerald subsequently returned and was living at his father's home three months prior to the search in question. Although Gerald and his father agreed that he should pay an unspecified amount of rent as soon as he was able, no rent had been paid prior to the search. Further testimony revealed that his father could enter his bedroom uninvited anytime, but never had. Additionally, Gerald's sister entered his room at will, even when he was not present.

Valid search? Does it matter where in bedroom evidence found? What if Gerald lived in basement apartment and paid rent to his parents? [State v. Swenningson, 297 N.W.2d 405 (N.D. 1980)]

G. A Bismarck couple upon returning from an out-of-town vacation discovered that their home had been burglarized and several items of clothing had been taken. A few days later the Bismarck Police were contacted by a cleaning business in Bismarck who stated that a man named Howe had left an assortment of clothing for cleaning which the manager suspected were stolen. The police and the victims went to the cleaning business without a warrant and identified the clothing as some of the clothing taken in the burglary, which was then released to the police department. The police subsequently obtained a search warrant for the home residence and although no evidence was found in the residence when the warrant was executed, a box of clothing was discovered outside the residence adjacent to the house. It was later determined that the search warrant was invalid as no affidavit was filed in support of the search warrant, no inventory was prepared, and the search was conducted at night without specific authorization.

Search of dry cleaning establishment or defendant's yard violate 4th Amendment rights? [State v. Howe, 182 N.W.2d 658 (N.D. 1971), cert. denied, 403 U.S. 923 (1971)]

H. In the early evening hours of April 2, 1981, Bismarck police officer was dispatched to investigate an incident at an apartment in south Bismarck belonging to Mrs. Hart. Upon arriving, the officer found Mrs. Hart on the floor in the hallway of her apartment in a semi-conscious condition. The officer also observed a male, Ralph Gelvin, lying unconscious on the floor of the kitchen. Mrs. Hart told the officer that Gelvin had

entered the apartment uninvited and had been acting strangely. Hart stated also that Gelvin had claimed to be "on drugs" and had waved a small piece of paper in the air claiming that it was LSD. Gelvin had refused to leave and when Mrs. Hart attempted to call the police, Gelvin assaulted her and tore the telephone off the wall. The officer took Gelvin to jail for detoxification and at the jail, Gelvin's belongings were taken and inventoried. Lying loose between the folds of the wallet was a small piece of paper with the cartoon design of "Goofy" on it. The officer seized the paper believing it to contain blotter acid (LSD).

Warrantless search proper? [State v. Gelvin, 318 N.W.2d 302 (N.D. 1982)]

I. Defendant rented a motel room and while he was temporarily absent, the cleaning lady admitted herself for the purpose of cleaning the room pursuant to normal motel operating practices. While cleaning the room the lady detected the odor of marijuana, observed a bag of some "green-like" material and noticed a pipe. She reported her discovery to the police. The police subsequently entered the defendant's motel room without a search warrant and observed the material. The police did not seize the material but instead they conducted a surveillance of the room. When the defendant returned the police re-entered the room and arrested him.

(Analyze each "search situation" and determine if there is a 4th Amendment violation; result change if cleaning lady removed items into hallway?)

J. Police officers in executing a search warrant of defendant's home for stolen property found two pills that were lying on the kitchen table. The pills, which were not unusual in shape or appearance, were seized by the officers.

(Did the officers' seizure create a 4th Amendment problem? Does it matter if the police officers were narcotic officers? Does it matter if the defendant had prior narcotics record or if narcotics paraphernalia were found also on the kitchen table?)

K. For several days in October, 1983, state and local law enforcement officers conducted surveillance of the Ronngren residence in Jamestown. Some of the surveillance activities were conducted from the home of Ronngren's neighbors. Armed with this information, the Stutsman County state's attorney and members of the surveillance team sought a search warrant from the county court. Following a hearing, during which the court viewed a video tape of activities at the suspect premises and heard testimony from the officers, the court issued the search warrant. Among other things, the court considered testimony of a drug enforcement agent that Ronngren's neighbor was in possession of a garbage bag from the Ronngren residence. The agent testified that according to information

provided by the neighbor, a dog dragged the garbage bag from the Ronngren residence to the neighbor's yard. Upon examining the bag, it contained marijuana seeds, marijuana stems and sticks, and a roach cigarette.

Any Fourth Amendment problem? Would it matter if the neighbor obtained the garbage bag from the Ronngren residence? [State v. Ronngren, 361 N.W.2d 224 (N.D. 1984)]

L. In March, 1984, an agent with the North Dakota Drug Enforcement Unit arranged for an undercover purchase of marijuana from a Fetzer in a parking lot in Mandan. When Fetzer left with the agent's money to obtain the drugs in question, he was followed by a surveillance team to the home of Frank Otto in Mandan. Although officers witnessed Fetzer speak to Otto on the back steps of the Otto residence, no exchange of money or marijuana was observed. Fetzer, however, did remain under constant surveillance until he returned and delivered the marijuana to the drug enforcement agent in the parking lot. Fetzer was then arrested and searched, but the money he had received from the agent was not found. The officers subsequently sought and obtained a search warrant to search the Otto home for the money in question and additional controlled substances. Before applying for the search warrant, the drug enforcement agent attempted unsuccessfully to contact an agent with the Crime Bureau to determine if probable cause existed to also obtain a search warrant for stolen goods as Otto's name had appeared in law enforcement files as a potential burglary suspect. Although the search warrant was limited to drugs and money, a local Mandan police officer accompanied the drug enforcement agent apparently to see if stolen goods were present that would connect Otto with the burglaries in question. In conducting the search of the residence, the officers found a microwave oven sitting on a cooler which was not plugged in nor in apparent use. One of the officers picked up the oven, and held it while another officer copied the serial number which was embossed on a small strip on the back of the oven. An NCIC check disclosed that the microwave oven was stolen. In addition to the microwave, marijuana and paraphernalia, a number of other unrelated items including a pellet gun, knife, wooden box pistol, notebook and miscellaneous items were seized. Also observed during the search but not seized were, among other things, an ornamental sword, antique items, and a clock. After the search, the officers obtained information that identified these additional items as stolen property. Two subsequent search warrants were obtained for the stolen property listed above as well as for a car noticed outside of the residence.

Any Fourth Amendment problems? [State v. Riedinger, 374 N.W.2d 866 (N.D. 1985)]

M. Review problems A [State v. Manning], B [State v. Johnson], G [U.S. v. Johnson], and H [State v. Larson], Lecture #1.

N.


MUCH LATER, THE PLAN IS PUT INTO ACTION--AS POLICE RAID THE HIDEOUT OF ACE LOGAN, THAT WANTED BANK ROBBER...
LOGAN FORGOT SOMETHING -- A CAN OF FILM! IT COULD BE IMPORTANT! WE'D BETTER RUN IT OFF AT HEADQUARTERS!
OUR ANONYMOUS TIP CAME TOO LATE! LOGAN'S SKIPPED OUT!

FOURTH AMENDMENT

LECTURE NO. 3

STANDING; CENTRALITY OF SEARCH WARRANT REQUIREMENT; OVERVIEW OF EXCEPTIONS; SEARCH INCIDENT TO ARREST; STOP-N-FRISK

XII. "Standing Doctrine" -- Katz v. U.S.

A. Stated -- defendant cannot secure suppression of evidence unless his rights were violated; Defendant is not an "aggrieved party" simply because the prosecution seeks to use illegally seized evidence against him (except in California)

B. Rationale -- 4th Amendment protects a person's privacy rights and they cannot be vicariously asserted by another

C. Authority -- Rakas v. Illinois, 439 U.S. 128 (1978); U.S. v. Salvucci, 448 U.S. 83 (1980); Rawlings v. Kentucky, 448 U.S. 98 (1980)

D. Test -- defendant have legitimate expectation of privacy in the area searched

E. Application

1. Passengers -- lawfully present in auto have no expectation of privacy in search of glove compartment or search under front passenger seat -- Rakas v. U.S., supra

2. Persons unlawfully present

a. Thief has no "standing" in stolen auto -- Palmer v. State, 286 A.2d 572 (Md. App. 1972)

b. Trespasser -- no "standing"

3. Defendant cannot complain about search of third party

4. N.D. approach -- State v. Lind, 322 N.W.2d 826 (N.D. 1982)

F. Burden of proof -- defendant must establish legitimate expectation of privacy

XIII. Centrality of Search Warrant Requirement/Overview of Exceptions

A. General Rule -- all warrantless searches and seizures are considered per se unreasonable and therefore unconstitutional -- "Get a warrant or get out of court." Except. . .

B. Exceptions -- evolved out of necessity but are "jealously and carefully drawn"

C. Significance

1. Searches with warrant are presumed good -- burden to rebut on defendant; doubtful cases resolved in favor of warrant -- see, e.g., State v. Boushee, 284 N.W.2d 423 (N.D. 1979); see also good faith exception discussion, Lecture #1

2. Searches without warrant -- burden on the State to show that exception exists

D. Rationale for Exceptions

1. Necessity -- "Have to get warrant, unless you can't"

2. Language of 4th Amendment prohibits "unreasonable" searches and seizures only

E. Equation for Exceptions: Balance individual's right to privacy v. society's need for reasonable police intrusion

1. Example -- auto search -- lesser expectation of privacy in auto

2. Exception must be limited in scope to its purpose, i.e., search originally valid, may become bad if exceed exception, e.g., stop-n-frisk

F. Exclusions Distinguished -- Fourth Amendment Inapplicable

G. Exceptions -- Fourth Amendment Applies but Warrant Process Unnecessary

1. Search incident to arrest

2. Stop-n-frisk

3. Exigent circumstances/emergency searches

4. Carroll Doctrine -- automobile searches

5. Misc./special search situations

a. Airport searches

b. Border searches

c. Administrative searches, e.g., public health searches

d. Parolees, probationers, and prisoners

e. Entry inspection searches, e.g., rock concert, courthouse, wildlife sanctuaries

f. Auto inventory search

g. Catch-all reasonableness -- Cupp v. Murphy; inevitable discovery -- Nix v. Williams

XIV. Search Incident to Arrest

A. Stated -- after a lawful arrest, the arresting officer may search, without a warrant, the person arrested and the area "within his immediate control"

B. Rationale

1. Protection of officer -- discovery of weapons -- prevent escape

2. Prevent destruction or concealment of evidence

3. Reduced expectation of privacy due to arrest

C. Authority -- Chimel v. California, 395 U.S. 752 (1969); U.S. v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973)

D. Requirement of Lawful Arrest -- see also Lecture #6

1. Probable cause -- when facts and circumstances within officer's own knowledge and of which he has reasonably trustworthy information are sufficient to warrant a man of reasonable caution to believe that offense has been or is being committed

2. Consequences of unlawful arrest -- search, and "fruits" of search or arrest, e.g., statements probably suppressed

3. What constitutes arrest -- elements:

a. Intent to make arrest

b. Real or pretended authority to arrest

c. Seizure or restraint, actual or constructive

d. Understanding by arrestee that being arrested

e. Statutory requirements -- Chapter 29-06, N.D.C.C.

4. Focus on what officer did

a. Police arrest powers -- force, search, seizure and restraint -- probable cause required

b. Police investigative powers -- stop and frisk, question, detain, order someone out of car -- reasonable suspicion required

c. "You're under arrest" -- not magic words

E. Requirement of Contemporaneous Search

1. Search before arrest -- generally no good, but see Rawlings v. Kentucky, 448 U.S. 98 (1980); U.S. v. Crews, 445 U.S. 463 (1980)

2. Results of search cannot be used to justify subsequent arrest -- compare State v. Harris, 286 N.W.2d 468 (N.D. 1979) -- [police arrest for disorderly conduct; S.I. disclosed drugs; prosecutor elected to pursue drug charge only]

3. Delayed search -- second search

a. "Booking-in" (incarceration) search of person -- okay -- see generally State v. Gelvin, 318 N.W.2d 302 (N.D. 1982); State v. Lind, 322 N.W.2d 826 (N.D. 1982)

b. U.S. v. Edwards, 415 U.S. 800 (1974) -- seizure of defendant's clothes at jail ten hours after arrest and booking upheld

c. Inventory search of personal property (e.g., purse, wallet) upon incarceration is valid usually upon inventory or Katz rationale (see Lecture #2) -- see Illinois v. LaFayette, 462 U.S. 640 (1983); State v. Gelvin, supra; State v. Lind, supra; therefore, seizure does not have to occur within search perimeter

d. If within search perimeter when seized but no immediate search, nor "booking-in" search, subsequent search probably suppressible, see containers discussion -- Lecture #4; compare U.S. v. Burnette, 698 F.2d 1038 (9th Cir. 1983), with U.S. v. Monclavo - Cruz, 662 F.2d 1285 (9th Cir. 1981); see also U.S. v. Brown, 671 F.2d 585 (D. Col. Cir. 1982)

e. Second (and later) search (and seizure) of property inventoried at jail likely good based upon Katz argument -- see People v. Richards, 454 N.E.2d 1192 (Ill. 1983)

f. Test: Distinguish search of person (and possessions at jail) from area within arrestee's control -- latter search must be immediate

F. Scope of the Search

1. Defined -- area from within which arrestee might have obtained either weapon or evidence

2. Subjective fear by officer or belief that evidence present -- unnecessary

3. Arrestee's person -- broad search authority, e.g., clothes, hair -- State v. Chausee, 138 N.W.2d 788 (N.D. 1965); Hardy v. Cunningham, 167 N.W.2d 508 (N.D. 1969); cigarette packages -- U.S. v. Robinson, supra

4. Body cavity searches -- something additional required -- State v. Clark, 654 P.2d 355 (Hawaii 1982), especially if minor offense -- Weber v. Dell, 804 F.2d 796 (2nd Cir. 1986) [reasonable suspicion that arrestee concealing weapons or contraband required]

5. Arrestee's immediate effects -- see discussion, supra

6. Blood sample -- Schmerber v. California, 384 U.S. 757 (1966); State v. Mertz, 362 N.W.2d 410 (N.D. 1985); State v. Kimball, 361 N.W.2d 601 (N.D. 1985), following elements necessary: (1) arrest; (2) clear indication that evidence will be found; (3) blood test performed in reasonable manner [see also Lecture #5 and DUI manual]

7. Automobile search incidents

a. New York v. Belton, 453 U.S. 454 (1981) -- allows search of entire passenger compartment of automobile based upon arrest of occupant; including separate containers therein, Commonwealth v. Henry, 517 A.2d 559 (Pa. 1986)

b. U.S. v. Schecter, 717 F.2d 864 (3rd Cir. 1983) -- if arrest proper (here DUI) -- search of passenger compartment valid without need for nexus between items seized and reason for search (or arrest)

c. State v. Massenburg, 310 S.E.2d 619 (N.C. App. 1984) -- Belton applied to locked glovebox

d. Note: S.I. search of auto may overlap with auto exception -- see Lecture #4

e. Query -- if defendant handcuffed and placed in back of squad car prior to search? -- Horton v. State, 408 S.2d 1197 (Miss. 1982) [S.I. search upheld]; State v. Harvey, 648 S.W.2d 87 (Mo. Sp. Ct. 1983) [several officers, one defendant handcuffed outside car -- search upheld]; may be problems

8. Beyond person and effects

a. Defendant's change of position -- Washington v. Chrisman, 455 U.S. 1 (1982) [allowed police to follow arrestee into his dwelling and search]

b. "Protective sweep" doctrine may allow brief search of residence for officer's protection if reasonably believe that someone else present -- U.S. v. Wiga, 662 F.2d 1325 (9th Cir. 1981); U.S. v. Gardner, 627 F.2d 906 (9th Cir. 1980)

c. Arrestee's companions, persons present during search warrant -- detain but not search unless stop-n-frisk principles apply -- Ybarra v. Illinois, 444 U.S. 85 (1979); Michigan v. Summers, 452 U.S. 692 (1981); State v. Grant, 361 N.W.2d 243 (N.D. 1985) [see also Lecture #6]

G. Petty Offenses

1. Custodial arrest necessary

2. Traffic infractions -- generally not, but see Williams v. State, ____ S.W.2d ____, 40 Cr.L.Rptr. 2032 (Tex.Ct.Cr.App. 1986) [parking violation sufficient for S.I. of truck]; Vicknair v. State, ____ S.W.2d ____, 40 Cr.L.Rptr. 2033 (Tex.Ct.Cr.App. 1986) [automobile safety violations]

XV. Stop and Frisk

A. Stated -- police officer with articulable suspicion that crime has occurred, is then occurring, or is about to occur may stop the suspect and if the officer has articulable suspicion that suspect is armed, may frisk, even though no warrant or no probable cause

B. Rationale

1. Protection of officer -- frisk

2. Prevention of crime -- stop

3. 4th Amendment does apply but intrusion limited and not "unreasonable" when balance right of privacy with necessity for crime prevention

a. Stop-mini-arrest

b. Frisk-mini-search

C. Authority -- Terry v. Ohio, 392 U.S. 1 (1968); Section 29-29-21, N.D.C.C.; U.S. v. Hensley, 469 U.S. 221 (1985)

D. Police Contacts Distinguished -- 4th Amendment not Apply

1. Test: If reasonable person believe free to go -- no seizure: U.S. v. Mendenhall, 446 U.S. 544 (1980); State v. Koskella, 329 N.W.2d 587 (N.D. 1983); Ins. v. Delgado, 466 U.S. 210 (1984) [police approach for street questioning likely not seizure despite citizen's "natural sense of obligation"]

2. Show of authority, implied restraint -- seizure; Brown v. Texas, 443 U.S. 47 (1979); although law enforcement uniform per se is not sufficient show of authority -- Fla. v. Royer, 460 U.S. 491 (1983)

3. Car stop -- always considered stop unless parked

4. Significance -- if seizure (& not mere police contact) and no 4th Amendment justification -- any statements or evidence seized suppressed

5. For discussion of "benign stops" (non-criminal, non-investigative), and inapplicability of Terry, see State v. Chisholm, 696 P.2d 41 (Wash. Ct. App. 1985)

E. Authority to Stop not Necessarily Authority for Frisk

1. Justification for stop -- articulable suspicion that crime committed or about to be committed and suspect committed it

2. Probable cause distinguished

3. Examples of stop

a. Factors -- experience of officer, suspect's actions (including flight), background, appearance, area of city, time, type of crime involved

b. Stop upheld -- tough crime area, shots, suspect in area; auto matching description on likely escape route

c. U.S. v. Place, 462 U.S. 696 (1983) -- certain characteristics of drug courier profile sufficient for stop

4. Justification for frisk -- articulable suspicion that suspect armed

a. Search incident distinguished

b. Basis for stop can be basis for frisk

c. Subjective fear unnecessary

5. Stop and frisk may be based on informant's tip -- Adams v. Williams, 407 U.S. 143 (1972)

F. Scope and Intensity of Stop & Frisk

1. Frisk of person limited to "pat down" for weapons

a. Soft bulges -- generally not

b. Cigarette package -- generally not

2. What constitutes stop (versus arrest)

a. Police officer's use of gun not necessarily turn stop into arrest requiring probable cause -- U.S. v. Merritt, 695 F.2d 1263 (10th Cir. 1982); U.S. v. Hensley, 469 U.S. 221 (1985)

b. Nor does use of handcuffs under limited circumstances -- People v. Weeams, 665 P.2d 619 (Colo. 1983)

c. Officer's request to perform field sobriety tests not necessarily arrest -- State v. Little, 468 A.2d 615 (Me. 1983) [see also DUI manual]

d. Length of stop depends upon circumstances of case -- U.S. v. Sharpe, 470 U.S. 675 (1985) [20 minutes not unreasonable]; People v. Hicks, 500 N.Y.Supp.2d 449 (N.Y. App. 1986) [allowed to take suspect back to scene of crime for possible ID]

2. Frisk perimeter co-extensive with search incident perimeter, including entire passenger compartment of car, see Michigan v. Long, 463 U.S. 1032 (1983)

3. Entire stop-n-frisk must be limited to purpose, but Terry stop may "expand" into probable cause -- State v. Arntz, 286 N.W.2d 178 (N.D. 1979)

4. Extended to "completed crime" with stop made on basis of police bulletin -- U.S. v. Hensley, 469 U.S. 221 (1985)

5. Persons stopped under Terry rationale not obligated to answer questions -- Berkemer v. McCarty, 468 U.S. 420 (1984)

G. Automobile Stop-n-frisk

1. Must be reasonable suspicion for stop, unless possibly enmasse safety check, DUI checkpoints [see also DUI manual]

   a. Delaware v. Prouse, 440 U.S. 648 (1979); State v. Goehring, 374 N.W.2d 882 (N.D. 1985) [evidence must exist in the record showing policies and procedures for HP safety check]

   b. State v. Placek, 386 N.W.2d 36 (N.D. 1986) -- rear taillights nonfunctioning sufficient to stop car

   c. State v. VandeHoven, 388 N.W.2d 857 (N.D. 1986) -- weaving of vehicle, driving below speed limit -- sufficient

2. Legitimate stop gives officer right to have driver exit car before questioning

   a. Pennsylvania v. Mimms., 434 U.S. 106 (1977)

   b. Reasonableness theory

   c. State v. Mertz, 362 N.W.2d 410 (N.D. 1985) -- officer allowed to put speeding driver into squad car

3. Frisk perimeter in auto co-extensive with search incident perimeter in N. York v. Belton, supra -- Michigan v. Long, supra

4. State v. Indvik, 382 N.W.2d 623 (N.D. 1986) -- although insufficient facts to initially justify stop, defendant's actions of engaging in high speed chase, pulling gun on officer "dissipated the taint of the prior illegality"; see also attentuation discussion, Lecture #1

H. Station House Detentions

1. Without probable cause, warrant or court order, cannot take suspect to station for questioning without consent or will be considered arrest -- Dunaway v. New York, 442 U.S. 200 (1979); Hayes v. Florida, 470 U.S. ____, 105 S. Ct. 1643 (1985)

2. Fingerprints without consent, warrant, or probable cause -- no good -- Davis v. Mississippi, 394 U.S. 721 (1969); Hayes v. Florida, supra [dicta -- if reasonable suspicion and taken "with dispatch" may be o.k.]

3. Cupp v. Murphy, 412 U.S. 291 (1973); State v. Phelps, 286 N.W.2d 472 (N.D. 1979) [Cupp distinguished] -- if probable cause, evidence readily destructible, and intrusion limited, evidence may be obtained even though no arrest -- not recommended [see Lecture #5]

I. Other Minor Intrusions Allowed Pursuant to Terry Justification

1. Michigan v. Summers, supra (1981), search warrant includes authority to detain occupants while search of residence conducted

2. Ybarra v. Illinois, supra (1979) -- need frisk rationale for search of occupants (unless named in search warrant); see also State v. Grant, 361 N.W.2d 243 (N.D. 1985)

3. Brief detention of luggage allowed if articulable suspicion -- U.S. v. Place, 462 U.S. 696 (1983)

4. Special search situations -- Lecture #5

LECTURE NO. 3

PROBLEMS

A. On November 12, 1981, Fargo Police Officer Peter Graber was on routine patrol when he heard, over his police radio, that the White Drug Store in Fargo had been robbed and drugs had been stolen. The call described two armed male suspects and a general description of clothing was given for both suspects. Police officers were also informed that the suspects had fled in a car but no description of the car was given. Officer Graber immediately suspected that his nephew, Koskela, was involved in the robbery. Koskela had recently been paroled from the State Penitentiary for robbery, and had a lengthy criminal record. Koskela was also unemployed and Graber had information from Koskela's roommate that Koskela was having a hard time functioning on the outside and that he was "back on drugs." Graber drove to the Koskela residence approximately two miles from the scene of the robbery, and observed Koskela driving towards Graber's squad car. Graber noticed that Koskela's hair was disheveled and his nephew refused to stop and talk to Graber or acknowledge his presence. Graber radioed for assistance and followed his nephew for approximately 10 blocks where Koskela parked in a driveway. Koskela immediately left his car and angrily asked Graber what he wanted. Graber asked Koskela to sit in the squad car and answer some questions. Koskela initially sat in the car but left the car shortly thereafter. A second officer then arrived on the scene and asked Koskela permission to look in the car which was denied. The second officer approached the car and saw a second man lying in the back seat. The drugs, masks, gun and other items were found in the automobile.

   Graber's initial encounter with Koskela void the subsequent proceedings? [State v. Koskela, 329 N.W.2d 587 (N.D. 1983)]

B. In November, 1978, at approximately 10:30 p.m., Mr. Steak Restaurant in Bismarck was the victim of an armed robbery. The robber was male, wearing a ski mask, and escaped with $636.00 in cash and checks. The manager notified the police that the robber had headed north on foot after leaving the restaurant. Two Bismarck Police officers proceeded to the scene of the robbery and observed a man jogging in a northerly direction carrying something in his hands. At this time they were approximately 5 blocks north of the restaurant. The police stopped the man and questioned him why he was jogging. The man's answers were irrational and he appeared frightened. His pants pockets were bulging and a piece of currency was protruding from one of his pockets. The man was arrested.

   (Lawful arrest?)

   State v. Arntz, 286 N.W.2d 478 (N.D. 1979)

C. On the day in question in this problem, the defendant went to a tire shop in Grafton, North Dakota, on several occasions requesting help in breaking the bead on the tires of his vehicle and for help in reinflating his tires. One of the employees lifted one of the tires and noticed that it was heavier than normal. The defendant became upset and ordered the employee to drop the tire. The employee, a member of the reserve police force in Grafton, reported this incident six hours later to the Highway Patrol. The highway patrolman arrested the defendant on the street near his automobile and took him to the police station. The defendant's car was also seized and taken to the police station where it was searched without a warrant.

State v. Gagnon, 207 N.W.2d 260 (N.D. 1973)

D. The police received a telephone tip from a reliable informant that led to the arrest of Wanda Brown on a street corner. At the time the arresting officers confronted Brown, she placed between her knees a small, zippered leather pouch that she had been holding in her hand. An officer seized the pouch, unzipped it, and found packets of heroin.

Assuming the informant's reliability and sufficient facts for arrest, is search of pouch valid? Matter if pouch seized and not searched until at police station several hours later? What is searched at jail several hours later pursuant to booking in?

[U.S. v. Brown, 671 F.2d 585 (D. Col. Cir. 1982)]

E. Defendant and three companions were stopped for speeding by one police officer. While checking the driver's license and registration the police officer smelled burned marijuana and spotted on the floor of the car an envelope marked "super-gold." The officer then ordered the four men out of the car and placed them under arrest for unlawful possession of marijuana. After patting down each of the four men and putting them at the four corners of the car, the officer searched the passenger compartment of the car finding a jacket belonging to the defendant. The search of the jacket disclosed cocaine.

[New York v. Belton, 453 U.S. 454 (1981)]

F. In December, 1978, Nevada FBI agents received information from the FBI office in Spokane, Washington, that Wiga, a federal parole violator, would be traveling to Las Vegas in the company of Alice Moody and Moody was expected to pick up some money from a specific bank. The agents conducted surveillance of the bank and approximately 2:00 in the afternoon, Moody arrived at the bank and transacted her business. The agents were given a pre-arranged signal by bank personnel and the agents them followed Moody to a motor home in the parking lot. The agents identified the driver as Wiga who

attempted to hide his face and drove off. The agents stopped the motor home and ordered Wiga out of the vehicle. Wiga was then arrested. The agents asked if anyone else was in the vehicle and Wiga stated no. The agents then called for Moody to come out and then conducted a cursory investigation of the motor home for other occupants. The agents found no other occupants but found a .357 revolver and a shotgun which were seized.

Warrantless search valid? [U.S. v. Wiga, 662 F.2d 1325 (9th Cir. 1981)]

G. A police officer patrolling his beat saw the defendant continuously from the hours of 4:00 p.m. until 12:00 midnight in a high crime area associating with six to eight people that the officer knew to be involved in the drug traffic. The officer did not overhear any of the conversations nor did he see anything passed between the defendant and the other parties. Late in the afternoon the officer saw the defendant enter a restaurant and began speaking with three more known drug dealers. The officer entered the restaurant and asked the defendant to come outside. As soon as they were outside the restaurant the officer said, "You know that I'm after." The defendant mumbled something and began to reach into his pocket. At that time the officer thrust his hand into the same pocket and pulled out two packages that contained heroin. Proper search?

[Sibron v. New York, 392 U.S. 40 (1968)]

H. An off-duty police officer was in his apartment and had just finished taking a shower when he heard noises at his door. The officer looked through a peep hole into the hall to see if anything was going on. The officer saw two men tiptoeing down the stairway. The officer called the police, put on his civilian clothes, armed himself with his weapon and went out into the hallway. The officer had lived in the apartment building for 12 years and did not recognize either man as a tenant. After the officer stepped into the hallway and slammed the door, the men began to run down the stairs. The officer took after them in close pursuit and apprehended one of the suspects. The officer asked the suspect what he was doing in the apartment building and the suspect indicated he was visiting a girlfriend. The officer asked who the girlfriend was; the party refused to answer. The officer immediately patted the suspect down for weapons and discovered a hard object in his pocket. The officer removed the object discovering some burglar tools.

Analyze search and seizure problems.

[Peters v. New York, supra, (1968)]

I. Sgt. Baker was on routine patrol in the city of Baltimore one night about 11:30 p.m. The officer received a report

over the police radio a shooting had occurred a few blocks from where the officer was located. The police bulletin described the getaway automobile as dark with chrome mag wheels. The officer saw a 1962 Chevrolet with mag wheels sitting in a parking lot. The officer requested a backup, approached the vehicle. The officer looked in the car and observed four occupants and a brown paper bag on the floor between the feet of the driver. The officer ordered all parties out of the car and seized the bag finding two pounds of marijuana inside. It was later discovered that the four occupants in the automobile were not involved in the armed robbery. The officer then searched the driver of the car and removed a key case and opened it up discovering two tablets of heroin.

Analyze each search and seizure problem.

[Williams v. State, 310 A.2d 593 (Md. App. 1973)]

J. Plain clothes police officer was working undercover in "high crime area" in a larger city. The officer observed the defendant and another party standing on the street corner. The officer approached the parties, and one party started to run. The defendant, however, did not see the officer. The officer identified himself, requested the defendant's I.D., and the defendant started to walk away. The officer subsequently grabbed the defendant and frisked him and found a weapon. The weapon was later tied in to an armed robbery that had occurred two months earlier. The defendant was ultimately charged and convicted.

What is going to happen to this case on appeal? Gibbs v. State, 306 A.1d 587 (Md. App. 1973)

(What if defendant had narcotics record and officer observed defendant giving non-descript brown paper bag to the party standing next to him? What about a frisk under these circumstances?)

K. Police arrest defendant with an arrest warrant for armed robbery in defendant's home. Police search the defendant in his house and subsequently take him to the squad car where he is handcuffed and placed in the rear seat. The police then return to the house and search the area from which the defendant was arrested. Search okay?

(What if police do not search the defendant until he arrives at station? What about search at the scene of defendant's wallet? Defendant's clothing for glass particles? What if defendant is arrested in the kitchen and officers search the upstairs bedroom?)

L. In investigating a burglary of a sporting goods store, the police received information (amounting to probable cause) that some of the stolen property was located at defendant's

residence. The police went to defendant's residence without a warrant and requested his permission to search his residence. The defendant refused consent even after the police warned him they could get a warrant. The officers could see from their vantage point on the front step some of the stolen items lying on the sofa in defendant's house. The police arrested the defendant and seized the merchandise. The police then went to the residence of defendant's accomplice and looked through his front window and saw some of the other items lying on the floor. The police subsequently broke down the door as the accomplice was not home and seized his merchandise as well. Both searches were without search or arrest warrants.

Analyze each search situation to determine if 4th Amendment problem. See generally State v. Lind, 322 N.W.2d 826 (N.D. 1982), for standing principles.

M. In November, 1983, agents with the Drug Enforcement Unit and Grand Forks Police Department obtained a search warrant to search the Clauthier residence for drugs. At approximately 11:30 a.m., while the officers were conducting the search, Grant entered the home with Clauthier and Clauthier's two small children. Grant and Clauthier had taken the children skating and were returning after stopping at a grocery store. Grant was carrying two large sacks of groceries at the time she entered the home. Law enforcement took Grant into another room of the house and questioned her for approximately 3 to 5 minutes. At the conclusion of the questioning, the officer asked Grant if he could look into her purse. She asked if she had a choice, to which the officer replied "no, you don't." She then handed her purse to the officer who unzipped it and discovered two baggies of marijuana and a pill bottle containing drug paraphernalia and marijuana residue.

Any Fourth Amendment problem? [State v. Grant, 361 N.W.2d 243 (N.D. 1985)]

N. In May of 1984, at approximately midnight, the Rolette County Sheriff's Department received a report of a shot having been fired into the St. John rectory. The sheriff responded to the call and while investigating, received reports of two residential dwellings which were also the target of gunshots in St. John, North Dakota. The sheriff interviewed the homeowners and other individuals at the crime scenes and received the names of two suspects, one of which was Indvik's. Indvik had reportedly been acting strangely earlier that evening. The other suspect resided in Belcourt, a nearby city. The sheriff and additional deputies established surveillance in the city of St. John including an area of the town which included the Indvik home, although the deputies in question were not given the name of this person as a suspect. At approximately 1:00 a.m., a deputy sheriff saw someone leave the Indvik home, get into a nearby vehicle, and drive away. This officer was instructed to follow the vehicle and as it

was leaving the city limits, was ordered by the sheriff to stop the car. When the deputy attempted to stop the car using its red lights, the vehicle in question sped away. A high speed chase followed with the suspect eventually fleeing the vehicle with a weapon in his hand. The suspect, Indvik, was eventually disarmed and arrested and a search warrant was obtained for his home and vehicle.

Any Fourth Amendment problem in this case? [State v. Indvik, 382 N.W.2d 623 (N.D. 1986)]

O. Defendant was stopped for speeding by a police officer. While issuing the ticket, the officer noticed a bulge under the defendant's leather coat that appeared to be a revolver in a shoulder holster. At that time, the officer knew that the defendant had been previously convicted as a felon for possession of drugs. The officer asked the defendant to step in front of the patrol car and when they reached the front of the vehicle, the officer conducted a "pat down" search on the outside of the defendant's coat. Feeling a "solid lump," the officer opened the defendant's jacket and found a heavy duty freezer bag containing approximately one ounce of marijuana. The defendant was then arrested. Prior to the pat down search, the officer was not threatened by the defendant in any way and the defendant had followed the officer's directions.

Did the officer's actions violate the defendant's Fourth Amendment rights? [State v. Schneider, ____ N.W.2d ____ (N.D. 1986)]

P. Reconsider problem H, Lecture #2.

Q.

FOURTH AMENDMENT

LECTURE NO. 4

AUTOMOBILE SEARCHES; OTHER EXCEPTIONS COMPARED; SEARCH OF SUITCASES, TRUNKS, AND OTHER CONTAINERS

XVI. Carroll Doctrine - Auto Exception - What It Is, What It Is Not

A. Stated -- when probable cause exists that moving vehicle contains evidence of crime, police may stop vehicle and search it without a warrant either at place of stop or at place where vehicle transported

B. Elements

1. Probable cause

2. Exigent circumstances

C. Rationale

1. Mobility of vehicle

2. Lesser expectation of privacy in vehicle

D. Authority -- Carroll v. U.S., 267 U.S. 132 (1925); Chambers v. Maroney, 399 U.S. 42 (1970); Coolidge v. New Hampshire, 403 U.S. 443 (1971); U.S. v. Ross, 456 U.S. 798 (1982); U.S. v. Johns, 469 U.S. 478 (1985)

E. Probable Cause Element

1. Car usually not divisible -- trunk, glove compartment, separate container therein -- U.S. v. Burnett, 791 F.2d 64 (6th Cir. 1986); State v. Kottenbrach, 319 N.W.2d 465 (N.D. 1982)

2. Probable cause must exist for each area searched

3. Probable cause must be for vehicle not for driver's arrest -- Preston v. U.S., 376 U.S. 364 (1964) -- but search incident principles may overlap -- see Lecture #3 and infra

F. Exigent Circumstances

1. Moving vehicle -- qualifies

a. Defined -- actual mobility or potential, i.e., driver in parked auto -- see, e.g., California v. Carney, 471 U.S. 386 (1985)

b. Rule -- "moving vehicle" satisfies exigent circumstances and car can be searched at scene or place of tow even though driver in custody at time of search

2. Parked vehicle (driver not present)

a. Coolidge v. New Hampshire, supra, limitation -- case by case

b. Officer alone at night even though car stuck and defendant arrested -- maybe o.k. -- State v. Klevgaard, 306 N.W.2d 185 (N.D. 1981); see also State v. Meadows, 260 N.W.2d 328 (N.D. 1977) [suspect left vehicle in public parking lot and unknown when would return]; see also U.S. v. Bagley, 765 F.2d 836 (9th Cir. 1985)

c. Get-away car near crime scene -- should be o.k. -- see e.g., U.S. v. Shye, 473 F.2d 1061 (6th Cir. 1973)

d. General rule -- get warrant unless moving vehicle

3. Problem of second search ("follow-up" search)

a. Distinguish continuing search v. earlier search terminated -- see generally U.S. v. Johns, 707 F.2d 1093 (9th Cir. 1983), rev'd, U.S. v. Johns, 469 U.S. 478 (1985)

b. Usually not recommended without warrant

4. Police foreknowledge about vehicle -- no consensus

a. State v. Isleib, 343 S.E.2d 234 (N.C. 1986) -- because availability of car was predicted (with probable cause) for next day, warrant required

b. Contra Adkins v. State, 717 S.W.2d 363 (Tex. Ct. Cr. App. 1986) -- warrantless car search upheld despite invalidated search warrant

G. Beyond Autos

1. Carroll Doctrine will extend to other movable conveyances, e.g., boat, truck, airplane, train -- see People v. McKinnon, 103 Cal. Rptr. 897, 500 P.2d 1097 (1972); U.S. v. Nigro, 727 F.2d 100 (6th Cir. 1984) [airplane]

2. But not to suitcases and boxes, etc., by themselves -- U.S. v. Chadwick, 433 U.S. 1 (1977); Arkansas v. Sanders, 442 U.S. 753 (1979); State v. Matthews,

216 N.W.2d 90 (N.D. 1974); State v. Kesler, ____ N.W.2d ____ (N.D. 1986); may be allowed if in car, see discussion infra

3. Motor homes -- cases divided

a. Carroll Doctrine inapplicable because greater expectation of privacy -- see U.S. v. Williams, 630 F.2d 1322 (9th Cir. 1980)

b. Compare People v. Chestnut, 188 Cal. Rptr. 650, 33 Cr. L. Rptr. 2479 (1983); State v. Leplex, 343 N.W.2d 41 (Minn. 1984)

c. Largely resolved -- California v. Carney, 471 U.S. 386 (1985) [fully mobile home in public parking lot -- warrantless search upheld]

d. Limitations -- home connected to utilities, on blocks, not mobile

H. Search of Vehicles That do Not Involve "Auto Exceptions"

1. Search incident to arrest analysis -- Preston v. U.S., 376 U.S. 364 (1964); Dyke v. Tayler Implement Co., 391 U.S. 216 (1968); New York v. Belton, supra (1981)

a. Search must immediately follow arrest

b. Search limited to search perimeter which under Belton is entire passenger compartment -- see full discussion, Lecture #3

c. Search incident often will overlap auto exception but will allow search of vehicle where auto exception will not, e.g., no probable cause for car search

2. Stop-n-frisk analysis -- Adams v. Williams, 407 U.S. 143 (1972)

a. Frisk perimeter same as search incident -- Michigan v. Long, 463 U.S. 1032 (1983) -- see Lecture #3 for full discussion

b. Stop of auto can be made on reasonable suspicion

3. Plain view doctrine analysis -- Harris v. U.S., 331 U.S. 145 (1968)

a. Elements -- esp. prior valid intrusion (i.e., inside car) must be present for technical plain view exception -- see Lecture #2 for full discussion

b. But moving vehicle -- automobile exception combines with probable cause observations from outside car and seizures should be upheld -- State v. Kottenbrach, 319 N.W.2d 465 (N.D. 1982)

c. Parked vehicle -- no one present -- probably need warrant for seizure, although observations from outside car are o.k. for probable cause -- U.S. v. Head, 783 F.2d 1422 (9th Cir. 1986)

d. Entire car as evidence of crime in plain view -- unclear, but see U.S. v. Shye, 473 F.2d 1061 (6th Cir. 1973)

4. Consent search of automobile -- Schneckloth v. Bustamonte, 412 U.S. 218 (1973) -- see Lecture #2 for full discussion

a. "May I see in your trunk" -- burden on state to prove voluntary consent

b. Use caution unless signed written consent or witnessed consent

5. Auto search where 4th Amendment inapplicable

a. Cardwell v. Lewis, 417 U.S. 583 (1974) -- Lecture #2

b. Abandoned vehicles -- compare State v. Klodt, 298 N.W.2d 783 (N.D. 1980), with State v. Stockert, 245 N.W.2d 266 (N.D. 1976) -- Lecture #1

(1) May be no auto exception because no exigent circumstances

(2) Statutory authority -- Chapter 39-26, N.D.C.C.

(a) 48 hours -- considered abandoned by statute

(b) 4th Amendment may not require as long

(3) If in doubt -- wait for search warrant (if probable cause); inventory search possible if traffic hazard

c. State v. Planz, 304 N.W.2d 74 (N.D. 1981) -- contraband in "open view" in auto with open windows on public lot -- no reasonable expectation of privacy

6. Inventory search of automobiles

a. Stated -- cars impounded or lawfully in police custody may be searched without warrant (or probable cause) if search is for purpose of securing or protecting car and contents

b. Rationale

(1) Protection of owner's property

(2) Protection of police against potential danger

(3) Protection of police against claim for loss of property

(4) Check on ownership of car, i.e., in case stolen and abandoned [not always cited as rationale]

c. Authority -- South Dakota v. Opperman, 428 U.S. 364 (1976); State v. Muralt, 376 N.W.2d 25 (N.D. 1985)

d. Application

(1) Examples -- traffic accidents, parking violations

(2) If true inventory, should include glove box (even locked) and car trunk -- see, e.g., Guillett v. State, 677 S.W.2d 46 (1984)

(3) Search cannot be sham or pre-text

(a) Should be written department policy

(b) Written inventory of property recommended

(4) Trend -- limit inventory searches

(a) Give car to spouse or relative

(b) Some courts not allow inventory of glove compartment, suitcases, or other closed containers -- see, e.g., People v. Bertine, 706 P.2d

411 (Colo. Sp. Ct. 1985), cert. granted U.S. Sp. Ct.; compare State v. Muralt, supra

(c) Minority approach -- lock up car -- no inventory -- unless car cannot be secured, e.g., auto accident cases

(5) If legitimate inventory pursuant to standard policy and car in continuous police custody -- search should be o.k. -- see generally State v. Klodt, 298 N.W.2d 783 (N.D. 1983); State v. Muralt, supra

(6) Compare jail inventory searches -- see Lecture #3 supra and separate containers searches (non-inventory) infra

7. Automobile forfeitures

a. Stated -- police lawfully in possession of vehicle and probable cause exists to believe that facts justify forfeiture under relevant statute, may conduct complete search of vehicle

b. Rationale

(1) Statutory authority -- vehicle essentially belongs to person seizing it

(2) Inventory search rationale also relevant

c. Authority -- Cooper v. California, 386 U.S. 58 (1967)

d. Application

(1) Statutory authority

(a) Section 19-03.1-36, N.D.C.C. -- drug cases

(b) Chapter 29-31, N.D.C.C. -- other felonies

(c) Title 20.1, N.D.C.C. -- wildlife cases

(2) Forfeiture statutes cannot swallow 4th Amendment -- if other exception applies, e.g., auto exception or search incident,

should follow those principles or search warrant before relying upon forfeiture rationale

(3) See generally State v. Backer, 331 N.W.2d 84 (N.D. 1983) for forfeiture procedure

I. Separate Container Searches Compared

1. Stated -- search of separate containers found in vehicle, e.g., suitcases or trunks, can be made warrantlessly on basis of Carroll Doctrine, unless probable cause focuses on containers per se and not on automobile

2. Rationale -- greater expectation of privacy

3. Authority -- U.S. v. Chadwick, 433 U.S. 1 (1977); Arkansas v. Sanders, 442 U.S. 753 (1979); U.S. v. Ross, 456 U.S. 798 (1982); U.S. v. Johns, 469 U.S. 478 (1985); Okla. v. Castleberry, 471 U.S. 146 (1985)

4. Application and other possible exceptions

a. Plain view, e.g., plastic bag or Texas v. Brown, 460 U.S. 730 (1983), situation -- Lecture #2

b. Contents can be inferred from outward appearance -- Arkansas v. Sanders, 442 U.S. 753 (1979)

c. Search incident to arrest -- may apply often; but elements must be satisfied, i.e., contemporaneous with arrest, etc.

d. Inventory searches -- see discussion, supra, this chapter; and Illinois v. LaFayette, 462 U.S. 640 (1983), and full discussion of "booking-in" searches, Lecture #3

e. Exigent circumstances, e.g., bomb scare

5. If focus on container only, should be able to seize but may need warrant to open -- see, e.g., Okla. v. Castleberry, supra (1985); U.S. v. Mazzone, 782 F.2d 757 (7th Cir. 1986); compare State v. Southard, 648 P.2d 504 (Wash. App. 1982) [even though probable cause focused on container alone, search upheld]

6. Search of auto with warrant will include all containers therein in which items could be found -- U.S. v. Calarco, 668 F.2d 920 (6th Cir. 1982)

LECTURE NO. 4

PROBLEMS

A. Deputy sheriff of Morton County was doing a routine check north of Mandan where a high rate of vandalism had been occurring recently. The area checked was a wooded area near a girl scout cabin. The deputy saw a parked auto without any lights near this cabin. The deputy approached this car and saw there were five people seated in the car. One of the windows was rolled down and the officer smelled what appeared to be the odor of marijuana. The officer subsequently requested a driver's license which the driver did not have. The deputy ordered all the occupants out of the car and the car was searched. On the rear seat, there was a plastic bag containing marijuana found. The driver of the car was also searched and a pipe and other paraphernalia was discovered.

(Proper search?)
State v. Binns, 194 N.W.2d 756 (N.D. 1972)

B. Deputy in Stutsman County observed defendant driving car in Jamestown city limits while drinking a beer from a beer bottle. The officer turned around and began to follow the suspect; before he could pull him over the suspect parked his car and went into a nearby restaurant. The officer got out of his vehicle and approached the suspect's car, seeing inside an open six pack and an open bottle on the driver's side of the car. The officer did not enter the car but instead went in the restaurant looking for the suspect. The officer was informed by the suspect's mother who worked in the restaurant that the suspect was in the rear of the restaurant. The officer went to the rear of the restaurant and could not find the defendant. The officer subsequently returned to the vehicle and seized the beer bottle without a warrant and conducted a further search looking for other open containers. A .22 pistol was found in the console between the two bucket seats. The defendant was subsequently convicted for carrying a pistol in a motor vehicle without a license.

(Discuss each search situation)
State v. Meadows, 260 N.W.2d 328 (N.D. 1977)

C. Defendant was driving station wagon on I-94 west of Mandan, North Dakota. When clocked by aircraft at 68 m.p.h., Highway Patrol officer stopped defendant who was determined to be 18 years old; defendant's brother, age 28, was a passenger. The officer noticed beer cans on the front floor of the passenger's side of the car. The officer removed the occupants and when he reached inside to determine if more beer cans, noticed an odor of marijuana. The officer continued his search finding a glass tube with residue inside, roach clip,

another glass tube in the glove compartment and a bag of marijuana under a mattress in the back of the car. The officer also searched a jacket and the ash tray finding additional items. Both persons were arrested and a search at the jail disclosed additional substances on their persons.

(Proper search?)
State v. Kottenbrach, 319 N.W.2d 465 (N.D. 1982)

D. Deputy Wade Allen, Cass County Sheriff's Department, responded to an accident scene in rural Cass County. Upon arriving at the scene, Deputy Allen saw a one-car accident and checked the vehicle for possible victims. The victim was found some 25 feet away from the vehicle, apparently having been thrown from the vehicle after the automobile had rolled over several times. The vehicle was a 1975 Honda with a hatchback window. The hatchback window was broken and the door was jammed open. After finding the driver, an ambulance was called and he was transported to the hospital. The officer then searched the automobile. The search disclosed a brown paper sack located in the right rear of the vehicle. Inside the bag was 43 grams of marijuana.

(Proper search?)

E. Fargo Police officers on routine patrol discovered a 1975 Chrysler automobile parked at the North Dam in Fargo with four subjects in the vehicle. This was at approximately 12:25 a.m. on October 2, 1980. One of the officers walked up to the vehicle and was going to request identification when he smelled a strong odor of what appeared to be marijuana. The occupants of the vehicle stated they had no identification and the officer then opened the passenger's side door and observed sitting between the passenger's feet what appeared to be a marijuana pipe and bottle of Miller's beer. The officer also noticed a brown cassette player case under the passenger's feet. The officer requested the passenger to open the case and inside was four bags of green vegetable material.

(Analyze the search problem.)

F. After midnight on August 4, 1981, custom officers, suspecting that a drug transaction might occur, began ground and air surveillance of two trucks. Shortly after the trucks stopped near a remote private airstrip, two small airplanes landed in sequence. After both planes left, the officers approached the two trucks and smelled the odor of marijuana in the general area of the trucks. An officer looked inside the trucks and discovered several sealed boxes and plastic bags. The officers then arrested the five defendants present at the two trucks, seized the boxes and bags, taking them to a DEA warehouse. Three days later, without obtaining a search warrant, federal agents opened some of the boxes and took core samples, which laboratory analysis proved were marijuana.

(Any search exception justify the warrantless search?)
State v. Johns, 707 F.2d 1093 (9th Cir. 1983), rev'd, U.S. v. Johns, 469 U.S. 478 (1985)

G. Joe Friday working night shift in burglary received a radio broadcast that an armed robbery had occurred minutes earlier at a local restaurant. Friday arrived at the scene (after a few "How's that ma'am?") discovered that the suspects were two Indian males armed with a sawed-off shotgun and they fled in a white over blue 1957 Chevrolet. Friday stopped a car matching this description with two Indian males approximately one hour later. The suspects were arrested and taken to the police station. Their car was searched at the scene but only after the suspects were removed from the scene. Nothing was found in "open view" or under the seats but Officer Friday, noticing the screws loose on the console, removed a chrome plate and found $105.00 in cash.

(Auto exception apply? What if car towed to police station impound lot before search? What if initial search at scene found nothing and in "second search" at police station the money was found in the console?)
King v. State, 298 A.2d 446 (Md. App. 1973)

H. Armed robbery situation similar to problem G except the defendants pulled into a gas station to get gas and use the restroom. At that time, the gas station attendant overheard the robbers' description over the radio and he immediately called the police. The police arrived within minutes and the defendants were arrested outside of the automobile. The automobile was searched as the officers believed that the weapon used in the robbery was located in the automobile. A .25 caliber pistol was found in the unlocked glove compartment. The defendants at the time of the search were not in their automobile.

(Auto exception apply?)
Bailey v. State, 294 A.2d 123 (Md. App. 1972)

I. In early August, 1970, a burglary was committed at a local contractor's in Baltimore. Stolen were a check writer and 800 printed payroll checks. The local banks in Baltimore were immediately notified of the numbers of the stolen checks. Two days later one of the banks spotted four of the stolen checks and asked the person passing the check to "wait a minute" while he made a telephone call. The suspect instead ran out of the bank and shouted to the driver of a car to "take off." The description of the car and this incident was given to local law enforcement and an immediate radio alert was broadcast. Officer Wawers observed the suspect's vehicle in a parking lot. Officer Wawers approached the vehicle finding two subjects in the car. Officer Wawers asked the suspects to accompany him to the police station which they agreed to do after receiving permission to lock their car. Officer Wawers did not at that time place them

under arrest. They were later arrested at the police station. Officer Wawers requested assistance and had another officer maintain surveillance over the automobile. When Officer Wawers arrived at the police station, he requested a tow truck and had the automobile removed to the police headquarters. At that time a search warrant was obtained for the automobile and the automobile was searched turning up the other 796 checks.

(Search problems? I.e., did the seizure of the automobile prior to the issuance of the warrant taint the subsequent search at the police station with the warrant?)
Skinner v. State, 293 A.2d 828 (Md. App. 1972)

J. Det. Snow, member of the narcotics section of the police department for 25 years and who had every narcotics class and experience imaginable, was maintaining undercover surveillance outside of Jack's Liquors. Det. Snow was located in a second story apartment and was maintaining his surveillance by peeking through venetian blinds. During the course of two and a half hours, Det. Snow observed 11 people approach an automobile that was parked in front of the liquor store all of whom were known heroin addicts. On each occasion a person passed United States currency to the driver of the automobile and in turn received an aluminum foil packet. Det. Snow subsequently called local law enforcement and told them to arrest the driver of the automobile. As the arresting party approached the vehicle the driver pushed a black purse through the vent window which was subsequently recovered by the police officers. Inside the purse were two compartments, one of which contained six aluminum foil packets containing "half a spoon" each of heroin. The other compartment contained ten packets which were characterized as "decks" of heroin. As the arresting party approached the car a flurry of activity was noticed, i.e., the driver was bending over and engaging in some type of activity below the windshield level. The driver was ordered out of the car and placed his hands up against the car and was searched. Immediately after the search of the driver, the detective looked into the automobile and picked up from the floor immediately in front of the driver's seat a black purse similar to the one that was thrown out of the vehicle.

(Analyze the search situation.)
Peterson v. State, 292 A.2d 714 (Md. App. 1972)

K. On May 16, 1972, Vicky Victim was assaulted. On May 18th, Vicky identified the defendant from a series of photographs and an arrest warrant was subsequently issued. The arrest warrant was broadcast via police teletype. On the basis of this teletype, the defendant's automobile was stopped months later. The defendant was ordered out of the car, arrested, and was searched standing next to his car. Immediately after the search of his person, the officer searched the automobile and recovered from beneath the right front seat a package of marijuana.

(Automobile exception apply? Any other theory justify the search in this case?)
Howell v. State, 306 A.2d 554 (Md. App. 1973)

L. Approximately 11:00 p.m., Officers Davis and Allen were on routine patrol in a high crime area in Washington, D.C. As they passed the Capitol storage lot, a fenced in area with a chain across the entrance, they observed two individuals duck down behind a vehicle stored in the lot. The officers turned around and returned to the lot. The two men that were seen on the lot were now leaving it. These men were stopped and the men explained to the police officers that they were looking at cars but acknowledged that they did not have permission to be there. The officers frisked the two recovering no weapons. The officers then noticed an automobile sitting across the street with its blinking lights on. The frisk of one of the parties had produced a set of keys and one of the parties stated that the car was his. The officers searched the car without a warrant and without consent contending that they were looking for a registration card. In the glove compartment the officers found a .38 revolver that was later found to have been used in an armed robbery that occurred five months earlier.

(Analyze each search and seizure situation.)
Martin v. State, 305 A.2d 197 (Md. App. 1973)

M. On May 8, 1973, Amtrak Railroad officials observed two male persons load a brown footlocker onto a train bound from San Diego to Boston. Their suspicions were aroused when they noticed that the trunk was unusually heavy for its size and it was leaking talcum powder, a substance often used to masque the odor of marijuana or hashish. Furthermore, both suspects matched a profile used to spot drug traffickers. Based on this information, the railroad officials reported the circumstances to federal agents in Boston. When the train arrived in Boston, federal narcotics agents and a police dog with a trained nose met the suspects. Without alerting the suspects the dog signaled the presence of a controlled substance. Before any arrests could be made, the suspects loaded the footlocker into the trunk of a third person (Chadwick's) automobile. At that point while the trunk was still open and before the car engine had been started, the officers arrested all three suspects. A subsequent warrantless search of the footlocker disclosed 200 pounds of marijuana.

(Any 4th Amendment violations?)
U.S. v. Chadwick, 433 U.S. 1 (1977)

N. On April 23, 1976, law enforcement officers received word from a reliable confidential informant that at 4:35 that afternoon Sanders would arrive on an American airlines flight and he would be carrying a green suitcase containing marijuana. The informant had previously given information that had led to Sanders' arrest and conviction for possession of

marijuana. Sanders arrived carrying the green suitcase matching that described by the informant. Sanders then placed the green suitcase in the trunk of a taxi cab and drove away. The cab was stopped several blocks from the airport and the trunk was later searched warrantlessly discovering 9.3 pounds of marijuana packed in ten plastic bags.

Arkansas v. Sanders, 442 U.S. 753 (1979)

O. Highway Patrol officer stopped the defendant's station wagon because of erratic driving. After asking the defendant for his driver's license and registration, the officers smelled marijuana smoke coming from the car. The officer then patted down the defendant and discovered a vial of liquid. A subsequent search of the passenger's compartment of the car disclosed marijuana and drug paraphernalia. The defendant was then placed in a patrol car and the officer continued with the search of the car including a recessed luggage compartment in the rear of the station wagon. In this area, the officer found a tote bag and two packages wrapped in green opaque plastic. Unwrapping the packages, the officer discovered 15 pounds of marijuana in each package.

Robbins v. California, 453 U.S. 420 (1981)

P. On November 27, 1978, a confidential reliable informant telephoned a law enforcement officer informing him that a person known as "Bandit" was selling narcotics kept in the trunk of his car parked at a certain location. The informant stated that he had just observed Bandit complete a sale and that "Bandit" had told him that additional narcotics were in the trunk of the car. The informant then gave a detailed description of Bandit and of the automobile in question. Law enforcement officers subsequently stopped the car and searched the driver, later identified as Albert Ross. The search of the interior of the car disclosed a pistol in the glove compartment. A search of the trunk disclosed a closed brown paper bag and a zippered red leather pouch. The brown paper bag contained heroin and the leather pouch contained $3,200.00 in cash.

(If informant stated that drugs were in the brown paper bag which was in the car, would the result change? See State v. Southard, 648 P.2d 504 (Wash. App. 1982).)

U.S. v. Ross, 456 U.S. 798 (1982)

Q. In October, 1984, several Fargo police officers were dispatched to investigate a disturbance caused by the continuous sound of an automobile horn. Officer Popel arrived at the scene first and discovered Muralt unconscious on the front seat with one of his legs leaning against the car horn. The other leg was extended outside the driver's side window. Popel awoke Muralt and required him to step out of the vehicle. Upon failing a field sobriety test, Muralt was

placed under arrest for actual physical control. The officers then handcuffed Muralt and placed him in the back seat of Officer Popel's car. Following the arrest and removal of the defendant to the squad car, Popel decided to impound Muralt's vehicle. Popel obtained in impound inventory form from his car and began the inventory process. In the back of the vehicle, Officer Popel discovered a canvas bag. Inside the bag were discovered a sawed off shotgun and several shotgun shells.

Warrantless search and seizure of separate container upheld pursuant to inventory search rationale? Any other warrantless search theory apply? [State v. Muralt, 376 N.W.2d 25 (N.D. 1985)]

R. Reconsider Lecture #1, Problems A, C, D, F; Lecture #2, Problems B and D; Lecture #3, Problems A, C, E, F.

FOURTH AMENDMENT

LECTURE NO. 5

EMERGENCY ENTRIES: HOT PURSUIT AND EXIGENT CIRCUMSTANCES; MISCELLANEOUS EXCEPTIONS

XVII. Emergency Searches: Hot Pursuit and Exigent Circumstances

A. Stated -- law enforcement agents are permitted to make warrantless entries, perhaps even without probable cause, if an emergency exists that justifies the officer's failure to get a warrant

B. "Exigent circumstances" defined -- emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence -- State v. Page, 277 N.W.2d 112 (N.D. 1979)

C. Rationale -- no time to get warrant

1. Delay would endanger life of officer or another or endanger property

2. Imminent destruction of evidence

D. Authority -- Ker v. California, 374 U.S. 23 (1963); Warden v. Hayden, 387 U.S. 294 (1967); Wayne v. U.S., 318 F.2d 205 (D.C. Cir. 1963)

E. Cases fall into four categories:

1. Emergencies where life, health, or property is threatened

2. Emergencies where evidence or suspect might disappear

3. Crime scenes

4. Hot pursuit

F. Note -- term exigent circumstances also used as element of other search warrant exception, see, e.g., auto exception, Lecture #4 supra

G. Emergencies where life, health, or property threatened

1. Stated -- law enforcement agents may enter dwelling warrantlessly even without probable cause to believe that crime committed if reason exists to believe that occupant's health or life is threatened or serious damage to property

2. Examples -- smoke coming out of window; sound of gunfire; smell of rotting flesh; screams from within dwelling

3. Note -- cases in this category where police responding to call for assistance, are often without probable cause because police purpose is not criminal investigation; or may be with probable cause that crime committed; see State v. Bakke, 723 P.2d 534 (Wash. Ct. App. 1986) -- entry into burglarized residence upheld despite lack of appreciation by resident

4. Significance -- 4th Amendment applies but police entry justified; once in dwelling, plain view seizures often result

5. Search of person may be allowed if life threatened

   a. Person swallowed heroin

   b. Person semi-conscious searched for medical information

6. Potentially dangerous item in place searched

   a. Cady v. Dombrowski, 413 U.S. 433 (1973) -- not recommended

   b. Bomb threats

7. Corollary to this exception is "protective sweep" doctrine allowed incident to arrest under certain circumstances -- see Lecture #3 supra

8. Caution -- search and seizure limited to emergency situation and plain view seizures, subsequent search must be justified by warrant or some other warrantless theory

H. Emergencies where evidence or suspect might disappear

1. Stated -- where information exists that evidence or suspect likely to disappear, warrantless entry into dwelling (to search or arrest), or other search may be proper under limited circumstances

2. Personal searches

   a. Schmerber v. Calif., 384 U.S. 757 (1966) -- warrantless seizure of blood from arrested DUI def. allowed because of arrest and emergency circumstances, compare Winston v. Lee, 470 U.S. 753 (1985) -- surgery to remove

bullet from suspect's chest not allowed, even with prior court authorization; see discussion infra re "catch-all reasonableness"

b. N.D. approach -- State v. Anderson, 336 N.W.2d 634 (N.D. 1983) -- seizure of blood not allowed absent arrest (or consent), i.e., emergency circumstances insufficient by themselves [see also DUI manual, pp. 157 et seq.]

c. Breithaupt v. Abram, 352 U.S. 432 (1957) -- blood sample seized from unconscious def. upheld; note -- consistent with Section 39-20-03, N.D.C.C.

d. Cupp v. Murphy, 412 U.S. 291 (1973) -- seizure of material under suspect's fingernails upheld where probable cause existed and material easily destroyed; note -- this exception very limited; N.D. Sp.Ct. found inapplicable in State v. Phelps, 286 N.W.2d 472 (N.D. 1979)

e. Tennessee v. Garner, 471 U.S. 1 (1985) -- deadly force inappropriate to prevent escape of unarmed fleeing burglary suspect

3. Warrantless dwelling entries

a. Warrantless entry into dwelling for arrest or search must be accompanied by exigent circumstances or consent -- Payton v. New York, 445 U.S. 573 (1980) -- see Chapter 6

b. N.D. makes a distinction between entries to arrest and entries to search -- see generally State v. Nagel, 308 N.W.2d 539 (N.D. 1981); Quick, Reflections on State v. Nagel: The State's Perspective, 58 N.D.L.Rev. 745 (1982)

(1) Warrantless entries to arrest -- two pronged test

(a) Is there probable cause to arrest?

(b) Will time and circumstances effectively prohibit officers from obtaining warrant?

(c) Following factors relevant:

1) Grievous offense involved (usually one of violence)

2) Suspect reasonably believed to be armed

3) Clear showing of probable cause

4) Strong reason to believe suspect is in premises

5) Likelihood suspect will escape if not swiftly apprehended

6) Unconsented entry is peaceably made

(d) All factors not necessary -- see also U.S. v. Tirinkian, 502 F. Supp. 620 (D.N.D. 1980), aff'd, U.S. v. Wentz, 686 F.2d 653 (8th Cir. 1982); State v. Page, 277 N.W.2d 112 (N.D. 1979)

(e) N.D. also allows warrantless entry to arrest (independent of above factors) if "imminent destruction of evidence" exists plus probable cause for arrest but mere belief destruction probable insufficient usually need:

1) Suspects know or will soon know police on trail

2) Entry is least intrusive as possible -- see State v. Nagel, 308 N.W.2d 539 (N.D. 1981)

(f) "Securing of premises" by arrest and then obtaining search warrant -- should be proper intermediate step if exigent circumstances -- see State v. Nagel, supra, U.S. v. Tirinkian, supra

(g) Welsch v. Wisc., 466 U.S. 740 (1984) -- warrantless entry and arrest of DUI suspect in home suppressed because minor offense and insufficient exigency

1) Likely distinguishable -- DUI offense was civil infraction, not criminal offense, no hot pursuit

2) Compare People v. Hampton, 209 Cal. Rptr. 905 (Cal. Ct. App. 1985); State v. Komoto, 697 P.2d 1025 (Wash. Ct. App. 1985); contra Patzner v. Burkett, 603 F. Supp.

1139 (D.N.D. 1985), rev'd 779 F.2d 1363 (8th Cir. 1985) [see also DUI manual at p. 157]

(h) Even if improper entry and arrest, subsequent seizures may still be valid if "untainted" pursuant to subsequent search warrant -- Segura v. United States, 468 U.S. 796 (1984); see attenuation discussion, supra, Chapter 1

(2) Warrantless entries to search

(a) N.D. has not decided question -- see State v. Nagel, supra, so entries should be used to arrest, secure premises only, then obtain search warrant

(b) U.S.Sp.Ct. reserved ruling on exigent circumstance entries for arrest or search -- Payton v. New York, 445 U.S. 573 (1980)

c. Note -- must be able to articulate reasons for entry (whether to search or arrest) -- cannot be mere speculation

(1) U.S. v. Rubin, 474 F.2d 262 (3rd Cir. 1973), cert. denied, 414 U.S. 833 -- def. ("runner") upon arrest yelled "call my brother" to spectators -- search upheld

(2) State v. Nagel, supra -- "runner" expected back within 20 minutes -- warrantless entry and arrest upheld; subsequent search conducted with search warrant

(3) U.S. v. Tirinkian, supra (D.N.D. 1980), aff'd, U.S. v. Wentz, supra (8th Cir. 1982) -- accomplice arrested and expected back from airport, difficulty in locating magistrate on Sunday afternoon -- warrantless entry and arrest upheld

(4) U.S. v. Johnson, 561 F.2d 832 (D. Col. Cir. 1977), cert. denied, 432 U.S. 907 -- three suspects dividing up heroin amongst themselves -- officer alone at 3:00 a.m. -- entry o.k. -- dicta only

(5) Compare People v. Oliver, 338 N.W.2d 167 (Mich. 1983) -- fact that defendant in motel room with evidence insufficient by itself

d. Warrant recommended if at all possible

(1) Certain suppression hearing with uncertain result

(2) Telephone search warrant may be obtained -- see Lecture #6 infra

e. Cannot "create exigency" -- good faith critical -- Johnson v. U.S., 457 U.S. 537, 102 S. Ct. 2579 (1982) -- warrantless arrest suppressed when defendant opened door because of officer's fictitious identity; see discussion, Chapter 6, infra

I. Crime Scenes

1. Stated -- although 4th Amendment applies to investigation of crime scenes, initial investigation probably justified on basis of exigent circumstances but subsequent investigations require warrant or exception

2. Examples -- arson, homicide scene investigation

3. Authority -- Mincey v. Arizona, 437 U.S. 385 (1978); Michigan v. Tyler, 436 U.S. 499 (1978); Michigan v. Clifford, 464 U.S. 287, 104 S. Ct. 641 (1984); Thompson v. La., 469 U.S. 17 (1984)

4. Standing and consent search compared

5. N.D. Sp. Ct. has not yet reached issue -- see, e.g., State v. Dilger, 322 N.W.2d 461 (N.D. 1982)

6. Caution! Warrant or consent should be obtained as soon as crime scene secured

J. Hot Pursuit

1. Stated -- law enforcement agent in "hot pursuit" of subject may make warrantless entry into dwelling for purpose of arrest

2. Significance -- plain view seizures, search incident to arrest

3. Authority -- Warden v. Hayden, 387 U.S. 294 (1967)

4. "Hot pursuit" -- does not necessarily involve extended chase -- U.S. v. Santana, 427 U.S. 38 (1976)

5. After arrest and plain view seizures, need warrant for further search

XVIII. Miscellaneous Exceptions/Special Search Situations

A. Airport Searches

1. Stated -- limited searches by airport personnel are allowed under 4th Amendment for security reasons

2. Rationale

a. Minority approach -- implied consent

b. Better reasoning -- search not unreasonable because of need for search and limited intrusion

3. Search limited in scope, e.g., magnometer; more intensive the search -- must need reasonable suspicion (stop-n-frisk) or probable cause (arrest)

B. Border Searches

1. Stated -- immigration officials may stop and search warrantlessly, sometimes even without probable cause, persons, vehicles, and other property crossing international borders either at border or at functional equivalent

2. Authority -- U.S. v. Martinez - Fuerte, 428 U.S. 543 (1976)

3. Rationale

a. Necessity -- prohibited smuggling of persons and contraband

b. Need for search outweighs 4th Amendment interest

4. Roving border auto searches generally require probable cause -- Almeida-Sanchez v. U.S., 413 U.S. 266 (1973), but car stop can be made on reasonable suspicion -- U.S. v. Brignoni-Ponce, 423 U.S. 873 (1975)

5. U.S. v. De Hernandez, 473 U.S. ____, 105 S. Ct. 3304 (1985) -- reasonable suspicion sufficient to detain suspect for 16 hours to allow "nature to take its course"

6. U.S. v. Villamonte-Marquez, 462 U.S. 579 (1983) -- court used border search rationale to allow stopping and boarding of vessels on waters accessible to open sea for purposes of checking documentation

7. Justification for search must increase if intensity of search increases, e.g., strip search, body cavity search

C. Public Health Searches

1. Stated -- unless exception is applicable, e.g., consent or exigent circumstances, warrants are generally required for public health inspections of residential or commercial premises

2. Administrative warrants, however, usually issued on less than probable cause

3. Cases in this area usually distinguish between searches made pursuant to licensing program, e.g., sale of guns, etc., and those that are not; the former may not require warrant based upon some sort of implied consent theory

4. Authority -- Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967); U.S. v. Biswell, 406 U.S. 311 (1972)

5. Statutory authority -- Chapter 29-29.1, N.D.C.C.

a. Warrant issue upon probable cause, or

b. Search or inspection part of legally authorized program of inspection

D. Parolees, Probationers, and Prisoners

1. Parolees, probationers -- many cases allow warrantless searches of probationers or parolees based upon written agreement between probationer and probation officer even through probable cause absent

2. Contra -- other cases require probable cause or at least reasonable suspicion

3. North Dakota allows a warrantless search if agreement in existence even if search without probation officer's knowledge or consent or even without

probable cause -- State v. Perbix, 331 N.W.2d 14 (1983); State v. Schlosser, 202 N.W.2d 136 (N.D. 1972); but probation conditions must be followed -- State v. Vermilya, 395 N.W.2d 151 (N.D. 1986) -- probable cause required because of probation conditions

4. Prisoners -- have limited 4th Amendment rights

   a. Test: balance prison's interest in security v. right to privacy

   b. May include search of visitors

   c. Search of prison cell -- U.S. v. Hinckley, 672 F.2d 115 (D. Col. Cir. 1982) -- suppression of diary seized from defendant's cell upheld because no security reason found; compare Hudson v. Palmer, 468 U.S. 517 (1984) -- no expectation of privacy in jail cell

   d. Monitoring prisoner's telephone conversations -- State v. Fischer, 270 N.W.2d 345 (N.D. 1978)

   e. Body cavity/strip searches -- Bell v. Wolfish, 441 U.S. 520 (1979) -- see also Lecture #3, supra

   f. May be 1st Amendment problems regarding prisoner mail

   g. Urine screening program upheld at N.D. State Pen. -- Hampson v. Satran, 319 N.W.2d 796 (N.D. 1982) (against both 4th & 5th Amendment objections)

   h. Electronic surveillance of arrestee in back of squad car upheld because no reasonable expectation of privacy -- People v. Crowson, 660 P.2d 389 (Sp. Ct. Cal. 1983); see also Lanza v. New York, 370 U.S. 139 (1962)

E. Entry Inspection Searches

1. Rock concert -- for good discussion of issues and authorities, see Jacobson v. City of Seattle, 658 P.2d 653 (Wash. 1983)

2. Courthouse -- see generally McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978) -- threat of violence justified magnetometer search; Section 29-29-20, N.D.C.C.

3. Wildlife sanctuaries

4. Test -- reasonableness, with following factors relevant:

   a. Public need for search

   b. Efficacy of search

   c. Degree and nature of intrusion involved

F. Catch-all-reasonableness

1. Myth of few "well-delinated" exceptions

2. Cupp v. Murphy, 412 U.S. 291 (1973) -- "search incident to a probable cause detention for highly evanescent evidence"

3. Note also -- good faith type cases [Lectures #1 and #2] and attenuation doctrines which are limiting exclusionary rule to its purpose of deterring unlawful police conduct

4. Limitations -- Winston v. Lee, 470 U.S. 753 (1985) -- surgery to remove bullet from robber's chest, unreasonable, despite probable cause and procedural safeguards; compare Schmerber v. Calif., supra

   a. Test -- case-by-case, weighing individual's privacy and security interests against society's interests and need for evidence

LECTURE NO. 5

PROBLEMS

A. On two separate occasions, drug enforcement agents received deliveries of controlled substances from an individual named Jay Braaten. One of the agents arranged with Braaten for a third delivery. Braaten did deliver this controlled substance to the agent pursuant to this pre-arranged plan and at the time of his arrest at the scene of his delivery he informed the agent that he had obtained the controlled substance from two individuals known to him as X and Y who lived at a certain address. Braaten also informed the agents that these two individuals were currently holding a large supply of drugs at this residence, that the two subjects were awaiting his return within 20 minutes after the time that he had left, and if he did not return within that time X and Y would know that something had gone wrong. The drug agents obtained a search warrant but prior to its execution the surveillance team entered the residence and secured the scene arresting the occupants.

(Proper search?)
State v. Nagel, 308 N.W.2d 539 (N.D. 1981)

B. Two police officers responded to a report of a domestic disturbance at a trailer house. The officers were acting without the authority of either an arrest or search warrant. Upon announcing their presence, the door was opened by a middle-aged male. In the background the officers were able to observe a woman crying. The man who opened the door indicated that everything was all right and the officers should not enter. The officers asked the lady if she wanted them to come in, to which she nodded her head affirmatively. The man continued to refuse the officers' admittance. A fight ensued and the husband was arrested for assaulting a police officer.

(Result?)

C. About 4:50 a.m. on December 2, 1971, the Tacoma Police Department received a telephone call from an operator of the telephone company stating that a male customer had called her and appeared to need medical assistance. The customer that had attempted to place the telephone call had dropped his telephone receiver, allowing the operator to trace the call and give the police department the person's address. The police went to the address in question and knocked on the door receiving no response. The officers looked through the window and saw a man in the apartment in a crouched position swaying back and forth. The officers opened the door, walked in the apartment, and were greeted by the dead body of a woman lying on the floor. The officers also discovered the subsequent defendant nearly unconscious with dried blood on

his chest. The officers searched the bedroom and found a .22 caliber pistol and a man's sweater with powder burns.

(Illegal search? What about the search of the defendant's bedroom?)
State v. Sanders, 8 Wash. App. 306, 506 P.2d 892 (1973)

D. Defendant in this case rented a room at a local motel on July 10, 1969. The following day at about 9:15 a.m., the maid at the motel checked the defendant's room and found the defendant lying fully clothed on the bed apparently sleeping. She returned about 11:30 and the defendant was in the same position. When she returned with another person about 1:30 p.m., the defendant still had not moved. His face appeared grayish, there was no indication of life. The maid returned again at 4:30 p.m. and the defendant still had not moved, she subsequently called the police. The police arrived at the scene and when looking for identification examined the defendant's clothing and a black bag lying on the floor. In a pocket of a coat lying on the bed the officers found narcotics.

(Proper search?)
State v. Jordan, 79 Wash.2d 480, 487 P.2d 617 (1971)

E. Husband returned home from work one day about 5:00 p.m. and in the bedroom found his wife lying across the bed next to his infant child who was cold and appeared dead. The husband called the police and ambulance. The police arrived shortly and took the wife and the infant to the hospital. The officers with the ambulance took no items from the house, the husband gave no one else permission to enter the house or remove anything from it. A second set of officers subsequently arrived after the ambulance had left apparently not knowing that the ambulance had already come and gone. The officers finding no one at the scene entered the house and searched each room finding nothing. One of the officers then called the station and was informed that the wife and infant were at the hospital. The officers then went back into the bedroom and observed a clipboard on the nightstand with a pad of paper. The pad of paper included a confession by the wife that she had attempted to kill the baby.

(Proper search?)
State v. Pires, 55 Wis.2d 597, 201 N.W.2d 153 (1972)

F. A motel maid disappeared shortly after reporting for work t 9:00 a.m. Her street clothes and partially eaten lunch were found on the sixth floor. Employees and residents were eventually joined by the police in a room by room search for her. Prior to the room searches, the officers conducted a thorough investigation of the basement, the roof, the air ducts, alleyways, and an enjoining restaurant. A subsequent room to room search was commenced and the last room to be searched was on the sixth floor and was the subsequent defendant's. The

police entered the room with a pass key provided by management and noticed reddish brown stains on the carpet. Finally a closet door was opened and two human feet were observed protruding from a laundry basket. Removal of blood soaked linens revealed a hatchet and the corpse of the unfortunate chamber maid.

(Did the officer do good?)
People v. Mitchell, 347 N.E.2d 607 (N.Y. Ct. App. 1976)

G. In the early morning hours in February, 1978, two men went to Joe Smith's farm under the pretense of borrowing gas for their car and then robbed him at gunpoint. One of the men carried a red gas can and both men were wearing snowmobile suits, light colored gloves, and ski masks, which effectively concealed their identity. Law enforcement was subsequently notified and arrived at the scene. Officers searched the area and discovered boot tracks which led them to a nearby road where they found tire tracks in the snow believed to be made by the robbers. Photographs, drawings, and measurements were taken of both the boot and tire tracks. Residents in the area were then interviewed who advised the officers that Brian and Randy Page had been in the vicinity shortly before the robbery and that they were driving a 1973 blue Pontiac. The next day, officers located the apartment of the Page brothers and measured the tires of the Pontiac parked outside. Measurements of boot prints leading from the car to the apartment were also taken. The shape and size of the tire and boot tracks were nearly identical to those found at the Smith farm. The officers went to the door of the apartment and were admitted by Randy Page who declined to answer the officer's questions. Both Pages agreed to accompany the officers to the Minot Police Department for further investigation. While Randy was dressing, in preparation of accompanying the officers to the station, one of the officers observed a billfold in his pocket containing a large amount of money. Both Pages were then placed under arrest and a pair of boots were taken from them shortly thereafter. No arrest warrants or search warrants were obtained until subsequent to their arrest.

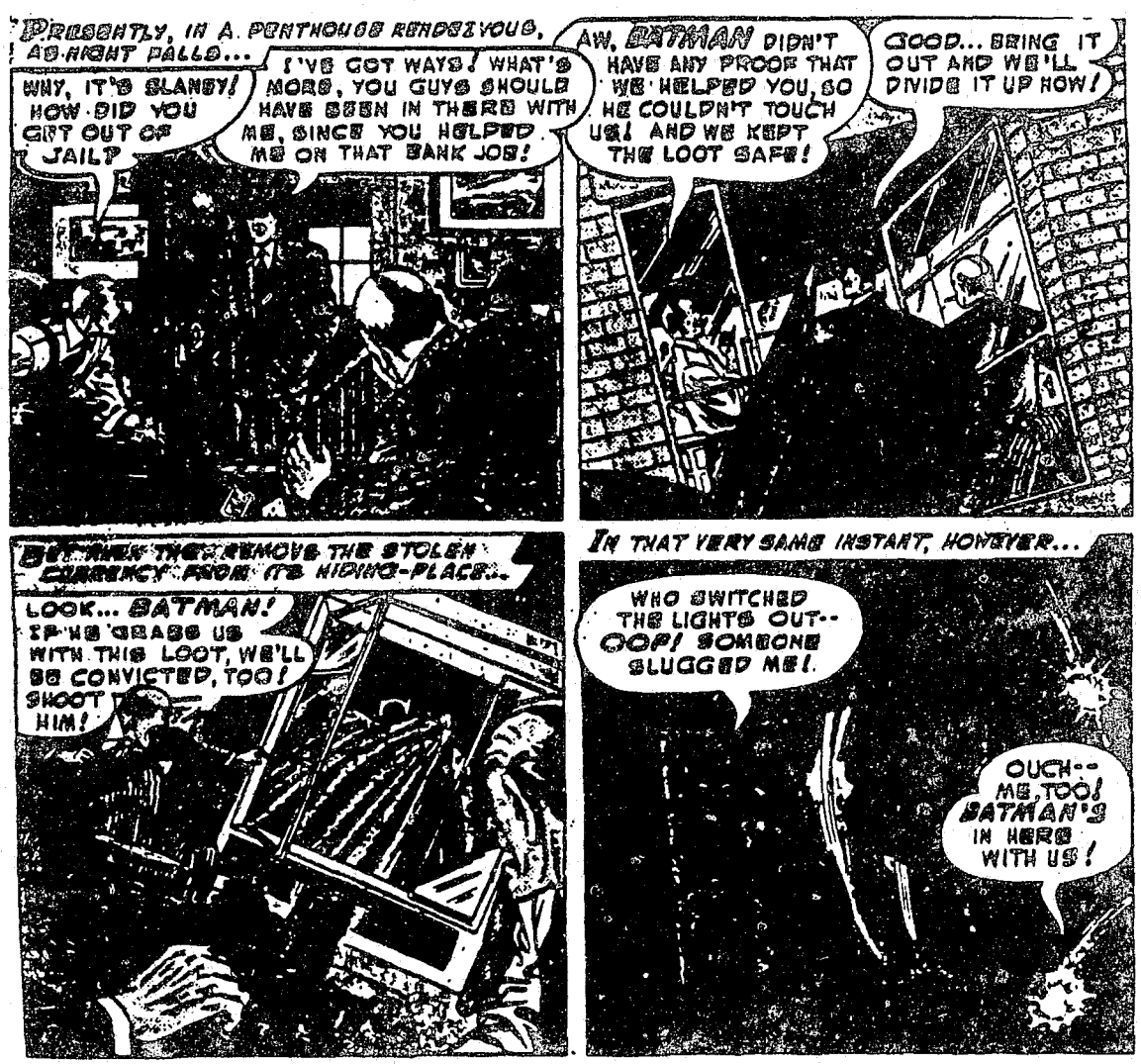
Any Fourth Amendment problem with this case? [State v. Page, 277 N.W.2d 112 (N.D. 1979)]

H. At approximately 5:00 p.m. in November, 1981, Dilger was drinking at a bar in Fargo. Approximately two or three hours later, Kathryn Hall, with whom Dilger shared an apartment in a house owned by Hall next door to the bar, entered. After an argument between Dilger and Hall, Hall left and returned a few minutes later with clothing and other items belonging to Dilger. After making two trips carrying in items belonging to Dilger, Hall left the bar at approximately 9:00 p.m. Persons in the bar then began teasing Dilger about having to sleep in the bar's kitchen. Dilger then left the bar and when he returned about 15 to 20 minutes later, was in a very

agitated state and declared he had killed Hall. He was then restrained by the customers. At approximately 9:22 p.m., the Cass County Sheriff's Department received a telephone call that was recorded in which Kathryn Hall said Dilger was going to shoot her, followed by a gunshot and a scream. Fargo police officers dispatched to the scene found the body of Kathryn Hall with the telephone receiver lying near her body. Law enforcement conducted a crime scene investigation which included the seizure of the telephone, body, and several photographs were taken.

Did law enforcement's warrantless entry and investigation violate the defendant's Fourth Amendment rights? [State v. Dilger, 322 N.W.2d 461 (N.D. 1982); and State v. Dilger, 338 N.W.2d 87 (N.D. 1983)]

I.



Assuming warrantless entry, will evidence be suppressed: Substitute a cache of heroin and a cutting mirror for the stolen bank proceeds and compare U.S. v. Johnson, supra, Lecture #1, Problem G; also reconsider Problems B, Lecture #1; H & I, Lecture #2; Lecture #7, Problem D.

FOURTH AMENDMENT

LECTURE NO. 6

WARRANTLESS ARRESTS AND ARREST WARRANTS; PROBABLE CAUSE CONCEPT; SEARCH WARRANTS

XIX. Warrantless Arrests and Arrest Warrants

A. When Arrest Warrant Required

1. General Rule -- a warrantless arrest may be made for a felony (not in officer's presence) or a misdemeanor committed in officer's presence even though there is time to get a warrant if probable cause exists that offense committed by person to be arrested

2. Exception -- if arrest made in arrestee's dwelling, warrant is required absent "exigent circumstances"

3. Authority

a. Cases -- U.S. v. Watson, 423 U.S. 411 (1976); Payton v. New York, Riddick v. New York, 445 U.S. 573 (1980); State v. Nagel, 308 N.W.2d 539 (N.D. 1981)

b. Statutory authority -- Chapter 29-06, N.D.C.C.

(1) Section 29-06-15(f), N.D.C.C. -- warrantless misdemeanor arrest allowed for DUI

(2) Section 29-06-15.1, N.D.C.C. -- arrest of non-resident traffic violator allowed warrantlessly if officer has reasonable belief that person will disregard written promise to appear

(3) Section 29-06-15(g), N.D.C.C. -- warrantless misdemeanor arrest allowed for domestic assault if within 4 hours, even though assault not witnessed by officer

(4) Chapter 51-21, N.D.C.C. -- shoplifting procedures -- statute unclear

4. Search warrant necessary to enter 3rd party's home for arrest -- Steagald v. U.S., 451 U.S. 204 (1981); although arrest warrant sufficient for defendant himself; see U.S. v. Underwood, 717 F.2d 482 (9th Cir. 1983), whether in own home or third party's

B. Warrantless Arrest in Dwelling -- "Exigent Circumstances" -- see Lecture #5

1. Unanswered by U.S. Supreme Court in Payton and Riddick

2. N.D. approach -- see Lecture #5, supra

3. Warrantless arrest may be allowed on doorstep -- U.S. v. Mason, 661 F.2d 45 (5th Cir. 1981); or common hallway -- U.S. v. Holland, 755 F.2d 253 (2nd Cir. 1985); but not within home following knock and fictitious identity -- Johnson v. U.S., 457 U.S. 537 (1982)

C. What Constitutes Arrest; Statutory Requirements

1. Elements:

a. Intent to make arrest, but not usually controlling factor -- see, e.g., U.S. v. Perate, 719 F.2d 706 (4th Cir. 1983) [found stop, not arrest despite officer's testimony that arrest]; Berkemer v. McCarty, 468 U.S. 420 (1984)

b. Real or pretended authority to arrest

c. Seizure or restraint, actual or constructive (see also Section 29-06-09, N.D.C.C.)

d. Understanding by arrestee that being arrested

e. Statutory requirements -- Chapter 29-06, N.D.C.C.

2. Focus on what officer did:

a. Police arrest powers -- force, search, seizure and restraint

b. Police investigative powers compared -- stop and frisk, questions, detain, order out of car

c. "You're under arrest" -- not necessarily magic words but statutory requirements must be satisfied

3. Statutory requirements -- Chapter 29-06, N.D.C.C.

a. Officer when making arrest without warrant must inform arrestee of authority and cause of arrest -- except:

(1) Defendant engaged in commission of offense

(2) Hot pursuit

(3) Forcible resistance before opportunity to inform

(4) Giving of information will imperil arrest (Section 29-06-17, N.D.C.C.)

b. Arrest with warrant -- see below

4. Application

a. City of Wahpeton v. Johnson, 303 N.W.2d 565 (N.D. 1980) -- traffic stop along with request by officer that defendant accompany officer to station -- not arrest

b. State v. Harris, 286 N.W.2d 468 (N.D. 1979) -- failure to process charge upon which arrested not invalidate search incident to arrest

c. Klinger v. U.S., 409 F.2d 299 (8th Cir. 1969), cert. denied, 396 U.S. 859 (1969) -- arrest upheld even though for improper charge (vagrancy) because probable cause for robbery existed at time -- despite statutory requirements similar to N.D.

d. State v. Klevgaard, 306 N.W.2d 185 (N.D. 1981) -- arrest of defendant upheld even though defendant informed cause of arrest was burglary as long as probable cause for lesser traffic offense of reckless driving

D. Who Can Arrest, When, Where, Force, Assistance

1. Who -- peace officer with or without warrant (under appropriate circumstances); private person -- under limited circumstances (Section 29-06-02, N.D.C.C.)

2. When -- arrest for felony, misdemeanor, or infraction can be made on any day and any time (Section 29-06-08, N.D.C.C.)

3. Where

a. Any county of state by any peace officer of state -- Rule 4 Crim. Rules

b. Fresh pursuit in other state (depending on other state's law) -- Sections 29-06-05,

29-06-06, 29-06-07, N.D.C.C. -- authorize other state peace officer arrests in "fresh pursuit"

4. Force

a. Arrest -- limited to force (if any) necessary for detention (Section 29-06-13, N.D.C.C.)

b. Resisting arrest -- all reasonable necessary means allowed (Section 29-06-13.1, N.D.C.C.)

c. Breaking door or window -- allowed with warrant or warrantlessly (if exigent circumstances) if refused admittance after notice of officer's authority and purpose;

(1) Exceptions to knock and announce rule

(a) Arguably if arrest warrant provides for it

(b) Arguably under conditions outlined under Section 29-06-17, N.D.C.C., above (giving of info. imperil arrest)

d. Tennessee v. Garner, 471 U.S. 1 (1985) -- limits deadly force against fleeing felon, unless necessary to prevent escape and probable cause that suspect poses significant threat of death or serious injury to officer or others

5. Assistance -- officer may request assistance from bystanders -- (Sections 29-06-03, 29-06-04, N.D.C.C.)

E. Execution of Arrest Warrant -- Rule 4, N.D.R.Crim.P.

1. Need not have warrant in possession but if have warrant (or copy) must show it upon request

2. If no warrant in possession, must inform defendant of offense charged, that warrant issued, and show warrant if requested as soon as possible

3. Return of warrant -- to magistrate that defendant brought before

4. Should also inform arrestee of officer's authority

F. Content of Warrant -- Rule 4, N.D.R.Crim.P.

1. Among other things, includes name of defendant, or if unknown -- description by which can be identified with reasonable certainty

2. Describe offense charged, command that defendant brought before nearest available magistrate

3. May have bail endorsed on it

4. Unnecessary for probable cause in warrant but must be in complaint or accompanying affidavit

G. Consequences of Illegal Arrest

1. Search incident to arrest, statements by defendant -- suppressed

2. But not grounds for dismissing complaint, precluding trial of defendant, or voiding subsequent conviction; State v. Biby, 366 N.W.2d 460 (N.D. 1985); State v. Hager, 271 N.W.2d 476 (N.D. 1978); State v. Mees, 272 N.W.2d 284 (N.D. 1978); Gerstein v. Pugh, 420 U.S. 103 (1975)

XX. Probable Cause Concept [Applies to Both Arrest and Search]

A. Defined -- where facts within officer's knowledge that are reasonably trustworthy are sufficient to warrant reasonable man to believe that offense committed (arrest warrant) or evidence is present (search warrant)

B. Compare:

1. Mere suspicion

2. Reasonable suspicion -- sufficient for stop-n-frisk; car stop

3. Probable cause

4. Preponderance of evidence -- burden in civil case

5. Clear and convincing evidence -- deprived child, mental health case

6. Proof beyond reasonable doubt -- burden in criminal case

C. Factors -- experience of observer, suspect's actions, appearance, background, area of city, time

D. Probable Cause for What?

1. Arrest

2. Search

E. Methods of Establishing Probable Cause

1. Personal observation (non-hearsay) method

2. Hearsay method

3. Combination of personal observation and hearsay method (corroboration method)

F. Purpose of Warrant Requirement Must be Satisfied

1. Purpose -- place "neutral and detached" magistrate between police and individual to be searched

2. Judge's decision cannot be "rubberstamp" -- must have information to make informed decision

G. Criteria:

1. Information to evaluate truthfulness of source of information, i.e., integrity of person upon whose statements probable cause based (source must be believable) [veracity prong]

2. Information to evaluate adequacy of facts furnished by that source, i.e., his basis of knowledge (source must not be mistaken)

H. Application

1. Personal observation method

a. Source integrity established by oath

b. Source's basis of knowledge must be given court

2. Hearsay method

a. Stated -- search or arrest warrant may be obtained based upon affidavit that includes hearsay (i.e., information furnished to affiant by someone else) even if informant not identified

b. Authority -- Aguilar v. Texas, 378 U.S. 408 (1964); Spinelli v. U.S., 393 U.S. 410 (1969); Ill. v. Gates, 462 U.S. 213 (1983); State v. Schmeets, 278 N.W.2d 401 (N.D. 1979); State v. Thompson, 369 N.W.2d 363 (N.D. 1985)

c. Hearsay cases in two groups:

(1) Named hearsay informant

(a) Source's integrity:

1) Ordinary citizen -- presumed reliable -- see generally People v. Ramsey, 545 P.2d 1333 (Sp. Ct. Cal. 1976); State v. Boushee, 284 N.W.2d 423 (N.D. 1979); State v. Ronngren, 361 N.W.2d 224 (N.D. 1985)

2) Police officer -- presumed reliable -- see Ramsey and Boushee, supra

3) Person from "criminal milieu" -- credibility of person or reliability of information must be established:

a) Prior "track record" of informant

b) Declaration against penal interest

(b) Basis of knowledge

(2) Unnamed informant

(a) Source's integrity

1) Citizen and police rarely unnamed

2) Confidential informant -- credibility of person or reliability of information must be established:

a) Prior "track record" of informant

b) Declaration against penal interest

(b) Basis of knowledge

d. If double hearsay -- each link must be established

3. Combination of personal observation and hearsay method

a. Source's veracity although insufficient initially may be "buttressed" by "independent police verification"

b. Source's basis of knowledge although insufficient initially may be "buttressed" by "self-verifying detail"

c. Authority -- Spinelli v. U.S., supra (1969); Draper v. U.S., 358 U.S. 307 (1959)

d. Test: probable cause exist based upon totality of circumstances with above factors (veracity and basis of knowledge) relevant -- Ill. v. Gates, supra; Mass v. Upton, 466 U.S. 727 (1984); N.D. has reserved deciding if Gates test applies -- State v. Thompson, 369 N.W.2d 363, footnote 5 (N.D. 1985)

4. Cases

a. State v. Boushee, 284 N.W.2d 423 (N.D. 1979) -- affiant need not be expert in identifying marijuana to provide probable cause

b. Rios v. State, 623 S.W.2d 496 (1981) -- unnamed informant previously reliable 3 out of 4 found sufficiently reliable

c. State v. Metzner, 338 N.W.2d 799 (N.D. 1983) -- affiant need not have knowledge that convicted felon kept firearm in residence, sufficient that purchased it, and court can draw inference that suspect would "probably" keep firearm in residence and the fact that may be kept in car does not detract from probable cause for residence

d. State v. Klevgaard, 306 N.W.2d 185 (N.D. 1981) -- possible to have probable cause that crime committed (e.g., burglary) without knowing which business burglarized

e. New York v. P. J. Video, Inc., ____ U.S. ____, 54 U.S.L.W. 4396 (1986) -- "usual" probable cause standard applies in obscenity cases despite First Amendment concerns

I. Imputed Knowledge Doctrine

1. Stated -- knowledge of one peace officer considered knowledge of all -- State v. Mees, 272 N.W.2d 284 (N.D. 1978), note 1, citing State v. Cook, 399 P.2d 835 (Kan. 1965)

2. Application -- radio messages, police bulletins

3. Whitely v. Warden, 401 U.S. 560 (1971) [warrant case]; U.S. v. Hensley, 469 U.S. 221 (1985) [police bulletin case]

XXI. Search Warrants

A. Authority to Issue -- state or federal magistrate within territorial jurisdiction; Rule 41, N.D.R.Crim.P.

B. Property That May Be Seized

1. Evidence of crime -- including documents, books, and other tangible objects; "mere evidence rule" rejected in Warden v. Hayden, 387 U.S. 294 (1967)

2. Contraband, fruits of crime

3. Property used in commission of crime

4. May include "all persons present"; see, e.g., State v. Hinkel, 365 N.W.2d 774 (Minn. 1985); U.S. v. Graham, 563 F. Supp. 149 (D.C.N.Y. 1983)

5. Searches of third party allowed even if not suspected of crime -- Zurcher v. Stanford Dailey, 436 U.S. 547 (1978)

6. Problems with "look but don't seize" warrants -- U.S. v. Freitas, 800 F.2d 1451 (9th Cir. 1986), but possible if comply with wiretapping statutes

C. Issuance

1. Based upon affidavit or sworn recorded testimony

a. All testimony must be recorded

b. Issuing judge can only consider affidavits and sworn testimony -- State v. Schmeets, 278 N.W.2d 401 (N.D. 1979)

2. Based upon remote communication, e.g., telephone

D. Content

1. Probable cause must exist in affidavits or sworn testimony

2. Warrant must identify "with particularity" person or place to be searched -- Lo-Ji Sales v. New York, 442 U.S. 319 (1979)

3. Warrant only good for 10 days -- but may be "stale" even before -- see, e.g., State v. Kelly, 636 P.2d 153 (Ariz. 1981)

4. Warrant must be served during daytime (6:00 a.m. - 10:00 p.m.) unless judge orders otherwise

5. Application

a. State v. Schmeets, 278 N.W.2d 401 (N.D. 1979) -- reviewing court limited to "four corners" of search warrant affidavit or recorded testimony; cannot consider affidavit from issuing magistrate that additional information presented that not in search warrant affidavit

b. State v. Mondo, 325 N.W.2d 201 (N.D. 1982) -- court allowed information in affidavit for arrest warrant to support contemporaneous request for search warrant (otherwise deficient)

c. Error in address insignificant because sufficient description -- State v. Gonzales, 314 N.W.2d 825 (Minn. 1982)

d. Warrant on whole sufficient even though seeking general property items such as "weapons and ammunition," "other drugs," and "other records" -- U.S. v. Rubio, 526 F. Supp. 171 (N.Y. 1981)

e. U.S. v. Strini, 658 F.2d 593 (8th Cir. 1981) -- court not condone state's attempt in search warrant to conceal informant's identity by calling him "a third unnamed C.I." but not found to be deliberate false statement, compare U.S. v. Tirinkian, 502 F. Supp. 620 (D.N.D. 1980)

f. If search warrant affidavit contains false statements knowingly and intentionally made, or with reckless disregard for the truth, false statements are stricken and affidavit must be considered without them -- State v. Ennis, 334 N.W.2d 827 (N.D. 1983); State v. Padgett, 393 N.W.2d 754 (N.D. 1986) [burden of proof is defendant's by preponderance of evidence]; Franks v. Delaware, 438 U.S. 154 (1978), but "redaction" may save warrant

E. Execution

1. Must give party present copy of warrant and receipt for property; if party absent -- leave copy

2. Inventory in presence of party or in presence of other credible person other than warrant applicant

3. Warrant, affidavit, inventory and return should be given issuing magistrate who files papers in trial court (public record)

4. Use of force -- Section 29-29-08, N.D.C.C. -- must knock and announce first unless district judge authorizes "no knock" warrant -- North Dakota Supreme Court interprets Chapter 19-03.1, N.D.C.C., to allow any magistrate to issue "no knock" warrant -- State v. Loucks, 209 N.W.2d 772 (N.D. 1973)

5. Who and what may be searched

   a. May search places and things where items sought may be located

   b. Must stop search when everything in warrant located

   c. Persons present -- probably cannot search but if felt armed and dangerous, frisk allowed; if arrest, can search incident to it -- Ybarra v. Illinois, 444 U.S. 85 (1979); State v. Grant, 361 N.W.2d 243 (N.D. 1985); compare U.S. v. Graham, 563 F. Supp. 149 (D.C.N.Y. 1983) -- search warrant for house and "any person present" upheld; State v. Hinkel, 365 N.W.2d 774 (Minn. 1985) [see also Lecture #3]

   d. May permit search of vehicles not mentioned in warrant -- U.S. v. Percival, 764 F.2d 876 (7th Cir. 1985) [not recommended]

6. What can be seized

   a. Items in warrant

   b. Plain view seizures (if elements met) -- review State v. Riedinger, 374 N.W.2d 866 (N.D. 1985)

   c. Michigan v. Summers, 452 U.S. 692 (1981) -- detention of owner of premises allowed while search warrant executed [see also Lecture #3]

7. Application

   a. No-knock warrant -- State v. Borden, 316 N.W.2d 93 (N.D. 1982), presence of unknown quantities of marijuana and "hard" drugs provided probable cause to believe drugs could be easily disposed of to justify "no-knock" search warrant; see also Section 19-03.1-32(3), N.D.C.C.

   b. Forcible entry -- State v. Farber, 314 N.W.2d 365 (Iowa 1981) -- held unnecessary to attempt to locate absent owner before forcible entry to execute search warrant, must comply with knock and announce

c. State v. Ronngren, 361 N.W.2d 224 (N.D. 1985) -- North Dakota court not yet determined if exclusionary sanction applies to failure to (justifiably) "knock and announce"; decided in defendant's favor -- State v. Sakellson, 379 N.W.2d 779 (N.D. 1985) -- knock on living room door insufficient when failed to knock at main door

d. People v. Mahoney, 448 N.E.2d 1321 (N.Y.Ct.App. 1983) -- issued but undelivered no knock search warrant allowed no knock entry

e. State v. Gronlund, 356 N.W.2d 144 (N.D. 1984) -- search warrant for "walking cane" properly executed by looking in pail because cane could have been broken and pieces placed inside

LECTURE NO. 6

PROBLEMS

A. Compare the following search warrant affidavits:

1. Search warrants for marijuana, LSD, and narcotic drugs:

a. "Information given by a reliable source was given to Officer Jones of the Bismarck Police Department that marijuana, LSD, and narcotic drugs are concealed in the above-named place."

State v. Dove, 182 N.W.2d 297 (N.D. 1970)

b. "Your affiant (police officer) has received reliable information and does believe that heroin, marijuana, barbituates and other narcotics and narcotic paraphernalia are being kept at the above-described premises for the purpose of sale and used contrary to the provisions of the law."

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

c. "A reliable informant who has given reliable information on criminal offenses before within the past week, informed affiant that 'pot parties' were being held on the premises described. Affiant (police officer) went to the farm house and walked up to the door. He saw what he believed to be marijuana 'roaches' on the door step. Affiant was met at the door by defendant Trappen and asked affiant what he wanted. Affiant identified himself as a deputy sheriff and asked permission to enter. Defendant refused affiant permission. Affiant saw defendant [Iverson] in house through the open door and proceed[ed] to enter so that no evidence could be destroyed. Upon passing through the porch entrance, affiant saw other narcotics paraphernalia. Upon entry into the house, affiant saw in plain view ash tray with what was believed marijuana. Affiant walked through other rooms to make sure that no person was on the premises who could destroy the contraband. Defendants were then taken outside and the premises secured until a search warrant could be obtained. On the way out of the house, affiant saw a pipe in open view and seized it. The pipe is of the type commonly used for smoking marijuana. Defendants rent the premises described above from Arvil Lerud."

State v. Iverson, 219 N.W.2d 191 (N.D. 1974)

d. (This affidavit was paraphrased by N.D.Sp.Ct. as follows:)

The affidavit of the special investigator upon which the search warrant was issued stated that an informer, whom he had known for several years and who had cooperated with him in the past, informed him that Mertens was going to receive a package by first-class mail containing microdot acid hits, a.k.a blotters or LSD, from a person named "Tom" and that the package was being mailed from San Francisco, California. He (the special investigator) then contacted the Devils Lake postmaster and informed him of the package that was coming. The postmaster advised him (the special investigator) to be at the postoffice at 8:00 a.m. on 19 January 1977 to ascertain if there was such a package. The special investigator came to the Devils Lake postoffice at the specified time and in the company of the postmaster observed a package wrapped in brown paper, approx. 3½ inches long, 3½ inches wide, and 2 inches thick, with red electrical tape over the entire bottom, addressed to Dave Mertens, Lakeview Dairy, Devils Lake, North Dakota, with a return address of "T. Mack" San Francisco, California. The postmaster informed him (the special investigator) that the package in question would be delivered to Dave Mertens in the normal course of mail delivery on 20 January 1977 at the Lakeview Dairy. He (the special investigator) was aware from his own personal knowledge that Dave Mertens was employed at Lakeview Dairy and was involved in the use and distribution of controlled substances.

State v. Mertens, 268 N.W.2d 446 (N.D. 1978)

e. (The search warrant affidavit was paraphrased by U.S.Sp.Ct. as follows:)

Bloomingdale, Ill., is a suburb of Chicago located in DuPage County. On May 3, 1978, the Bloomingdale Police Department received by mail an anonymous handwritten letter which read as follows:

"This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flies down and drives it back. Sue flies back after she drops the car off in Florida. May 3 she is driving down there again and Lance

will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,00.00 worth of drugs in their basement. They brag about the fact they never have to work and make their entire living on pushers.

I guarantee if you watch them carefully you will make a big catch. They are friends with some big drug dealers who visit their house often.

Lance & Susan Gates
Greenway
in Condominiums"

The letter was referred by the Chief of Police of the Bloomingdale Police Department to Det. Mader, who decided to pursue the tip. Mader learned, from the office of the Illinois Secretary of State, that an Illinois driver's license had been issued to one Lance Gates, residing at a stated address in Bloomingdale. He contacted a confidential informant, whose examination of certain financial records revealed a more recent address for the Gates, and he also learned from a police officer assigned to O'Hare Airport that "L. Gates" had made a reservation on Eastern Airline flight 245 to West Palm Beach, Fla. scheduled to depart from Chicago on May 5 at 4:15 p.m.

Mader then made arrangements with an agent of the Drug Enforcement Administration for surveillance of the May 5 Eastern Airline flight. The agent later reported to Mader that Gates had boarded the flight, and that federal agents in Florida had observed him arrive in West Palm Beach and take a taxi to the nearby Holiday Inn. They also reported that Gates went to a room registered to one Susan Gates and that at 7:00 a.m. the next morning Gates and an unidentified woman left the motel in a Mercury bearing Illinois license plates and drove northbound on an interstate frequently used by travelers to the Chicago area. In addition, the DEA agent informed Mader that the license plate number on the Mercury registered to a Hornet station wagon owned by Gates. The agent also advised Mader that the driving time between West Palm Beach and Bloomingdale was approximately 22 to 24 hours.

Mader signed an affidavit setting forth the foregoing facts, and submitted it to a judge of the Circuit Court of DuPage County, together with a copy of the anonymous letter. The Judge of that

court thereupon issued a search warrant for the Gate's residence and for their automobile.

Illinois v. Gates, supra

f. "1. In the fall of 1981 Renae Ostberg stated to Drug Enforcement Agent Buzzano [sic] that Ed always has good hash.

"2. Ed Ennis was seen by Police Officers comming [sic] to the Ostbergs home just pryor [sic] to Agent Buzzano [sic] buying Hashish.

"3. A search of Ed Ennis home revealed numerous bottles of Counterfeit Drugs.

"4. March of 82, a Confidential informant who has given information in the past leading to under cover purchases of drugs and who has given information known by Jim Quickstad to be true and reliable about Drug Dealers told to Jim Quickstad that Ed Ennis had 10 lbs. [sic] of Marijuana in his home on April 7, and has been selling Marijuana from this 10 lbs. Ed Ennis told the confidential informant that the 10 lbs. of marijuana were at his home at 1309 24th stW and could be bought there."

(Does it matter if Ennis (def.) did not tell the informant the information in paragraph #4 and it is stricken by the court?) State v. Ennis, 334 N.W.2d 827 (N.D. 1983)

g. "That the Harvey Police had picked up two juveniles near the Harvey grade school and that said girls are under the influence and that they had obtained the drugs from Terry Hager and Ronnie Schmeets and that they were at the place of the above two individuals and that they stated that cocaine, hashish oil, and marijuana were at his residence."

State v. Schmeets, 278 N.W.2d 401 (N.D. 1979)

h. (The search warrant affidavit was paraphrased by the N.D.Sp.Ct. as follows:)

The search warrant had been issued by the judge of the county court of increased jurisdiction on the strength of an affidavit executed by the police officer in charge of the raid, in which the officer had stated that he was an officer with the police department of the city and was working as a special investigator dealing with narcotic drugs; that he had received information from a reliable informant who previously had given the officer information which had led to several arrests and convictions;

that the reliable informant, within four days prior to the giving of the information, had observed marijuana at the upstairs apartment residence at 1016 University Avenue, which apartment was occupied by one Bruce Hoar, and that such reliable informant had personal knowledge that a quantity of marijuana was located in such apartment; and that the affiant had attended schools on drugs and knew that prohibited drugs might easily be disposed of or destroyed.

i. "I, Wesley J. Berg, being first duly sworn, depose and state that I am a deputy with the Mercer County Sheriff's Office. As such, one of my duties is to investigate crimes occurring in Mercer County. In that capacity I have become familiar with the below described facts.

"On February 15, 1984, at about 10:00 a.m., CST, the North Dakota Drug Enforcement Unit in Bismarck, North Dakota, received an anonymous phone call. The caller told them that Randy and Jackie Thompson, who live outside of Zap, North Dakota, presently have a large supply of marijuana in their house. According to the informant, Randy and Jackie Thompson lived inside the city of Zap until a short time ago when they moved to a farmstead. Randy Thompson was described as being heavy set, five feet ten inches tall, with dark hair and is approximately 30 years old. Jackie Thompson was described as a large woman with light hair and who is 27 or 28 years old. The informant said, further, that both Randy and Jackie Thompson work at a power plant near Beulah, North Dakota, and that Jackie Thompson, specifically, works in the office at the power plant. The Thompsons, according to the informant, drive a blue and white pickup with a camper on it.

"This informant advised the Drug Enforcement Unit that she had provided information against a Mr. Mike Stockert in May of 1983. The information she provided against Mr. Stockert proved to be correct in every detail, and Mr. Stockert is presently serving time in the North Dakota State Pennitentiary [sic] as a result of this information.

"Acting on the above information, I have verified that Randy and Jackie Thompson did live in the city of Zap until shortly before Christmas. At that time, they moved to the Edward Bauer farmstead located in the Northeast quarter of Section 14, Township 146, Range 89. Jackie Thompson works cleaning the office at the Great Plains Coal Gasification Associates. Randy and Jackie Thompson own a blue and white 1978 Ford pickup, license number TCW-499 which has a topper or camper on it.

"The anonymous informant advised the Drug Enforcement Unit that Randy and Jackie Thompson were selling marijuana in Bismarck on February 11, 1984. They were driving their blue and white pickup at the time.

"Based on the foregoing information, I hereby apply for a warrant to search the Randy and Jackie Thompson residence located at the former Edward Bauer farmstead located in the Northeast quarter of Section 14, Township 146, Range 89, in Mercer County. This application is for a warrant to cover the house, and any out buildings on the farmstead, as well as for the blue and white pickup owned by Randy and Jackie Thompson described above. The objects of the search are marijuana, any other controlled substances, and related drug paraphernalia which may be found."

j. "Your affiant has received information from a confidential reliable informant who has furnished information in the past that has resulted in the arrest of seven persons, six for violations of the Uniform Controlled Substances Act and one for the criminal offense of burglary. These cases are still awaiting adjudication in North Dakota courts. The informant has never given information that has proved to be incorrect.

This reliable informant informed your affiant that on March 8, 1981 he had entered the above-named premises and purchased a green leafy vegetable substance believed to be marijuana from X, the renter of the above described premises. The informant returned this substance to your affiant who performed a duquenois-lavine field test on the substance and the results of the test were positive for marijuana. The informant stated to your affiant that he observed the occupant of the above-named premises cut the marijuana from a larger piece and then subsequently weighed on a scale which was located on the kitchen table. When the informant received this aluminum foil the occupant of the apartment stated, 'There's a lot more marijuana where that came from.'"

Dawson v. State, 14 Md. App. 18, 284 A.2d 861, 871-873 (1971); Stanley v. State, 313 A.2d 847, 849-863 (Md. App. 1974)

2. Affidavit for arrest warrant:

a. "The undersigned complainant being first duly sworn states that on or about January 25, 1978, at Fargo North Dakota, said defendant did willfully and

knowingly possess a controlled substance, to-wit: marijuana."

See generally State v. Erdman, 170 N.W.2d 872 (N.D. 1969)

3. Misc.

a. Affidavit for search warrant to seize film "Deep Throat"

"That your affiant has read numerous articles and critiques about the film "Deep Throat" and from these articles and critiques your affiant believes that the film depicts sodomy between human beings as defined by the obscenity section of the North Dakota Century Code."

State v. Spoke Committee, 270 N.W.2d 339 (N.D. 1978)

b. For rifle (specifically identified) and any invoice or receipts evidencing the purchase or possession of firearm, and other firearm [assuming probable cause that suspect is convicted felon, had purchased specifically identified firearm and lives at certain address]

Based upon over 11 years of experience investigating the Federal Firearms Laws and training as a Special Agent of the Bureau of Alcohol, Tobacco and Firearms, I know that persons who purchase firearms generally maintain these firearms in their residences along with receipts, invoices, sales slips, or other papers evidencing the purchase and transfer of these firearms.

State v. Metzner, 338 N.W.2d 799 (N.D. 1983)

4. Also consider Lecture #7, Problem D, for warrantless arrest issue.

FIFTH AMENDMENT

LECTURE NO. 7

RIGHT TO SILENCE -- APPLICATION AND LIMITATION: MIRANDA v. ARIZONA

I. Spirit of 5th Amendment

A. Stated -- "No person. . .shall be compelled in any criminal case to be a witness against himself. . ."

B. Purpose

1. Preserve dignity and integrity of citizens by not allowing inquisition type interrogation by government

2. Ensure statements are truly voluntary

C. Vehicles to Ensure 5th Amendment Compliance

1. Miranda warning

2. "Voluntariness" requirement

II. Miranda Requirement

A. Stated -- whenever person to be interrogated by law enforcement officer "has been taken into custody or otherwise deprived of freedom of action in any significant way" he/she must be given following warnings:

1. Right to remain silent, need not answer any questions

2. If choose to say anything, answers can be used against you

3. Right to consult with lawyer, before or during questioning

4. If cannot afford lawyer, one will be provided without cost

Verbatim recital of Miranda warning not required; equivalent sufficient -- California v. Prysock, 453 U.S. 355 (1981)

B. Authority -- Miranda v. Arizona, 384 U.S. 436 (1966)

C. Rationale for Miranda Decision

1. Custodial interrogation inherently involuntary absent warning

2. "Voluntariness" requirement insufficient by itself to ensure voluntary statement

D. Miranda Provides Two Protections:

1. Privilege against self-incrimination (5th Amendment)

2. Right to counsel (6th Amendment -- to ensure 5th Amendment complied with)

E. When Miranda Required/Exclusions:

1. "Custodial interrogation" -- two pronged analysis:

a. Custody -- actual physical custody or freedom of action restricted to degree associated with formal arrest, i.e., "constructive custody"

(1) Questioning in home often not custodial, but can be -- Orozco v. Texas, 394 U.S. 324 (1969); Beckwith v. U.S., 425 U.S. 321 (1976); State v. Abrahamson, 328 N.W.2d 213 (N.D. 1982)

(2) Questioning in police facility often custodial unless clear that person free to go -- Oregon v. Mathiason, 429 U.S. 492 (1977); California v. Beheler, 463 U.S. 1121 (1983)

(3) May be "in custody" even though no probable cause for arrest -- Dunaway v. New York, 422 U.S. 200 (1979), conversely may be no custody even if probable cause, e.g., telephone interview -- State v. Halvorson, 346 N.W.2d 704 (N.D. 1984)

(4) "Focus of investigation" -- not test -- Calif. v. Beheler, 463 U.S. 1121 (1983); Beckwith v. U.S., supra

(5) Mathis v. U.S., 391 U.S. 1 (1968) -- defendant in prison must be given Miranda before questioning on unrelated charge

(6) General on-the-scene questioning usually not considered custodial situation, i.e., "what happened here?" @ scene of crime -- State v. Skjonsby, 319 N.W.2d 764 (N.D. 1982); or "who driving car?" at traffic accident -- State v. Fields, 294 N.W.2d 404 (N.D. 1980); State v. Berger, 329 N.W.2d 374 (N.D. 1983); even though person may not be free to leave; test:

are suspect's actions curtailed to degree associated with formal arrest?; Berkemer v. McCarty, 468 U.S. 420 (1984)

(7) Miranda requirement also not apply to Terry stops (see Chapter 3, supra) unless or until person arrested; test of arrest -- how reasonable person would have viewed situation; Berkemer v. McCarty, supra

(8) Certain background information may not require Miranda even if arrest, e.g., name, occupation, address -- State v. Gress, 504 P.2d 256 (Kan. 1972); U.S. v. Taylor, 799 F.2d 126 (4th Cir. 1986)

(9) Questioning by probation officer non-custodial even though condition of probation that truthfully answer questions -- Minn. v. Murphy, 465 U.S. 420 (1984)

(10) Caveat -- custodial situation may develop requiring warnings before further questioning

b. "Interrogation" -- express questioning or functional equivalent

(1) Functional equivalent -- words or actions that police should know are likely to elicit incriminating response

(2) Authority -- Rhode Island v. Innis, 446 U.S. 291 (1980)

2. Volunteered statements always admissible -- not necessary to interrupt but cannot question without warnings -- State v. Carmody, 253 N.W.2d 415 (N.D. 1977)

3. Privilege against self-incrimination only applies to testimonial compulsion

a. Not apply to physical evidence -- fingerprints, blood samples, handwriting, line-ups, field sobriety tests, urine screening -- Schmerber v. California, 384 U.S. 757 (1966); City of Wahp. v. Skoog, 300 N.W.2d 243 (N.D. 1980); Hampson v. Satran, 319 N.W.2d 796 (N.D. 1982)

b. Personal papers may be protected but. . .

(1) Partnership records -- are not personal (therefore unprotected); Bellis v. U.S., 417 U.S. 85 (1974); compare U.S. v. Doe,

465 U.S. 605 (1984) -- although sole proprietor's business records not protected, act of production is protected

(2) Andresen v. Maryland, 427 U.S. 463 (1976) -- party privileged from personally producing papers but not from its production by someone else, e.g., lawyer, accountant, or policeman with search warrant

4. Not apply to private party questioning -- State v. Red Paint, 311 N.W.2d 182 (N.D. 1981)

a. For who is private party -- see 4th Amendment discussion, Lecture #2

b. Cannot act @ direction of police or considered agent

c. Caveat -- although Miranda not apply to private party, statements still must be voluntary -- compare State v. Rovang, 325 N.W.2d 276 (N.D. 1982)

5. "Public safety exception" -- New York v. Quarles, 467 U.S. 649 (1984) -- public safety exception adopted, i.e., "where's the gun" question allowed to hot pursuit rape arrestee

6. May not apply to routine traffic offenses such as infractions -- State v. Fields, supra, or where driver detained no longer than is necessary to issue citation, but applies to DUI's and custodial traffic arrests; see Berkemer v. McCarty, supra

F. Waiver of Miranda Rights

1. State has "heavy burden" to establish waiver -- Lego v. Twomey, 404 U.S. 477 (1972) -- preponderance of evidence; Colorado v. Connelly, ____ U.S. ____, 107 S. Ct. 515, 40 Cr.L.Rptr. 3159 (1986)

2. North Carolina v. Butler, 441 U.S. 369 (1979) -- waiver found even though defendant refused to sign written waiver

3. State v. Walden, 336 N.W.2d 629 (N.D. 1983) -- waiver found even though partial rights when defendant interrupted, said "knew rights" and signed written waiver

4. Written waiver recommended if at all possible

G. Application of Miranda Principles

1. If suspect does not want to talk, questioning must cease

   a. Michigan v. Mosley, 423 U.S. 96 (1975) -- resumption of questioning allowed on unrelated charge, but compare State v. Thompson, 256 N.W.2d 706 (N.D. 1977) [see problems to this lecture]

   b. State v. Roquette, 290 N.W.2d 260 (N.D. 1980) -- questioning allowed when defendant initiated questioning, after initially invoking right to silence

   c. Defendant's invocation of right to remain silent cannot be used at trial -- State v. Schneider, 270 N.W.2d 787 (N.D. 1978), compare State v. Allery, 322 N.W.2d 228 (N.D. 1982) ["Well, you'll have to prove it"; "Maybe I'm the Incredible Hulk" -- not improper comments upon defendant's right to silence; however, defendant's non-verbal conduct of "grinning but no reply" -- "approached" improper comment]

   d. State v. Graham, 660 P.2d 460 (Sp.Ct. Ariz. 1983) -- request by "custodial defendant" to turn off tape recorder -- not invocation of right to silence

   e. U.S. v. Barnhill, 429 F.2d 340 (8th Cir. 1970) -- selectively refusing to answer specific questions, not necessarily invocation of right to silence as to all questions

   f. State v. Perkins, 364 N.W.2d 20 (Neb. 1985) -- defendant's continued silence not invocation of right to silence

2. If suspect wants lawyer, questioning must cease until lawyer obtained (usually more jealously guarded than "right to silence")

   a. Edwards v. Arizona, 451 U.S. 477 (1981) -- no "per se" rule prohibiting any questions until attorney obtained, but no more questioning unless counsel available to defendant or accused initiates questioning; no waiver if defendant responded to further police initiated custodial interrogation (even if rights repeated)

   b. Oregon v. Bradshaw, 462 U.S. 1039 (1983) -- plurality decision in which court interpreted Edwards to require two pronged showing; (1) defendant initiated conversation and (2)

waiver of rights; Smith v. Illinois, 469 U.S. 91 (1984) [invocation and waiver are entirely distinct questions]

c. Equivocal requests for attorney ("maybe I should get attorney") -- compare Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979), with People v. Kendricks, 459 N.E.2d 1137 (Ill. App. 1984)

d. Moran v. Burbine, ____ U.S. ____, 106 S. Ct. 1135 (1986) -- police have no obligation to tell suspect that attorney retained on his behalf by third party has attempted to contact him; also, no police misbehavior by falsely advising counsel that will be no questioning; see also Section 29-05-20, N.D.C.C.

3. Compare situation when defendant already has attorney (or right to attorney has attached):

a. 6th Amendment Right v. 5th Amendment Right

b. Test -- whether defendant indicted or "adversary criminal proceedings" began -- Moore v. Ill., 434 U.S. 220 (1977); right attaches at least after formal charges, preliminary hearing, indictment, information, or arraignment

c. Waiver of 6th Amendment -- stricter standard of waiver necessary than Miranda waiver -- "intentional relinquishment or abandonment of known right or privilege"

d. Brewer v. Williams, 430 U.S. 387 (1977) -- statement deliberately elicited after arrest on warrant and arraignment thereon violated right to counsel

e. Wyrick v. Fields, 459 U.S. 42 (1982) -- Sixth Amendment issue undecided regarding post-polygraph questioning regarding results when arrestee, released on bail, with attorney appointed, requested a polygraph and waived Miranda (without attorney) before test; 8th Circuit eventually decided issue against defendant and cert. denied, 464 U.S. 1020 (1983)

f. Massiah v. U.S., 377 U.S. 201 (1964) -- surreptitious eavesdropping of indicted defendant found violative of 6th Amendment

g. U.S. v. Henry, 447 U.S. 264 (1980) -- paid informant in cell with indicted defendant not allowed to testify to defendant's statements

even though no "initiated questioning" if police know or should know that statements on indicted charges would be deliberately elicited by informant; although should be admissible for unindicted offenses, Maine v. Moulton, ____ U.S. ____, 106 S. Ct. 477 (1985); situation different if informant "motivated by conscience" and not police agent; see, e.g., State v. Olson, 274 N.W.2d 190 (N.D. 1978); or mere "listening post" -- Kuhlmann v. Wilson, ____ U.S. ____, 106 S. Ct. 2616 (1986)

h. Michigan v. Jackson, ____ U.S. ____, 106 S. Ct. 1404 (1986) -- defendant's assertion of right to counsel during arraignment creates bar to subsequent uncounselled, police initiated questioning. Unless attorney present, or defendant initiates questioning -- no waiver possible (same per se rule as Edwards v. Arizona, supra, provides in Miranda context)

i. Also note -- Disciplinary Rule 7-104(A)(1) -- prohibits prosecuting attorney from contacting defendant directly

4. Relationship with 4th Amendment

a. Dunaway v. New York, 442 U.S. 200 (1979) -- detention on less than probable cause, statements suppressed even if Fifth Amendment complied with unless sufficient break in causal connection between illegality and confession

b. Compare State v. Carlson, 318 N.W.2d 308 (N.D. 1982) -- confession upheld 22 hours later after initial illegal detention when @ home in interim, with Taylor v. Alabama, 457 U.S. 687, 102 S. Ct. 2664 (1982) -- no sufficient intervening event found; see also attenuation doctrine discussion, supra, Lecture #1

H. Erosion of Miranda Requirement (see also attenuation discussion, supra, Lecture #1)

1. Harris v. New York, 401 U.S. 222 (1971) -- statements given without Miranda used on cross-examination to impeach defendant who testified inconsistent with statements if statements otherwise voluntary; if confession involuntary, cannot be used to impeach; Mincey v. Arizona, 437 U.S. 385 (1978)

2. Michigan v. Tucker, 417 U.S. 433 (1974) -- state allowed to use witness whose name given by defendant even though incomplete Miranda warnings

3. Oregon v. Haas, 420 U.S. 714 (1975) -- statements given after defendant requested attorney allowed for impeachment

4. Jenkins v. Anderson, 447 U.S. 231 (1980) -- pre-arrest silence of defendant allowed to impeach trial testimony regarding self-defense but not post-arrest silence (post-Miranda); see Doyle v. Ohio, 426 U.S. 610 (1976); U.S. v. Hale, 422 U.S. 171 (1975)

   a. State v. Helgeson, 303 N.W.2d 342 (N.D. 1981) -- pre-arrest silence used substantively (not just for impeachment)

   b. Fletcher v. Weir, 445 U.S. 603 (1982) -- post-arrest, pre-warning silence also allowed for impeachment on issue of self-defense

   c. Anderson v. Charles, 447 U.S. 404 (1980) -- post-arrest, post-Miranda statements used for impeachment regarding location car stolen from

   d. Wainwright v. Greenfield, ____ U.S. ____, 106 S. Ct. 634 (1986) -- post-arrest, post-Miranda silence cannot be used as substantive evidence of sanity

5. Oregon v. Elstad, 470 U.S. 298 (1985) -- Fifth Amendment not require suppression of confession voluntarily made after proper Miranda warning and valid waiver, solely because police had obtained an earlier unwarned and uncoerced admission from the suspect [case distinguishes Miranda rule from constitutional violation]

6. Compare Mass. v. White, 439 U.S. 280 (1978) [equally divided ct.] -- suppressed statements could not be used for search warrant

III. "Voluntariness" Requirement

A. Rationale -- cannot "rubberhose" defendant after Miranda given

B. Procedure

1. Jackson v. Denno, 378 U.S. 368 (1964) -- judge must make pre-trial determination outside of jury's presence; see also Rule 104, N.D.R.Evid.

2. Review Mincey v. Arizona, 437 U.S. 408 (1978), for discussion of Miranda compliance and voluntariness issue (due process determination)

C. Application

1. Direct physical force -- cannot be used

2. Indirect physical abuse -- prolonged interrogation, improper medical attention, lack of sleep -- usually factual determination and lower court's finding often upheld -- see, e.g., State v. Discoe, 334 N.W.2d 466 (N.D. 1983); compare State v. Walden, 336 N.W.2d 629 (N.D. 1983)

3. Threats -- should not be used -- State v. Rovang, 325 N.W.2d 276 (N.D. 1982); State v. Larson, 343 N.W.2d 361 (N.D. 1984)

4. Promise of leniency -- depends upon statement, "no promises, but cooperation made known" -- should be o.k.

5. Some deceit or trickery may be allowed (but not recommended); Michigan v. Mosley, 423 U.S. 96 (1975); Frazer v. Cupp, 394 U.S. 731 (1969) -- murder suspect told falsely that accomplice had confessed -- statement allowed; Oregon v. Mathiason, 429 U.S. 492 (1977), suspect falsely informed that fingerprints found at crime scene

6. Intoxication

   a. No per se rule -- accused must be intoxicated to degree of "mania" -- see generally State v. Klevgaard, 306 N.W.2d 185 (N.D. 1981); State v. Dilger, 338 N.W.2d 87 (N.D. 1985)

   b. Also applies to Miranda waiver situation

7. Mental condition -- Colorado v. Connelly, supra (1986) -- coercive police activity is necessary predicate to finding confession involuntary ["voice of God" unsolicited confession to police officer upheld]

IV. Miscellaneous

A. Ellison v. State, 500 A.2d 650 (1985) -- exhaustive decision holding that Fifth Amendment privilege terminates at moment sentence is pronounced and judgment final; not through the appellate process

LECTURE NO. 7

PROBLEMS

A. On November 27, 1979, a deputy sheriff from western North Dakota was informed by state radio that there had been a car accident in Gladstone, North Dakota, and that the driver had been taken to a hospital in Richardton, North Dakota. The deputy went to the accident scene and contacted the Richardton city police chief requesting him to go to the hospital and if the chief felt it was necessary "to obtain a blood alcohol test from the driver." The city police chief went to the hospital and after locating the suspect, asked him if he was the driver of the car at the time of the accident. The suspect answered yes and the chief asked if he would submit to a blood alcohol test. The suspect agreed and he was placed under arrest for DWI. He was then informed of some of his Miranda rights but not all. A blood sample was subsequently taken. The deputy sheriff subsequently arrived at the hospital and visited the suspect in his room. He indicated to the suspect that he needed certain information to complete the accident report and to issue a citation for the offense of DWI. No Miranda warnings were given to the suspect by the deputy sheriff.

(Analyze each search and seizure situation.)
State v. Fields, 294 N.W.2d 404 (N.D. 1980)

B. On August 25, 1972, Burley Harryman registered at a Dallas, Texas motel. On the evening of September 7, 1972, the motel management entered the suspect's room because he was several days behind in his rent, efforts to find him were futile, and the motel was nearing capacity. The motel personnel found a high powered rifle with a telescopic sight and a variety of narcotics paraphernalia, including at least two spoons that had been burned on the bottom and a number of syringes. She removed everything to a utility closet in the hallway and called the police. Two officers responded, one searched Harryman's room with no results. The other examined the removed belongings. A radio check revealed that the rifle had been reported stolen in Colorado. The radio check also revealed that the license plates on Harryman's car had been stolen. The police told the motel personnel that it was unlikely that the suspect would return but to give them a call if he did. About eight hours later, Harryman returned and the motel people called the police. While the suspect was in the lobby paying his bill and attempting to retrieve his belongings, two officers arrived and placed Harryman under arrest. One of the officers searched his person and found concealed at the base of his back, tucked under the waistband of his trousers, a condom containing a white powder substance. Before reciting the Miranda warnings, the officer

asked "what is this?" The suspect responded, "Oh, you know what it is. It is heroin."

(Result?)
Harryman v. Estelle, 616 F.2d 870 (5th Cir. 1980)

C. Robert Carmady, his brother Michael, Eldon Hanson, and Phillip Sharbono spent several hours together on August 14, 1973, consuming alcoholic beverages in several bars in Carrington, North Dakota. When the bars closed at 1:00 a.m., the four men got into a car owned by Michael and proceeded at a high rate of speed out of Carrington pursued by Carrington police officers. At a point near the city of New Rockford, the car swerved out of control and overturned. Eldon Hanson died at 2:00 a.m. as a result of injuries received. At the scene of the accident the arresting officer informed Robert Carmady that he was under arrest for aggravated reckless driving and DWI. Carmady stated at that time that he was not the driver of the automobile. There were several attempts at that time by the officer to read to the suspect the Miranda rights. Each attempt was interrupted by the suspect insisting that he understood his rights. The suspect was subsequently taken to the New Rockford Hospital waiting room while the officer checked on the welfare of Mr. Hanson. When it was learned that Hanson had died, the suspect exclaimed, "My God!" and stated that he was the driver. After this point the complete Miranda warning was given but there was no questioning. As the officers were transporting the suspect and his brother to the jail in Carrington, the suspect asked him why they were taking his brother, "I was driving the car."

(Any 5th Amendment problem?)
State v. Carmody, 253 N.W.2d 415 (N.D. 1977)

D. Approximately 12:30 a.m. in February of 1975, patrolman Walls of the Bismarck Police Department investigated a vehicle parked in an alley on the north side of a local repair shop. The officer found footprints in newly fallen snow leading from the driver's side of the vehicle to a window in this repair shop. The window was broken and a tire wrench was lying on the ground near the broken window. The police contacted the owner of the repair shop and after he arrived and unlocked the door, the police entered discovering Klesalek in the bathroom. This person was placed under arrest for burglary and the police then followed the second set of footprints to a house located a few blocks away from the repair shop. The officer requested a back-up unit and after they arrived he knocked at the door of the residence and was greeted by Russell Metzner. Metzner was standing in the doorway in his stocking feet and stated that he had been over to see his girl friend in the trailer court. The officer asked to see the suspect's boots and he returned from the living room with them giving them to the officer. The officers did not enter the house. The officer examined the boots, observed that the soles and a little bit of the

leather was wet and that the heel pattern was similar to the pattern made by the footprints which they had been following from the repair shop. The officer placed the suspect under arrest for burglary and advised him of his Miranda rights.

(Any 4th or 5th Amendment problems?)
State v. Metzner, 244 N.W.2d 215 (N.D. 1976)

E. Approximately 7:30 p.m. on March 26, 1980, a police report was broadcast to police cars in the vicinity of the Biltmore Motor Hotel that a fight was in progress. Within seconds of the initial broadcast, the location of the room was announced and it was also announced that gunshots had been fired. Officers Jorgenson and Lawyer both responded in separate squad cars to this request for assistance. Officer Jorgenson arrived first and Officer Lawyer arrived moments later. Both officers upon arriving observed a female, later identified as Charlotte Skjonsby, sitting against the north wall of the room. This person appeared to have been the victim of a gunshot wound. Lying on the floor was a male body, later identified as Michael Kurtz, who also appeared to have been shot. Also in the room was a third person, later identified as Richard Skjonsby, who was located a few feet away from the other two persons.

When Sgt. Lawyer arrived Officer Jorgenson was attending to the male victim on the floor of the room and Lawyer upon entering the room exclaimed, "What happened?" or "Who did this?" Without any further questions or statements Richard Skjonsby stated, "I did this. I went crazy. I left the room and came back. The gun is in the car." One of the officers then asked, "Where is the car?" Mr. Skjonsby replied that it was outside. The officer then requested the keys and Mr. Skjonsby handed them to him. The suspect was subsequently read his Miranda rights and he indicated he did not wish to say anymore so no further questions were asked of him. The defendant was subsequently led to the officer's patrol car which was located in the Biltmore parking lot and on the way to the squad car the defendant motioned toward a car in the parking lot. One of the officer's described the car to the defendant and he stated, "That is my car."

The defendant was transported to the police station and was read his Miranda warnings a second time by Captain Pavlicek. While looking through the phone book attempting to contact an attorney, the defendant asked Captain Pavlicek, "How many times did I shoot him" After being successful in contacting an attorney, the defendant contacted his father and made the following comments. "Dad, I did something bad, very bad. I shot Charlotte and her boyfriend at the Biltmore in a room. I'm at the Fargo Police Department. I think Charlotte is in the hospital."

(Analyze each Miranda situation.)
State v. Skjonsby, 319 N.W.2d 764 (N.D. 1982)

F. Approximately 5:00 p.m. on April 26, 1976, Thompson went to visit friend Morrell at Burleigh County Jail. The jailer denied the visit as the police had information from Morrell that Thompson was involved with him in several burglaries in Burleigh and Morton counties. Thompson was then arrested on an outstanding warrant, heard and waived Miranda, and asked to write a statement concerning his involvement. After writing two lines, Thompson stated he wanted to "think about it for a while." The jailer and Thompson then engaged in informal conversation which included a question as to whether Thompson committed any burglaries. Thompson admitted to burglaries in Burleigh County and consented to search of his car. A Bismarck police officer subsequently took Thompson to Bismarck Police Department, re-read Miranda, and asked Thompson if he would talk. Thompson refused, "wanting to make a deal." The Bismarck officer refused and at this time, a Mandan officer questioned Thompson in an adjoining room. Thompson was re-read (#3) the Miranda warnings, told that "the jig is up" and Thompson subsequently confessed to all the burglaries in both counties and showed the officer where the loot was hidden.

(Valid confession and subsequent seizure of the loot?)
State v. Thompson, 256 N.W.2d 706 (N.D. 1977)

G. On May 22, 1983, the Highway Patrol received a call on state radio that a red semi-trailer truck was being driven in an erratic manner on Interstate 94 toward Mandan, North Dakota. The patrolman driving east on Main Street in Mandan observed a red semi-trailer truck parked on the sidewalk, facing west, in front of the Western Gas Station. As the officer approached the truck, he observed "a couple of guys" coming out of the station and observed one person (later identified as Berger) approaching the driver's side of the cab. The officer approached Berger and detected the odor of alcohol and observed that Berger had difficulty walking. The officer subsequently asked Berger, without Miranda, if he was the driver of the truck, to which Berger stated yes he was. Berger was then administered the field sobriety test and was subsequently arrested for the offense of DWI.

(Statements by Berger suppressible? What if the field sobriety tests were given first?)
State v. Berger, 329 N.W.2d 374 (N.D. 1983)

H. Some residents in Jamestown were burglarized in May, 1981. The stolen items included loose change worth approximately $150.00, paper money worth approximately $900.00, approximately 70 Susan B. Anthony dollars, and approximately 20 silver dollars. Local banks were notified and a bank subsequently contacted the police informing them that the bank had received some rolls of Susan B. Anthony dollars marked "S.A. Rovang." The sergeant with the Jamestown Police Department subsequently met with the victims who identified some of the coins as being those taken in the burglary. The

sergeant informed the victims that more evidence was necessary in order to charge the defendant and also informed the victim that he could interview the suspect if he wished. Sergeant informed him that the victim could do anything he pleased to the suspect, including striking him. The victim and a friend subsequently confronted the suspect on two occasions. The first occasion the suspect was questioned for approximately 20 minutes and denied committing the burglary. The victim subsequently interviewed the suspect a second time after receiving information from an unidentified party who implicated the suspect. At the second interview, the defendant subsequently confessed after approximately 15 minutes of questioning during which the suspect was informed that he had better confess or the victim would "beat the crap out of him." The suspect was subsequently taken to the police department and confessed a second time after having been given his Miranda warning.

(Discuss each 5th Amendment situation and whether or not either of the confessions should be suppressed.)

State v. Rovang, 325 N.W.2d 276 (N.D. 1982)

I.

Fifth Amendment violation?

J.

Custodial situation?

LECTURE NO. 8

POLICE INVESTIGATION AND JUVENILE OFFENDERS; ELECTRONIC SURVEILLANCE

I. Introduction

A. History

1. Kent v. U.S., 383 U.S. 541 (1966) -- Transfer hearing to adult court must comply with "due process and fair treatment"

a. Right to attorney

b. Reasons for transfer decision

2. In Re Gault, 387 U.S. 1 (1967) -- at adjudicatory hearing juvenile entitled to due process protection

a. Adequate notice of charges

b. Right to counsel

c. Privilege against self-incrimination

d. Right to confront and cross-examine witnesses

3. In Re Winship, 397 U.S. 358 (1970) -- standard of proof beyond reasonable doubt found to apply to juvenile hearings

4. McKiever v. Pa., 403 U.S. 528 (1971) -- juvenile not constitutionally entitled to trial by jury

5. Breed v. Jones, 421 U.S. 519 (1975) -- double jeopardy protection extended to juvenile

6. Schall v. Martin, 467 U.S. 253 (1984) -- pretrial detention of juvenile that "serious risk," with early hearing within 17 days, upheld

B. Rationale of Separate Juvenile System

1. "Parens patriae"

a. Rehabilitation

b. Protection

2. "Best interest of child"

C. Definition of Child -- Section 27-20-02(1), N.D.C.C.

1. Less than 18

2. Not married (and living with spouse) or in military

II. Fourth Amendment

A. Arrest and Detention

1. When juvenile can be "picked up" -- Section 27-20-13, N.D.C.C.

a. Court order

b. Pursuant to laws of arrest -- Lecture #6

c. If reasonable grounds to believe [with or without order of court but limited to law enforcement officer or juvenile supervisor]

(1) Child suffering from illness or injury or in immediate danger

(2) Run-away

2. When juvenile can be held -- Section 27-20-14 through 27-20-17, N.D.C.C.

a. Child should be released to parent or guardian unless:

(1) Detention necessary to protect person or property of another

(2) Child may abscond

(3) No parent or guardian available

b. If taken into custody and held, written notice and reasons for detention must be given parent and court

3. Photos and fingerprints -- Section 27-20-53, N.D.C.C.

a. Photos not allowed without court's permission -- probably also have to comply with 4th Amendment

b. Fingerprints

(1) Limited generally to major felonies and 14-year-old juveniles and older

(2) Latent prints at scene and probable cause -- may fingerprint regardless of

age or offense assuming 4th Amendment compliance

(3) Fingerprint files to be kept separate and may be subject to destruction

B. Search and Seizure

1. Most frequently cited exceptions and exclusions

a. Consent search -- Lecture #2

(1) Parent -- areas of common authority but not area of exclusive use

(2) School officials -- generally no authority to consent

b. Private party search -- Lecture #2

(1) Parent -- yes

(2) Public school teachers -- not private party -- New Jersey v. T.L.O, 469 U.S. ____, 105 S. Ct. 733 (1985)

2. Application

a. State v. Swenningson, 297 N.W.2d 405 (N.D. 1980) -- father's consent valid for son's room

b. School locker searches

(1) Consent by school official and private party exclusion -- probably not apply

(2) Reasonable suspicion -- new standard (Terry v. Ohio) -- New Jersey v. T.L.O., supra

(a) Need for search -- safety and discipline

(b) Teacher arguably in loco parentis

(c) Test: reasonable grounds that search will discover evidence and search related to objective

(3) Bomb threat -- exigent circumstances

III. Fifth Amendment

A. Miranda Warning

1. Not yet decided by U.S. Supreme Court but probably constitutionally required -- Fare v. Michael C., 442 U.S. 707 (1979)

2. N. Dak. -- required to give Miranda warnings

a. Statutory rights -- Sections 27-20-17, 27-20-26, 27-20-27, N.D.C.C.

b. In Interest of D.S., 263 N.W.2d 114 (N.D. 1978); Huff v. K.P., 302 N.W.2d 779 (N.D. 1981)

c. Compare State v. Red Paint, 311 N.W.2d 182 (N.D. 1980) -- private party questioning, therefore Chapter 27-20 not apply

B. Voluntariness Requirement

1. Totality of circumstances

2. Age and experience -- factors

IV. Waiver of Constitutional Protections by Juvenile

A. Fifth Amendment

1. N. Dak. -- child by himself arguably cannot waive Miranda protection

a. May waive with parent but without attorney if voluntary waiver and parents' interest not adverse to child's

b. Authority -- D.S., Huff v. K.P., supra, Chapter 27-20, N.D.C.C.

c. Query -- does Chapter 27-20, N.D.C.C., apply if no juvenile proceedings initiated?

2. Fare v. Michael C., supra (1979) -- parent not required by U.S. Constitution for juvenile to waive

3. Parents' right to waive

a. Constitutional protection are personal to juvenile

b. Parent and child should be allowed to confer and warning should be in parent's presence

B. Fourth Amendment

1. Schneckloth v. Bustamonte, 412 U.S. 218 (1973) -- should apply -- Lecture #2

2. Caveat -- Section 27-20-26, N.D.C.C. -- requires counsel (or parent) at all "stages of proceedings"

V. Electronic Bugging and Related Matters

A. Use of Undercover Agents

1. Generally recognized as necessary but there are constitutional limitations:

a. 4th Amendment -- entry into dwelling upheld based upon consent -- "misplaced reliance" rule -- State v. Goeller, 264 N.W.2d 472 (N.D. 1978) -- Lecture #2

b. 5th Amendment -- usually no Miranda problem because no "custodial" interrogation

c. 6th Amendment -- i.e., right to counsel -- generally cannot use informant once defendant charged and represented by counsel -- Massiah v. U.S., 377 U.S. 201 (1964) -- Lecture #7

d. 14th Amendment -- i.e., due process (fairness) possible limitation

e. Caveat: statutory question of entrapment Section 12.1-05-11, N.D.C.C.

2. Application

a. Hoffa v. U.S., 385 U.S. 293 (1966)

b. Weatherford v. Bursey, 429 U.S. 545 (1977)

B. Electronic Eavesdropping and Surveillance

1. 4th Amendment applies to "bugging devices" and wiretaps -- Berger v. New York, 388 U.S. 41 (1967) -- and must be complied with

2. Even if no "physical trespass" into area bugged -- Katz v. U.S., 389 U.S. 347 (1967) -- Lectures 1 & 2

3. However, 4th Amendment does not apply to wiring a 3rd party or wiring an undercover agent because of "misplaced reliance" rule

a. U.S. v. White, 401 U.S. 745 (1971)

b. U.S. v. Caceres, 440 U.S. 741 (1979)

C. Application and Misc. Problems

1. 4th Amendment does not apply to use of pen registers -- Smith v. Maryland, 442 U.S. 735 (1979) -- Lecture #2

2. "Beeper" -- cases are by no means clear

a. Minority of cases find no 4th Amendment violations

b. Most distinguish installation from the monitoring

(1) Installation

(a) If beeper attached before defendant acquires ownership -- installation likely okay warrantlessly -- U.S. v. Knotts, 460 U.S. 276, 103 S. Ct. 1081 (1983); U.S. v. Karo, 468 U.S. 705 (1984) -- see also Lecture #2, but monitoring may require warrant

(b) Installation of beeper on exterior of automobile likely okay -- see Cardwell v. Lewis, 417 U.S. 583 (1974) -- Lecture #2

(c) Interior of auto or other conveyance (e.g., airplane) may require authorization to install, see, e.g., U.S. v. Butts, 710 F.2d 1139, (5th Cir. 1983), rev'd by en banc majority, 729 F.2d 1514 (1984), cert. denied by U.S. Sp.Ct., unless strong Carroll Doctrine case exists; see Lecture #4 supra

(2) Monitoring

(a) Open fields or on public way -- 4th Amendment not involved -- see U.S. v. Knotts, supra; see also Lecture #2

(b) If beeper used to monitor location within private residence or similarly protected areas -- prior authorization likely required -- U.S. v. Karo, 710 F.2d 1433 (10th Cir. 1983), rev'd, U.S. v. Karo, 468 U.S. 705 (1984)

c. Prudent police officer would obtain warrant or prior court approval

3. Statutory law may also have to be complied with

a. Title III of Omnibus Crime Control and Safe Streets Act (1968) -- provides for electronic eavesdropping with court order -- not apply to beepers or pen registers because do not transmit speech

b. No North Dakota statute regarding electronic surveillance or bugging

LECTURE NO. 8

PROBLEMS

A. In January of 1979, a Bismarck home was burglarized and jewelry and silverware were reported missing. During the course of the investigation, a juvenile was questioned. He informed police that he and the defendant, an emancipated 19-year-old male, had committed the burglary. He also indicated that some of the stolen property was still at Gerald's residence. After obtaining this information, the police went to Gerald's residence which was also his father's home. Gerald's father gave the police written permission to search his home and the jewelry and silverware were found in Gerald's bedroom. Testimony at a subsequent suppression hearing revealed that Gerald's father had his permission to enter his bedroom at any time but had never done so. The evidence also indicated that the defendant had paid rent to his father after the search in question for his room.

(Any 4th Amendment problem?)
State v. Swenningson, 297 N.W.2d 405 (N.D. 1980)

B. On December 10, 1976, a 16-year-old girl was reported missing by her parents. During the morning of May 5, 1977, a body was found floating in a culvert in south Fargo which was later identified as the body of this girl. D.S., a 15-year-old juvenile, was the prime suspect. On May 4, 1977, D.S. had been taken into custody by the Fargo police at the request of his parents. D.S. was subsequently charged on a petition with the delinquent act of criminal mischief for causing damage to his parents' home. On May 6, 1977, the juvenile was interrogated by two law enforcement officers after attempting unsuccessfully to contact the juvenile's parents. The juvenile was interrogated at the Cass County Sheriff's Office Conference Room and the juvenile was advised of his Miranda warnings and that he could have his parents present. D.S. subsequently confessed and a search warrant was issued later that day for the murder weapon. Upon termination of the interrogation, a state's attorney's inquiry was immediately held where the juvenile again repeated his confession after given his Miranda warnings.

(Any 5th Amendment violation?)
In Interest of D.S., 263 N.W.2d 114 (N.D. 1978)

C. Reconsider Problems E & F, Lecture #2.

SIXTH AMENDMENT

LECTURE NO. 9

6TH AMENDMENT -- RIGHT TO COUNSEL; EYEWITNESS IDENTIFICATION

I. Right to Counsel

A. When Accused has Right to Counsel

1. Stated -- after time that judicial proceedings have been initiated against defendant, "Whether by way of formal charge, preliminary hearing, indictment, information, or arraignment, or at every 'critical stage' of the criminal process"

2. Application

a. Right to counsel

(1) Custodial interrogation -- Miranda v. Arizona, 384 U.S. 436 (1966)

(2) Post-indictment line-ups -- U.S. v. Wade, 388 U.S. 218 (1967)

(3) Preliminary hearings -- Coleman v. Alabama, 399 U.S. 1 (1970)

(4) Juvenile justice process -- In Re Gault, 387 U.S. 1 (1967)

(5) Trial -- Gideon v. Wainwright, 372 U.S. 355 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972)

(6) Sentencing -- Moore v. Michigan, 355 U.S. 155 (1957)

(7) Appeal -- Douglas v. Calif., 372 U.S. 352 (1963)

(8) Violation of probation -- Mempha v. Rhay, 389 U.S. 128 (1967)

(9) See also Section 29-05-20, N.D.C.C.

b. Indigent defendants

(1) Felony cases -- entitled to counsel at every stage of proceedings

(2) Misdemeanor cases -- entitled to counsel unless sentence will not include imprisonment

(3) Authority -- Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, supra (1972); Rule 44, Crim. Rules

(4) Caveat -- Baldasar v. Illinois, 446 U.S. 222 (1980) -- uncounseled misdemeanor conviction cannot be used under enhanced penalty statute; see also State v. Orr, 375 N.W.2d 171 (N.D. 1985)

c. No right to counsel

(1) Taking blood samples, handwriting, fingerprints, voice samples, photographs

(2) Grand jury witness

(3) Pre-indictment line-up -- Kirby v. Illinois, 406 U.S. 682 (1972)

(4) Post-indictment photo display -- U.S. v. Ash, 413 U.S. 300 (1973)

B. Waiver

1. Right to counsel -- can be waived by "knowing and intelligent" waiver

2. Caveat -- juvenile cases in North Dakota -- In Interest of D.S., 263 N.W.2d 114 (N.D. 1978) -- Lecture #8

II. Eyewitness Identification

A. Line-ups

1. Right to counsel -- 6th Amendment

a. Applicable to post-indictment line-ups -- U.S. v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967)

b. Not applicable to pre-indictment line-ups -- Kirby v. Illinois, 406 U.S. 682 (1972)

2. Line-up cannot be "unnecessarily suggestive" -- Stovall v. Denno, 388 U.S. 293 (1967) -- due process (14th Amendment); Manson v. Braithwaite, 432 U.S. 98 (1977)

3. Significance -- exclusionary rules

a. Right to counsel violation -- per se exclusion of pre-trial id. but not trial id. if otherwise okay and witness can id. defendant

b. "Suggestive" line-up not per se rule but totality of circ. test -- if id. based upon "independent source," trial id. o.k. if witness can id. defendant

4. Application

a. Right to counsel -- line-ups before formal charge probably o.k. without counsel

b. "Suggestiveness" problem -- one person "show-up"

(1) Confrontation occurring shortly after crime (at scene) not favored but usually upheld:

(a) Early id. usually not in error

(b) Need to apprehend correct person asap

(2) Accidental confrontation -- o.k. if truly accidental

(3) Non-custodial confrontation, i.e., witness goes to defendant's place of work at police suggestion not favored

(4) Courtroom confrontation -- not favored

(5) Emergency confrontation -- Stovall v. Denno, supra (1967), i.e., at hospital -- probably o.k. if true emergency

B. Photographic Identification

1. No right to counsel whether pre or post-indictment -- U.S. v. Ash, 413 U.S. 300 (1973); State v. Lewis, 300 N.W.2d 210 (N.D. 1980)

2. Photos also cannot be "unnecessarily suggestive," i.e., due process limitation of Stovall -- Simmons v. U.S., 390 U.S. 377 (1968)

3. Test -- same as for line-ups

4. Application -- one photo "show-up" should not be used but rarely reversal -- State v. Denny, 351 N.W.2d 102 (N.D. 1984); State v. Denny, 350 N.W.2d 25 (N.D. 1984); State v. Azure, 243 N.W.2d 363

(N.D. 1976); Manson v. Braithwaite, supra (1977); State v. Bruggeman, 263 N.W.2d 870 (N.D. 1978) [id. at trial not tainted by earlier photo show-up]

C. Identification Procedures -- Line-ups and Photos

1. Test -- not one of perfection

2. No. of people or photos

a. Cases range from 4 to 10; 6 or 7 o.k.

b. General rule -- the fewer people -- less reliable the procedure

3. Look-alikes

a. Closer the resemblance -- more reliable the procedure

b. State v. Lewis, supra (N.D. 1980)

c. Generally not necessary that all look-alike as long as defendant is not singled out

4. Police cannot make comments about any person or photo; also improper to have witness "pick again"

5. Separation of witnesses making Id. recommended

D. Line-ups and Relationship to 4th and 5th Amendments

1. 5th Amendment -- no violation; U.S. v. Wade, supra (1967); Schmerber v. Calif., supra (1966) -- Lecture #7

2. 4th Amendment -- must be complied with

a. U.S. v. Crews, 445 U.S. 463 (1980) -- illegal arrest but "independent source" test satisfied so in court id. allowed; State v. McCabe, 315 N.W.2d 672 (1982)

b. Suspect may be required to participate in line-up on less than probable cause but court order required; see, e.g., State v. Hall, 461 A.2d 1155 (N.J. 1983); Baker v. State, 449 N.E.2d 1085 (Ind. 1983)

E. Expert testimony

1. State v. Fontaine, 382 N.W.2d 374 (N.D. 1986) -- should be consulted concerning use of expert witness to challenge accuracy of eyewitness testimony

LECTURE NO. 9

PROBLEMS

A. In October, 1978, Donna, a restaurant employee at A & W in Bismarck, was robbed while sitting in her car in the restaurant parking lot counting her tip money. Three other employees while leaving the restaurant also witnessed the robbery. Donna testified at trial that she felt something being thrust in her ribs, she looked up and saw the defendant who asked her for her money. She subsequently gave him $12.00 and he stated, "Kiss me like you love me and don't say anything." After this embrace the victim and the three witnesses called the police and gave them a general description of the person that committed the robbery. The description included a medium to tall, slim black man with a beard and wearing dark clothing. The defendant was subsequently arrested in Mandan based upon this description. On the same evening, a photographic display was shown to the victim and three witnesses. The display consisted of seven color photographs of black men. One of the photographs was of the defendant whereas two of the remaining six photographs were of the same man. The defendant's photograph was the only one with facial hair and no glasses. Each of the witnesses viewed the photograph separately and two out of the four were able to identify the defendant.

(Was the photographic display impermissibly suggestive under the circumstances present in this case? Was it necessary that the defendant be represented by an attorney?)
State v. Lewis, 300 N.W.2d 210 (N.D. 1980)

B. Fred Wilson, a native of Devils Lake, North Dakota, was robbed in May of 1974 near the Presbyterian Church. At approximately 5:00 p.m., Mr. Wilson was coming up from the basement of the church when he saw the defendant. The defendant grabbed him and threatened to kill him unless he gave him some money. Wilson tried to escape and the defendant held and choked him. The defendant subsequently dragged Wilson across the street into an alley at which time Wilson blacked out. When he came to, he noticed that his glasses were gone, that he had been beaten and robbed. Wilson called the police and the defendant was arrested shortly thereafter based upon Wilson's description. Forty-five minutes after Wilson's initial trip to the police station, he returned to identify the defendant. The defendant was in a cell at the station at that time and was without counsel. Wilson identified the defendant at that time.

(Any 6th or 14th Amendment problem with this identification?) What happens if Wilson cannot identify the defendant at trial?)
State v. McKay, 234 N.W.2d 853 (N.D. 1975)

C. In March, 1980, a shooting occurred at the Biltmore Motor Motel in Fargo. The defendant was taken into custody at the scene of the crime which was a room in the Biltmore Motel. Numerous witnesses gave statements on the evening of the shooting which included a description of the defendant. A few days later these witnesses were interviewed at length and were shown one photograph of the defendant which they all identified.

(Any problem with this one person photographic line-up? What happens at trial if the witness cannot identify the defendant?)
[See Lecture #7, Problem E]

D. Is this line-up impermissibly suggestive?