



Constitutional Law in One Hour

DATE: Monday, October 31, 2022
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MCLE: 1.0 Professional Practice

This program has been approved for credit in
New York State for all attorneys
including those who are Newly Admitted
(less than 24 months) and administered by
the Onondaga County Bar Association.

PRESENTERS

Peter DeLucia currently serves as the Principal Court Attorney to the Hon. Joseph F. Cawley, Broome County Court. Previously he served as an Assistant Attorney General at the Binghamton Regional Office of New York State Attorney General Letitia James and as an Assistant District Attorney with the Broome County District Attorney's Office, handling the prosecution of misdemeanor and felony level cases. Mr. DeLucia was also previously employed as a litigation associate with two Binghamton-area law firms. Mr. DeLucia is a 1995 graduate of the University of Notre Dame and a 2001 graduate of Albany Law School of Union University.

Joshua S. Shapiro Esq. is the Special Counsel for the Town and Village Courts to the Administrative Judge of the Sixth Judicial District. In that role he primarily works with the District Supervising Judges, providing support and assistance to the 174 Town and Village Courts located within the Sixth District. Prior to that position Joshua spent 11 years as an Assistant District Attorney, beginning his career with the Suffolk County District Attorney and ending with the Broome County District Attorney, where he prosecuted violent felony offenses and homicides. During his career he has tried numerous criminal cases in Village, Town, District, County, and Supreme Courts in both Suffolk and Broome counties, running the gamut from simple misdemeanors up to and including murder cases. Joshua graduated from Binghamton University in 2003 and earned his JD from the University of Richmond School of Law in 2006. Joshua is admitted to practice law in New York State.

State and Federal
CONSTITUTIONAL LAW

Selected Criminal Law Topics:
Fourth, Fifth and Sixth Amendment

Quick Recap

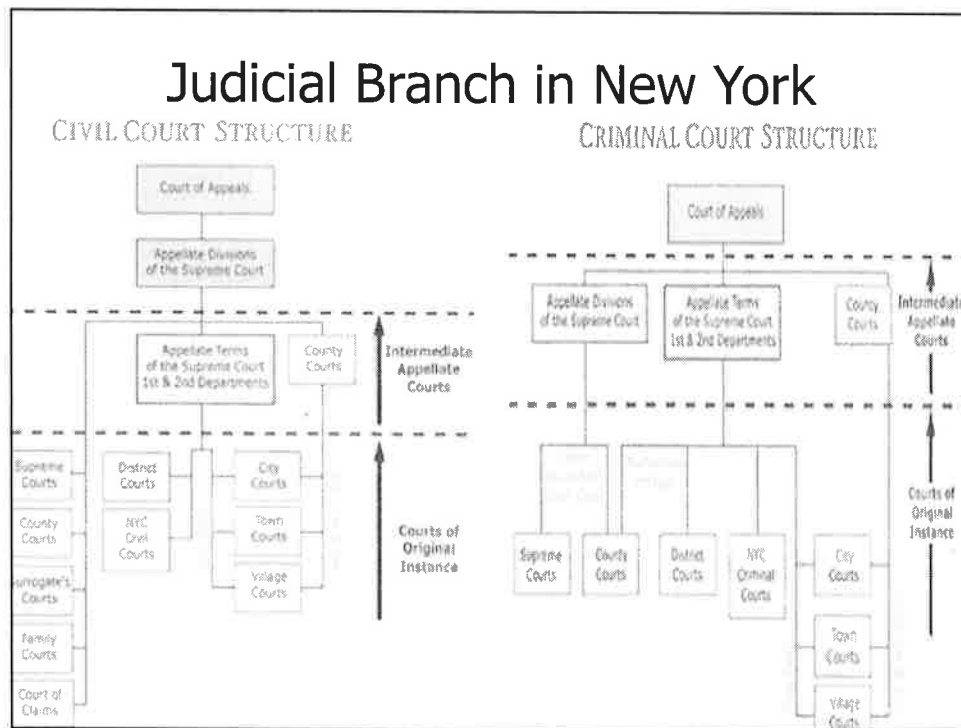
United States Constitution

v.

New York State Constitution

Three Branches of Government

- Legislative Branch (Congress)
- Executive Branch (President)
- Judicial Branch



New York State Constitution Article VI Section 17

- Town, village and city courts jurisdiction
- Regulation by the Legislature

The Bill of Rights

- **The Due Process Clause:**
- Through a series of court decisions during the early-mid 20th century, the Supreme Court held that the 4th, 5th, and 6th amendments applied to the states
- Mapp v. Ohio, 367 U.S. 643 (1961) (Unreasonable Search & Seizure);
- Augilar v. Texas, 378 US 108 (1964) (Warrant requirements);

The Bill of Rights

- **Selective Incorporation (Continued):**
- Benton v. Maryland, 395 US 784 (1969) (Double Jeopardy);
- Malloy v. Hogan, 378 US 1 (1964) (Right against Self-Incrimination);
- Klopfer v. North Carolina, 386 US 213 (1967) (Right to a speedy trial);
- Parker v. Gladden, 385 US 363 (1966) (Right to an impartial jury);
- Pointer v. Texas, 380 US 400 (1965) (Right to Confront Witnesses);

The Bill of Rights

- **Selective Incorporation (Continued):**
- Gideon v. Wainwright, 372 US 335 (1963) (Right to Counsel);

THE FOURTH AMENDMENT

US Constitution: 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

THE FOURTH AMENDMENT

NY Constitution: 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.

Can you spot the differences?

- Clue: The language is the same

The Great State of New York

- Affords substantially more protection to its citizens under the Fourth Amendment of the New York State Constitution than the federal government does under the Fourth Amendment of the United States Constitution...
- Even though the language is identical!

Search and Seizure under the 4th Amendment

- HUGE TOPIC: This is a refresher.

Focus

- Generally, a search without a sufficient warrant is INVALID
- Result: suppression of all evidence obtained as a result of search and all evidence derived from that evidence. "Fruit of the poisonous tree."
- Practical reality: Case may be dismissed
- Why? To deter unlawful police action

True Story



Search

- A "search" is a government intrusion on a reasonable expectation of privacy.

Seizure

- "A significant interruption of a person's liberty of movement as a result of police action." People v. Cantor, 36 NY2d 106 (1975)
- Factors:
 - Duration of interaction
 - Wording of questions
 - Weapon drawn
 - Lights or sirens used
 - Location

Exceptions to the Warrant Requirement

- Exigent circumstances
- Emergency
- Search incident to a lawful arrest
- Consent
- Abandoned property
- Plain view
- Vehicle searches (addressed later)

Exigency

- When there is not enough time to obtain a warrant...
- Only where: prevention of imminent use of dangerous weapons or to prevent the potential destruction or removal of evidence
- "Hot Pursuit" Where a search and arrest take place immediately after commission of a crime (not traffic infraction), the suspect can be pursued into his home and located / arrested where exigent circumstances justify immediate entrance.
- "Protective Sweep" Quick, limited walk through of home in areas where a person could be.
 - Must have facts to believe someone on the premises poses danger to the officer or is destroying evidence.

Emergency

- OK to effect warrantless entry to investigate a substantial threat of imminent danger to life or property where:
 - (1) Reasonable grounds to believe an emergency exists and there is an immediate need for protection of life or property
 - (2) Search is not primarily motivated by intent to arrest and seize evidence
 - (3) Some reasonable basis (like PC) to associate the emergency with area to be searched

Search incident to lawful arrest

- An arrestee and the immediate area around him ("grabbable area") may be searched at time of arrest.
- Justified because:
 - (1) Safety of arresting officer to search and seize weapons
 - (2) Preservation of evidence within suspect's reach if:
 - (a) Contemporaneous in time with arrest
 - (b) Limited to defendant's "grabbable area"

Search Incident to Lawful Arrest: Cont.

- Does NOT extend to any bags or containers UNLESS:
 - (a) Arrestee is armed, or
 - (b) Necessary to prevent destruction of evidence

Strip search: Only when there is reasonable suspicion to believe arrestee is hiding contraband beneath clothing

Body cavity search: Need warrant

Consent search

- Need Level 2 Founded suspicion
- Valid substitute for PC / warrant, but must be knowingly and voluntarily made
- People bear "heavy burden" or proving consent at suppression hearing beyond a reasonable doubt
- Co-tenants: Police may search dwelling / apartment / house after receiving consent from one co-tenant
UNLESS:
 - (a) Other co-tenant is present at the time AND
 - (b) Other co-tenant specifically refuses consent-Landlord cannot consent without a tenant's consent

Consent Search- cont.

- Factors for Courts to consider regarding voluntariness of consent:
 - (1) Custody
 - (2) Background of suspect
 - (3) Threats or pressure
 - (4) Promises
 - (5) Deception
 - (6) Informed suspect
 - (7) Physical violence

Is there proof of WRITTEN CONSENT?

Abandoned property

- Voluntary and intentional relinquishment of a know privilege / right
- Property that is abandoned by defendant can be lawfully seized and an arrest may be predicated on defendant's prior possession of abandoned property
- If property abandoned as a result of improper police conduct, then SUPPRESSION
 - Example: Chase after flight in Level 1 or 2 situation

Plain View

- Not as simple as it sounds
- Can seize an item in "plain view" without warrant only if:
 - (1) Lawfully in position to observe item
 - (2) Lawful access to item when seized
 - (3) Incriminating character of item is immediately apparent

Police v. Citizen Encounters: People v. DeBour

- There is in NYS a 4 level test for police and citizen encounters
- Created to clarify the rules for police?!

DeBour: Level 1: Approach to Request Information

- Brief, non-threatening request for generic information supported by objective, credible reason (non necessarily criminal): "articulable basis"
- Cannot ask to search
- Cannot pursue in the event of flight
- Name, address, destination, reason for being in area
- Test: Whether a reasonable person in the defendant's situation would have believed he was suspected of wrongdoing?
- Citizen can refuse to answer or walk away!

DeBour: Level 2: "Common Law Right of Inquiry"

- Further questioning of our stopped citizen if: "Officer has a founded suspicion that criminal activity is afoot."
- What does that mean??
- Additional facts or circumstances that would lead a reasonable person to believe criminal activity is taking place
- Still cannot: stop / detain / pursue
- Citizen can refuse consent, refuse to answer questions and walk away
- Can: ask for consent to search (including containers), ask more pointed / accusatory questions
- What counts?
 - Material lie? Founded suspicion
 - Minor discrepancy on unrelated matter? NO

DeBour: Level 3: Stop and Frisk

- If a police officer has reasonable suspicion that a person has / is / or about to commit a crime (felony or misdemeanor), he can forcibly stop and detain an individual
- Can also hold person for show-up; transport to show-up; pull over car
- Frisk? Only if stop was for violent crime OR reasonable apprehension that suspect possesses weapon. Then, can only frisk for weapon, not drugs or contraband! No plain feel in NYS.

DeBour: Level Four: Arrest

- Must be based upon "reasonable cause" (same as what is typically referred to as "probable cause") that a crime has / is / about to be committed.
- "'Reasonable cause' exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and such person committed it."

Automobile Stops and Searches

- Automobile stop = seizure
- Less of an expectation of privacy in a motor vehicle
- Generally, stop must be predicated on:
 - (1) V & T infraction
 - (2) Reasonable suspicion of a crime
 - (3) Lawful roadblock
- Was the car stopped / parked? It makes a difference.

Automobiles Stops and Searches: Stopped / Parked Vehicles

- If stopped / parked: apply DeBour analysis
- If the car you approach is stopped, you do NOT need reasonable suspicion to approach / or a traffic infraction!
- It is easier to approach and question a stopped motorist than a moving one. Why? Stopping a moving car is a greater intrusion on a person's rights.

Automobile Stops and Searches: Traffic Infraction and Pretext Stops

- Car may be stopped when police have reasonable suspicion to believe the motorist committed a traffic infraction or a crime.
- Traffic stop's duration must be reasonable and can't extend merely to investigate unrelated crimes.
- Pretext stop OK where police have reasonable cause to believe traffic infraction committed. Officer's subjective motivations are irrelevant.

Automobile Stops and Searches: Roadblocks

- A roadblock is a seizure and must be set-up in a non-arbitrary, non-discriminatory, uniform procedure.
- It must further a legitimate governmental interest and can't be used for general crime control.
- Be prepared to justify the roadblock set-up, uniform procedures, and targeted crimes / reasons.

Automobile Stops and Searches: Vehicle Searches

- Warrant exception due to lessened expectation of privacy in motor vehicle.
- Three general bases for auto search:
 - (1) Automobile exception: If there is reasonable cause (probable cause) to believe the vehicle contains contraband, police may search vehicle . Cannot search vehicle or driver based solely on a VTL violation!
 - (2) Consent: Consent to search may be requested where a "founded suspicion of criminal activity is afoot." Remember DeBour Level 2
 - (3) Vehicle inventory

Automobile Stops and Searches: Vehicle Searches: Cont.

- Search incident to arrest? Only if defendant is NOT secured and within reaching distance of vehicle, or there is reasonable belief that the evidence of the offense of arrest might be found in the car. Arizona v. Gant
- Pursuant to a lawful traffic stop and "founded suspicion" (DeBour Level 2), police may have dog sniff car.

Automobile Stops and Searches: Inventory Searches

- Do you have an inventory policy that limits your search discretion or directs that a search be conducted in a specific manner?
- If yes— impounded car may be inventoried and resulting contraband charged to occupants without warrant / consent / etc.
- Why? Safeguards property; protects against false claims; protects from danger.

Inevitable Discovery

- Exception to general rule of suppression where evidence is obtained illegally when prosecution can show that the evidence would have been found anyway through the use of regular / routine police procedures.
- New York: Applies only to secondary evidence.
-Example: People v. Stith, 69 NY2d 313 (1987):
Gun inadmissible.

The Fifth Amendment

- The right against self-incrimination
- But what else??

The Fifth Amendment

- 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 in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fifth Amendment

- The Right to Prosecution Via Grand Jury:
- All felony prosecutions in New York must be by Grand Jury Indictment unless the defendant consents to prosecution via a Superior Court Information

The Fifth Amendment

- The Right against Double Jeopardy

Miranda v. Arizona

- Police may not engage in custodial interrogation of a suspect without advising him of his "Miranda Rights," that he has the right to counsel, and that he has the right to remain silent.

Miranda v. Arizona

- There must be “custody” and “interrogation” before Miranda is implicated.
- Custody: Whether a reasonable person in the same circumstances as the suspect would feel free to leave
- Interrogation: Are the questions of the type that a reasonable police officer would believe would produce an incriminating response?

Miranda Hypotheticals

- Q: Defendant has been pulled over for V&T violations. The officer smells alcohol on his breath, his speech is slurred, and his eyes are bloodshot and glassy. He is not free to leave. Must the Police Officer Mirandize him before questioning him further?
- A: No. Mere “investigatory questioning” aimed at clarifying a situation, such as pursuant to a V&T stop, has been held to be non-interrogatory.

Miranda Hypotheticals

Q: Defendant has been pulled over for V&T violations. The officer smells alcohol on his breath, his speech is slurred, and his eyes are bloodshot and glassy. He has been given, and has failed the HGN, the Walk & Turn, and the One-Legged Stand. The Officers have observed the defendant for fifteen minutes, and have now given him a PBT on which he has blown a .26. Should the defendant be Mirandized?

A: Probably. At this point, the defendant is almost certainly in custody, and the point of "mere investigatory questioning" has passed where the police and defendant know that he is certainly being arrested.

Miranda Hypotheticals

Q: Suspect is a person of interest in a homicide investigation. The police have asked the suspect to "come down to the station to answer some questions." The suspect agrees to. Must the suspect be mirandized before questioning can begin?

A: Probably not. As he has come to the police station voluntarily, the custody prong is not met at this point.

Miranda Hypotheticals

Q: Suspect is a person of interest in a homicide investigation. The police have asked the suspect to "come down to the station to answer some questions." The suspect agrees to. After some initial questioning, the suspect admits that he shot victim in the back four times, but claims that it was self defense. May the police continue questioning him?

A: No. At this point Miranda warnings should be given. No reasonable person in the same circumstances could be said to feel that he is free to leave after admitting to shooting someone in the back four times.

The Sixth Amendment

- 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 defense**

SPEEDY TRIAL

- In New York Governed by C.P.L. 30.30
- Prosecution has the following Time Periods to be ready for trial:
 - Felony: 6 Months
 - Class 'A' Misdemeanor: 90 Days
 - Class 'B' Misdemeanor: 60 Days
 - Petty Offenses: 30 Days
- No Speedy Trial Limitations for:
 - Murder, & Traffic Infractions

Right to a Jury in Criminal Cases

- In New York:
 - Felony Cases are tried by a jury of 12
 - Misdemeanor cases are tried by a jury of 6
 - Violations & Traffic Infractions are tried in front of a judge
- Exception: The Five Boroughs of NYC.

Right to be informed of the charges

- In Misdemeanor Cases, Accomplished by:
 1. Misdemeanor Informations
 2. Misdemeanor Complaints
 3. Prosecutor's Informations

- In felony cases, accomplished by:
 - Felony Complaint
 - Indictment
 - Superior Court Information

Right to confront witnesses

- Crawford v. Washington, 541 U.S. 36 (2004)
- CROSS EXAMINATION!!

The "Indelible Right To Counsel"

When has a Defendant's "Indelible" Right To Counsel Attached so that he may not be questioned without a lawyer?

Q: Defendant is in custody, is not represented by an attorney yet, and an accusatory instrument has been filed. Has his indelible right to counsel attached regarding these charges?

A: Yes. Once an Accusatory Instrument has been filed, the defendant may not be questioned about those charges.

When has a Defendant's "Indelible" Right To Counsel Attached so that he may not be questioned without a lawyer?

Q: Defendant is in custody, and has a lawyer on the instant case, and the police are aware that he has a lawyer. Has his Indelible right to counsel attached?

A: Yes. Once the Police are aware that the defendant is represented by counsel on the instant charge, he may not be questioned on those charges.

When has a Defendant's "Indelible" Right To Counsel Attached so that he may not be questioned without a lawyer?

Q: Defendant is in custody, and clearly and unambiguously asks for a lawyer. Has his Indelible right to counsel attached?

A: Yes. Once the defendant clearly asks for a lawyer, questioning must cease. However, if it is an equivocal request, questioning may continue.

When has a Defendant's "Indelible" Right To Counsel Attached so that he may not be questioned without a lawyer?

Q: Defendant is in Custody. When asked if he wants an Attorney, the defendant states, I don't know, do I need one? Has the indelible right to counsel attached?

A: No. A request for an attorney must be unequivocal.

When has a Defendant's "Indelible" Right To Counsel Attached so that he may not be questioned without a lawyer?

Q: Defendant is in Custody on an unrelated charge. The police do not know that he is represented by an attorney on that charge. May he be interviewed?

A: No.

When has a Defendant's "Indelible" Right To Counsel Attached so that he may not be questioned without a lawyer?

Q: Defendant is in Custody on an unrelated charge for which he has an attorney. He has not yet been arraigned, or he is in custody pursuant to a bench warrant. Has his indelible right to counsel attached?

A: No.

Right to Counsel

- Hurrell-Harring v. New York, 15 N.Y.3d 8 (2010);

Motion Papers

- What must they contain??

Suppression Hearings

- Burden of proof
- Is hearsay admissible??

Questions??