**Con Crim Midterm Review – 1.26.21**

**Well first of all before we do that let's just talk generally this exam shouldn't freak anybody out if you know the material I keep kind of thinking I kind of like the way Glenn builds it up to make it sound like just this horrifying experience if you talk to people who've been through it it hasn't been for them I don't think I will say that the I think the biggest challenge for you guys right now is being first years is learning how to do this I also have not yet met a student in the second year who doesn't say man your class was a lot easier than I remember second year sucks so I think the big difficulty here is just learning how to how to do this how to you know you're learning it in two classes that I'm aware of tordsen torts and crim and I don't I've never taken Marshall davidson's class but I think they're similar enough so having said that nobody is born knowing how to do this you shouldn't feel bad that you weren't born knowing how to do this so we're going to learn and don't be intimidated just know the material what I've done is I made an outline I made it quick in response to one of these a couple years ago and I've updated it a couple of times since then there are better ways to do it in different ways to do it but I wanted to find a way to organize the material to where it makes sense for me let me check the way for quick make sure nobody's waiting OK so I'll show and I'm going to go through the outline and show you what I've got can you guys**

**About the statement Daniel case which is the one where the cop took the license of the kids or young people I guess is in my mind they're young I don't remember but and the question was so is it illegal win for the cop to ask or is it only illegal for the cops to take the license and I thought that's a good question it's but it also shows how to think about it differently the question is not bad cop versus good cop here the question for the court was particularly when was it seized when was the person seized and so that's kind of some of the thinking you have to learn how to do here alright I'll show you what to do for the first couple of chapters first couple of classes we did some general stuff you should know the general stuff that is that the constitution has a Bill of Rights those are the first 10 amendments The United States constitution the default is that it applies in federal court and the US Supreme Court is the ultimate arbiter that the Tennessee constitution applies in the state the Tennessee Supreme Court is arbiter and the Tennessee constitution we said can provide greater rights not fewer then the federal constitution that becomes important in some of the search and seizure issues I'm not going to go three through these parallel provisions you should know what they are that's an easy one 'cause you don't have to understand anything you can just memorize it so I would know that and then the only point I'm going to make on this outline is that pre trial release in Tennessee everybody gets bail everybody gets bail set except capital defendants we have more time I could talk about the Capitol Hill rioters and why so many of them are bonding out but their federal defendants and so they don't all get bail but there's a totally different standard we're not going to go into that then we talked about due process I think if I remember right I'm actually going to record this class so we have a record there**

**Fancy phrase and what we said we went through some of those cases is that there's different ways to look at incorporation one is all one view of the courts was that all that that that due process the 14th amendment means that all of the rights that normally apply to the federal constitution also apply to the states that's one view it's called total incorporation then there was a view fundamental incorporation saying hey any right included in the Bill of Rights considered fundamental applies to the states and then there's another view selective incorporation which just says we just pick and choose and that's not separate than fundamental it's just a different way of looking at it when i can say about due process thus far is that**

**For a long time really the last 100 years the court was saying well it doesn't mean every single thing in the Bill of Rights applies it means only those things that we consider fundamental OK for 100 years we didn't know if the Second Amendment applied in state court would that prohibit the state of Tennessee from outlawing let's say certain kind of handguns we found out more recently that the current version of the United States Supreme Court considers the second member fundamental but we didn't know until we knew yes Sir you got it yeah thank you yeah I mean if you don't understand it either call me email me I can talk more about it or read that chapter in the book because it really explains it pretty well OK thank you yeah you got it yes Sir OK also wouldn't get too caught up in these different definitions of what it is what you should know is that it was going to give and it's never been a given thus far that every single right in the United States the constitution applies to the states some people thought that's what the 14th amendment said was due process mean it means if anything everything in the constitution other people said no it has kind of a separate meaning that case DA versus Osborne and I'm talking everybody not just the person who asked the question DA versus Osborne talked about freestanding due process and they just talked about this this idea of fairness that's what we call substantive due process you're not going to get an essay question on describe all the different types of due process you're just not we didn't cover it enough there are lower review articles that could bend your face off if you want to read about that and study it for a living but but you should know the big idea and then we did start talking about the 4th amendment and I've got it quoted there but you know I called it lots of classes the first thing the way out organized this is I think a lot of the cases and this is going to be not these cases they're not going to end up in the exact same order as you studied because I organized it a little bit different than that you can organize it I think the table of contents you know is a pretty good organization but I did it a little bit different define the probable cause and remember it's an objective test two things whether a crime has been committed and evidence will be found in in a particular place to be searched at least we talked about Aguilar spinelli this is one of those circumstances where people say well that used to be the law but gates is now the law why should we have to know Aguilar spinelli and the reason you have to know it is because it defines those two prongs and we still talk about those in state and federal court in fact Illinois V gates which rejected Aguilar spinelli and ultimately said fatality in circumstances was the approach some people including my criminal procedure professor referred to gates as strong prong week prompt in other words the two prongs still had to be there but it could be one strong and one week I think that's an overstatement but whatever Aguilar spinelli said there have to be 2 prongs the basis to the informants knowledge and the veracity or truthfulness gates replaced that and said no it's really a totality of the circumstance which is very hard as we talked about you know if you're police officer trying to say do we have probable cause based on this informant how do you say yeah because it's a totality you don't know what a quartel do and when your defense lawyer trying to challenge it it's very hard to figure out you borrow was it yeah are there certain stipulations that do not go into the totality of circumstances like are there certain things that they do not look at at all like things that are just not needed. That's an interesting question I mean it's kind of like it wouldn't very well be called the totality if it didn't include everything right but you're probably right there's probably something some case somewhere he said you don't need to know that I mean I could imagine constructing a hypo and throwing out some weird fact like it was 4:00 o'clock in the afternoon and maybe that wouldn't be relevant to the totality of the circumstances but but it could be so no I don't know of anything particular but because it's the totality right OK included yubara you don't have I am thank you I included you borrow because I think it's a really good case even though I think it was either in a footnote or it was quoted in one of these cases it's a really good case that sort of explains that probable cause is personal in that case it was actually probably reasonable suspicion but remember that I was the one where there were 50 people in the bar and they went in on I think probable cause or reasonable suspicion that the bartender was dealing if I remember right they patted somebody down and the question was could they do that if they knew the bartender was dealing and the answer was no they can't just Pat down the customers number one they didn't have reasonable suspicion as to the that customers choose to customer and two patter down is a separate analysis we learned in Terry do you think that person warm dear a I can't remember if that was in your text or not but I included it also both of these are also in the PowerPoints that I've shared on twin this is just showing that it's personal the snitch in that case singled out a guilty person and the court said hey it's specific it doesn't apply to the passenger who had not been identified Maryland V Pringle is the same way but kind of the opposite the court said it was enough to search because constructive possession and all that there were three people in the car they could all reach it then I talked about what's really the governing principle what are we protecting with the 4th amendment and that's where somebody asked the good question about cats this weekend remember that the phone booth the reason the phone booths in that some of you remember what those are the person had a reasonable expectation expectation of privacy that's the key phrase is there reasonable expectation of privacy and you get into some crazy arenas like you know could I film could I install a camera in your bathroom absolutely not that you have an expectation of privacy in your bathroom you would have one in a public toilet which is why even though you know the big Department stores won't catch shoplifters they don't typically put cameras in the changing rooms 'cause they couldn't and the police couldn't use it California be because you have an expectation of privacy not that the Department stores are mistake and then California beat Greenwood if you abandon your trash on the in front of your house like on the curb you are telling the world I'd no longer have an expectation of privacy in that trash right we got a question this weekend Glenn about the helicopter and somebody wanted to know students always want to talk about 400 feet versus 1000 for the airplane that's fair enough in that case a helicopter was flying at 400 feet and the court said that's OK because even though the defendant manifested an expectation of privacy it wasn't reasonable remember there are two problems you've got to manifest an expectation of privacy and it's got to be reasonable and it wasn't reasonable because helicopters can fly under 500 feet there was a case in Florida the rally that they talked about where an airplane they had the same analysis for an airplane flying at 1000 feet I wouldn't get hung up on the foot on the feet I mean the point is we don't know what 300 feet is and I think in Florida V rally the court did say you know it could be lower and it might be unreasonable I think they used the example of helicopter could be like surrounding offline over a particular house and maybe that wouldn't be reasonable but here commercial airspace clearly encompassed 400 feet professional water yeah I'm really sorry I have two questions about the trash and then the just basically your expectation of privacy if my trash is up against my house it is not necessarily like under a porch or anything we were looking at some hypotheticals couple days if it's just up against my house in my driveway but not necessarily like roped off or anything would it still be considered like able to be searched without a warrant hold that thought 'cause we're going to get exactly to that hypothetical at the end OK that was there that was one of the essays that was included in one of the essays I did last midterm last year and so I included it here and I just wanted to walk you through an essay OK and then my second question hopefully quickly as well going back to the phone booth situation obviously when the phone booth situation took place laptops and things were not necessarily predominant at the time so at this point would a laptop sort of fall underneath that umbrella as well like is there an expectation of**

**I have a general question OK are we expected to know the case names no good question I'm terrible with case names some of you right now could throw out a case that I know well and if you said just the name I'd have to stop and think about it or look at us sometimes it's handy as a shorthand I would encourage you if your memory allows you to do that to do that but if you're like me and are terrible with names like that then I'll show you at the end when we do a discussion case how to do it very thank you where were we Oh yeah the helicopter OK and then Jones was this weird case it's almost like that case in attenuation that you think you know how it's going we were all curious we were watching Jones I don't know when it was it was in the last 10 years because there was this GPS unit on a car and we thought man that's bad because the only thing the GPS unit tells like a dog sniff right the only thing it tells you is where the person is going it's not a search and if we had enough cops they could follow you everywhere so a lot of us in the defense community thought it's going to be a bad case and the US Supreme Court came out with this crazy case that said ah it is a search but not because it reveals private information but because it's private property that they stuck something on none of us had ever thought about or taught or learned the trespass theory so don't worry about it don't worry about knowing it it would be stupid to test but no that is a case that's out there back to miss Curtis is question about the trash up against the house remember where the police took a dog on a porch you know we know that dogs aren't necessarily searches if they sniff you as you're walking down the street and they smell weed and somehow communicate to their owner I smell weed which they do by you know sitting down or standing up or whatever it is with cop says that they do but when the police took a dog on a porch they said no that's that's too much homes are inviolate remember we get to the Peyton case where homes are a totally different thing right and so that the porch is in the curtilage which law schools the only time you'll ever hear that word in your whole life but the curtilage which is the area immediately surrounding so miss Curtis I think you're situation where the trash is up against the house I think that's a good question in my opinion that probably depending on where it is falls within the curtilage but I can see if your trash was halfway down the driveway your lawyer in the DNA fighting in court trying to say no it's more like trash and the the dyay saying it's more like abandoned trash and the defense lawyers say no it's more like curtilage but you know that's a good question US versus white said no warrant was necessary for an informant overhearing why somebody had a great question about that over the weekend or over the last week asking me if how can we how can we you know aren't we letting the cops bypass the 4th amendment when we just let let me just send informants places that's a great question and we'll talk about that more after the exam we've got a whole section on that zirker that was the case that said you know they there was a search warrant for this was I think the college newspaper and there was a riot there was evidence in the college newspaper pictures of the riot they wanted a search warrant and what the case really stands for is that you don't have to be a criminal for them to search it just has to be evidence and by the way the 1st amendment which a lot of people were upset about in this case like you know it's really bad if fully start searching journalist that just looks like a totalitarian state but but the court said now that doesn't matter when they can still get a search warrant there's evidence of a crime and then we talked about the warrant requirement you can already see if you're following this that there are lots of different ways to organize this this is just how I did it warrants are required unless there's an exception for searches or seizures probable cause judges decide whether probable cause exists and there's a particularity requirement the whole point is to prevent against general searches that is against something that maybe happened in old England or something because there's a lot of stuff written about general searches and that's what the 4th amendment was designed to prohibit so we include a particularity requirement which means particularly describing the place to be searched the person to be seized and then we did a couple of cases Maryland V Garrison that was the one where the police thought there was one apartment but there were actually two and they went to the wrong one and got the drugs and the the court said it's OK it was just a reasonable mistake also they were really good cops they stopped when they realized I also said did a separate number for manner of service this building it fits under how we serve warrants two and at that same case but Richards V Wisconsin came up there which was the case that said if you remember wiscconsin had this theory that you have to knock and announce that's part of the 4th amendment but not in drug cases with every drug case is always dangerous and the Supreme Court upheld the search in this case with either and I don't know if it was a no knock warrant they just ignored it but but they upheld the search and they say in doing so they said look the knock and announce rule is affirmed unless police have a reasonable suspicion that it would be dangerous or futile so there is still not going to announce rule but it gets more and more toothless and you guys know later we take the exclusionary rule out of the knocking announce rules oh man it's super fruit toothless right now we talked about what if police lie in a search warrant this also can apply to material omissions meaning they leave something out that's a big deal but for now let's just focus for this for this test and for now let's just focus on falsehood and the federal standard is if the search warrant contains deliberately false statements or with reckless disregard for the truth so you know it's false or you really should've known it's falls then the defendant has to make a preliminary showing before they're entitled to an evidentiary hearing if it's made deliberately false or with reckless disregard the court strikes it out and says OK whatever statement is a lie or really really reckless we just take that out and then we just evaluate so we're going to look at all the evidence except the lion see is that enough to get probable cause Tennessee has a slightly different standard which I like more which is if the statement is deliberately false the warrants invalid even if the statement is not that material this this is easily testable 'cause you can ask a question and then say what would the feds do what would the state do so know how that works and then we start getting into the meat of it which is the exceptions to the warrant requirement the first one is is what some people call a public what I call probable cause in public remember Watson in that case there was a statute that said hey put all Postal inspectors which believe it or not are really a significant law enforcement agency but all Postal inspectors can arrest without a warrant and the police did that Postal inspectors arrested somebody for stolen credit cards which is mostly what they they investigate stuff like that and the court said you know what that's OK probable cause in public has a long history in the common law it's a good idea we're going to allow it so that's really where I start with defining if you've got probable cause and it's in public then then the police can arrest you remember Ren that's where the police pulled over some young African male African American nails it seemed pretextual seemed like a racist stop by the way the court wrote the opinion and I think it's important because the court said doesn't really matter if it was a pretextual \*\*\* as long as there was probable cause now the police can't go making an arrest and lying about what their probable cause was but if they had probable cause even if they had a bad motive for pulling someone over they are allowed to do that pretextual stops are OK as long as probable cause is present and Atwater versus city of Lago Vista the question was OK this public arrest without a warrant is OK in a felony circumstance but what about in some really minor offense and the spring court said yeah you can do that as long as your state allows for it there's all kinds of different state schemes in Tennessee I wrote but see Tennessee that means there's a slight wrinkle there in Tennessee they can cite you and when they cite you they can't search you because it's not typically arrest so there's no search incident to arrest or citation and then gerstein V Pugh that is because we allow police this broad power to arrest people based on their own cop view I mean this is not a courtroom right this is the police officer who are engaged in the competitive interpretive ferret out ferreting out crime says the courts because we give them that power they gotta go before a magistrate and they have to do it timely they left open the question of what timely meant and in the next case County of Riverside versus McLaughlin came along and said 48 hours is good if within that if it's within 48 hours it can still be an unreasonable amount of time but the defendant would have to show it's unreasonable so I can imagine a scenario where my client gets arrested and they hold him for 47 hours in order to keep him without sleep and question him without seeing anybody and then on the 48 hour or the 47th hour and 59 minutes they take him in front of the magistrate well that's under 48 hours but I could still at least in good faith make the argument that's been reasonable same is true if it goes more than 48 hours it's just the burden shifts if it's more than 48 hours the state has to prove a bona fide emergency so it can take more than 48 hours if I don't know there was a hurricane there was a flood there was maybe some weird covid and I don't know I can't imagine a lot of emergencies and the trans will cause exception does not apply to non public including a home Payton V New York that is one of the cases that sticks in my head because it's so fundamental an because it comes up a lot because police violate this lot they go in peoples houses and arrest them because they think they can absent exogen circumstances they can't cross the threshold without a warrant and then I wrote I just noted to myself it also they need a warrant for a dog to sniff house which is from the earlier but so that defines what the scope of the house is is Florida be Jardine which we already talked about and then another big exception of the warrant requirement that that does a lot of people in is search incident to arrest right in this case they searched found heroin in the cigarette pack the search was good because we allow the search those searches and to rest for officer safety and evidence preservation and that includes the grab area then we did some cases that define what that grab area is in schimel or China and I pronounce it you can serve an arrest warrant in a home in this case they had a warrant they went to home which is totally OK but they can't then go rifling through you know the back bathroom because the reason for the grab area is officer safety and evidence protection it's not an excuse just to search the whole house Arizona V Gant was the one where they took the guy out of the car and then why are you handcuffed him took him away from the car and then searched the car and tried to justify it with a grab area and they said no the grab areas like grab area it's not just for you to go Willy nilly hunting through the car and then to your point miss Curtis about about laptops we Riley V California said search incident to arrest does not include phones you need a warrant for those I'm just going to go ahead without looking it up and apply that to a laptop I know that when the Vanderbilt case was happening you know they searched those guys phones and computers and everything in order to find evidence of this of this rape and they got warrants in every case because of this particular requirement I mean it's you've got an expectation of privacy assume it's password protected it's manifested I mean I'm sure you could also give that up by like opening your computer leaving it in the mall and leaving it open to the world but typically speaking they're going to warrant for those kind of electronic devices 'cause your whole worlds in there I think there were cases that that talked about you know nothing is more personal like than a phone I mean it's got your you know it's got private information in there it's got personal information Kentucky V King that was the case out of Kentucky where the police created the exigency and the courts said yeah we're going to go ahead and assume there's an agency but only because the courts did we're not deciding that I think they were amended it for that and they said exigency's are OK if the police even if the police created so if the police created exigency and then they use that to justify search that's all right in this case banging on the door right if I remember right it doesn't matter as long as there really is an exigency the exception to it doesn't matter is if you create the exigency by saying I'm going to violate your 4th Amendment rights and let you do this then that would be impermissible sort of a bad faith exception there and then we did Mitchell he was yeah so going back to search incident to arrest just real quick so after the persons person is arrested in like putting put in the back of the cop car the only time you can actually go back and search their core is when you believe that evidence of that crime is still in the car right I think so first of all let me back off your statement was the only time no there's lots of other ways to search a car one of the one of the exceptions you gotta think of the police is almost like a torque plainest lawyer they're going to throw every theory that they can to get what they want to get to search the car that's their job one way they might search the car is if they arrest me in the car and while they're arresting me they searched the grab area another way they might get in the car which we haven't gotten to is the automobile exception if they have probable cause to get in the car in that case who cares where I am back see the police car whatever if they have probable cause the automobile deception allows him to search it including containers if what they have probable cause for would fit in the containers another way that we talked about toward the end of the course would be an inventory search if they have a policy or if it's otherwise not unreasonable for them to inventory the car so there's lots of ways to get in the car but the search incident to arrest only applies that one way for the cops to search the car only applies when it's when those two justifications officer safety need to preserve evidence or are clear and ready when you're in the back of the police car they don't need to protect the officer so they only have one of those that makes sense Lindsey yes it does thank you OK so at that point is that like when they get the person at it like their vehicle and then you know they like having standard like when they immediately start going through like that grab area like the front seat or whatever is that when it's justified to do that and so like in that case when they put him in the back of the cop cars when it was not justified right it's yeah but but I want to be real clear here OK yes you're correct in what you're saying but but you need to get off the idea that that means they can't search it means they can't search for that reason they might have other reasons and a lot of times as a defense lawyer what I was doing in court is I was going and saying you know I found some motion saying man they searched my car after the after they put my guy in the cop car that's a clear violation of whichever case Robinson whatever case we talked about right and the DNA would come back and say number one your guy was fighting with him on the pavement when they searched the car and he could have receiving gotten his gun that was totally part of the grab area or if those weren't the fax the VA might come back and say they were going to inventory the car anyway your guy had 48 outstanding warrants for being a sex offender all over the United States where you crazy you know so they're trying to justify the police have different ways to do it I guess I'm just trying to like picture like when the grab area search would happen at like I'm like walking through a live PD scene and trying to figure out at which point it would have happened in yeah and and and you can imagine you could draw all kinds of hypo that that there is no answer for it they just have to go to court and find out what the what the black dress says right but in the cases that we've seen and you will see on the exam is going to be pretty clearly defined mean I've said this to the I think I said this to class I thought it but you know these multiple choice questions my job is to make it pretty clear what the answer I mean what the what the scenario is on the essay questions it's the opposite on the essay questions lots of times I want to get close to the edge so that you have to kind of go on the one hand but on the other hand so it shows you know both sides of it but but yeah the grab area is going to be when you can grab it alright alright we did Gandhi did rabbit alright and then Kentucky V King we did Mitchell V Wisconsin yeah when the driver is unconscious exigent circumstances Mr misspelled allow warrant for a blood draw blood dissipation alone is not exigent circumstances I think yeah those are both cases that are defining exogen circumstances which really means emergency circumstances which is another exception to the warrant requirement exogen circumstances and then there's the big automobile exception Carol I don't even know if Carol was one of the cases that was assigned in the text but it's it's it was cited by the cases assigned in the text because it's where the automobile exception was born They can search your car if they have probable cause it's like an arrest of a person based on mobility and regulation and then we got in this weird thing where USV Ross said it includes all containers including paper bags in the trunk provided the probable cause goes to that container so if I have probable cause to look for something large I can't look in a tiny container if I have probable cause to look for something small I can probably look in all containers if it could fit him and then California V acevedo where police have probable cause reasoning justifies search of containers in car evidence with it I just said that Wyoming V Houghton and that extends it to passengers where the belongings could conceivably conceal the object of the search if I remember right that was like a purse or something at the passenger and they were looking for something that could fit maybe drugs I don't remember and then we talked about the inventory exception that's to protect police and suspects property absent bad faith in here pursuant to a policy it doesn't say there has to be a policy but it makes it more likely it will be upheld so they said look in the absence of somebody saying we're inventorying just to search it's probably going to be upheld that's what that means consent then we talked about that's a huge exception kills a lot of my clients they tend to give consent just walk around giving everybody consent for everything they do that was the one where 64 in the car one in the car said sure go ahead and the defense lawyer just like I would have done said well you crazy like you didn't he thought he had to he didn't know he didn't have to sure go ahead it's kind of vague and the court said now it's a totality in determining whether that's a voluntary consent gotta be voluntary but how do we determine whether it's volunteering its totality so failure to tell everybody you don't have to say yes but will you say yes doesn't kill it and then we had a state case initial stop for speeding was reasonable Terry stop and then putting in the police car was too much in a subsequent consent was involuntary not sufficiently attenuated miss Curtis from the illegal search Georgia V Randolph this is the one where it's pretty unusual factually where both the husband and wife are maybe boyfriend girlfriend I forget where president she saying search him he's a dirty rat and he saying I am not she's a dirty rat you are not allowed to search me in that circumstance one objecting will defeat consent the issue is apparent authority somebody asked me I don't know if he's on the call but asked me about landlords and I said I thought in my head I can't remember I looked it up landlords do not get to consent for you yeah I'm sorry does that also apply to roommates well it depends right it's going to depend on if you're Co tenants and an apparent authority I mean if you're not home and your roommate says come in and search and says I have the right to go in miss gulliver's room or maybe lies and says that's my room issue is that's why I wrote the issue is apparent authority OK but if you're there saying no hell no you don't then that's the case here OK yeah what happens if like I own the house and my roommate doesn't if we're still coaching it but the title is in my name so you're the owner and landlord Anne lived there and then I rent out a room I guess it would depend on which room you know and and who given an who's given permission I mean we could we could get into all kinds of typos about that that come close to one I'm not sure all right then we talked about a little search and little seizure as an exception to the warrant requirement Terry V Ohio this is I could have called this stop and frisk this title but I called it limited search and seizure Terry said yeah we got a problem because police keep doing this and they really need to keep doing this in order to fight crime effectively so we gotta come up with something because they clearly don't have probable cause so we're going to do something less right a little seizure or brief investigative stop if police have reasonable suspicion and then separate from that separate from that they need justification for a frisk or a small search which is a limited to a Pat down of clothes I don't care how many times I say this how many times I yell at there are still students on this call who given some opportunity will write down that every time a police interacts with somebody gets to pass somebody down for officer safety and that's not the case OK I get it there are judges who think that there are prosecutors and defense lawyers who think that I think we just want our officers to be safe but it's pretty clear that in order to pass somebody down you gotta have another justification part of the confusion is also the cases where they seem to have no other justification but the crime is dangerous but it's clear that Terry said that it's clear that the case law requires a justification sometimes that justification can be the crime itself but where there's counter indications is going to be harder than peers yeah so would it is thing but I remember you talking about this in class about how you said if you were like a pot dealer and you were high all the time they might be able to stop you but they don't have just based off that they know you maybe they've arrested you before for I don't know having marijuana whatever they wouldn't just off that have a reason to frisk you because you're not known to be dangerous they don't see you casing a place would that be an example of a distinguish between a stop and having the cost of risk yeah maybe I mean you gotta understand you know you guys are getting to the point in law school where you're supposed to have the big realization that there are no answers that's the big realization of 1st year there are no answers the answer is what the black dress says that's why it's important to know all of these justifications I don't know if I'm a police officer after I've patted down a pot dealer and I found all kinds of drugs and I want to keep them in court I'm going to probably write up my report emphasizing how dangerous pot dealers were and that my my former partner was shot by whatever I think whatever I remember that makes me scared about dealers on the other hand the defense lawyer is going to be in there screaming that's crazy there's going to be a separate separate justification and pot dealers they eat a lot of munchies but they're not dangerous but those are the arguments that would be used and it's important to me that you come out knowing these arguments knowing that those are separate separate inquiries Glenn funk knows it but not because he's a prosecutor because he used to be a defense lawyer and he had to know it like and it's important that you know that as to specific factual scenario like I said multiple choice questions are usually pretty clear as my questions are a little bit closer to the line OK Kansas V Glover reminded us that reasonable suspicion is not some crazy legal theory but supposed to be common sense so if you're police officer and you know that a car belongs to a guy and the guy has a suspended license it's pretty reasonable to assume the driver has a suspended license I completely disagree with that but I gotta say Clarence Thomas was very convincing there and made me feel dumb I still want to be able to argue a that could be anybody driving the car but I also think a low standard of proof like like it's not probable that it's him but is it slightly yeah maybe he's right Florida versus JL an anonymous tempstar tipster wasn't very specific and wasn't corroborated I think that was just like an anonymous call and I joked that I would I would do that to talk all the time if I was allowed to just anonymously I would anonymously report him that's not even reasonable suspicion even though it's a low standard so I think those cases are good because Kansas versus Glover says hey it doesn't take much but Florida versus JL says it takes something not just an anonymous call I think that was where the anonymous call was like a an African American male wearing Plaid and there were three African American males one of whom was wearing Plaid or something like that it was like really unspecific yeah then Florida V royer Mr Myers can you shut off your mute yourself unless you unless you're asking a question alright now it's good when you're not muted in making noise I only see like 4 of you but you're one of them will you rise to the top when you make noise yeah there Florida V royer you can read that there was reasonable suspicion to briefly detained but search and seizure of the defendant of the luggage went too far must be the least intrusive means necessary US versus Drayton I wrote really nice with those little symbols because I thought that was ridiculous but it seemed like the court thought that those police officers were really nice and the cops asking to search asking to search is not a seizure and they said look the question is whether a reasonable person on a bus stopped in the middle of nowhere where police are like standing in a certain way would have felt free to leave and we know people on buses or we've heard of them or they work for our gardens or something so we think they feel free to leave said the positioning and uniforms are relevant but not this positive if you don't know what this positive means look that up professor Brendan versus yeah hey so with a stop it doesn't rise to the level of arrest without certain factors but can you you can't leave though if there's reasonable suspicion of a dangerous crime you still can't leave um yeah you can't leave yeah I mean so there's lots of ways to police can stop you know and and they can briefly detain you that's still a seizure is just a little seizure supported by less proof so if I get a call hey there's a girl wearing glasses in a white T shirt and long blonde hair standing on the street corner and they walk up to you and they corroborate that somehow and their tip is good and they walk up to you maybe that doesn't allow for a full arrest but it still would allow for an investigative detention which is a seizure which means you can't leave that's what it means from their side I really want to focus whenever people whenever students ask these questions they always say hey so the cops can still do that I want to focus on you in that the question as to whether it's a seizure at all is not whether you feel free to leave but whether a reasonable person would feel free to leave and so if the answer is no then it's a seizure what level of seizure depends on what they do next I mean if they walk up to you and handcuff you and search you that's an arrest if they stop you and say miss Cargill I want to ask you a few questions where you going what are you doing are you a drug dealer that might be less than a full scale arrest and might only require probable cause that answer yes thank you all right Brendan V California by the way i'm not i got too much going on my screen i'm not monitoring the chat so if there's something in the chat but i need**

**That's what I would view as a red herring in that in that thing but I'm open to being corrected you might be able to find something the fact that I don't know anything about it makes it less likely that it's on the test that I'm focused on South thank you Oh yeah brendlin passengers are people too that means they are seized so it might be justified if you're the passenger and the driver's done something that justifies a pure sees to the question in that case was standing the passenger saying hey I got rights too and the state saying no you're just you're not really seized you're just in a car they are seized after the person's appointment so they can challenge it Rodriguez that's a that's an important case that says hey a traffic stop is a Terry stop for constitutional purposes and so if the police pull you over right and then they extend the purpose of the stop they pull you over for speeding they write you a ticket for speeding they give you the ticket and then they say you know what sit here with me for six hours while I rifle through your car they had reason to pull you over but what they're doing exceeds the purpose of the stop and then we talked about the fact that the way this usually works is in police his favor is they pull you over for legitimate reason then during the legitimate reason they notice or somehow get probable cause to extend it further so they might pull you over for just a Terry stop just let's say you're speeding they pull you over speeding they walk up to the car and you're covered in cocaine and you ask them are you my dealer that might give them probable cause to further search the car right so that's how they sort of walk the ladder of probable cause they start with reasonable suspicion that's also what a knock and talk is police go knock on the door of the building or house and they're totally allowed to do that they don't have to have any kind of probable cause or reasonable suspicion to do the same thing that a magazine salesman would do and just knock on your door in fact there was a case that's not I'm not testing on but there was a case where somebody had no trespassing signs on and recently and the US Supreme Court said now there's still an open license for the police to come to your door So what they'll do is knock on the door when you open it and they see all your mountain of drugs and guns and paraphernalia or whatever then they've got probable cause to do more to get a search warrant alright I'll get off that state versus berios a state case yeah that was the same kind of thing as Rodriguez it's just that they placed the guy in the police car that was too much and then there was a consent that was involuntary Daniel this is the question I got that I thought was a good one what's going on that's a consensual encounter how you doing that's a consensual encounter what's going on can I see your license at that point they aren't seized just asking for the license is not a seizure taking the license is a seizure based on the standard articulated in six above unreasonable person not free to leave so that's when it becomes a seizure and then Plainview plain feel if police are in or are feeling a place they are allowed to be in or feeling and the incriminating nature of the contraband is immediately apparent we talked about film canisters which a lot of you don't know what are but if I'm padding you down looking for your gun and I know you're not allowed to have one I can feel a gun if I'm patting you down and feel a box of raisins I probably can't pull that out could be a box of raisins could be some kind of weird vape product that I'm unfamiliar with could be like I don't know terrible things poison anthrax but you can't tell by feeling it same thing when I look in your house if I look in your house if I'm not police officer walking down the sidewalk I can see in your Bay window you have I don't know something terrible in there something obviously criminal I'm allowed to go get a search warrant based on that if the incriminating nature is immediately apparent OK exclusionary rule that's the remedy what do we do when the police all these things go badly for the police we exclude the evidence it is that is a rule that's not itself in the constitution it was created by judges as the remedy for violations of the constitution we talked about there could be other remedies there could be you could Sue him you could complain other countries don't have this rule weeks which I think was quoted in Wolf V Colorado is the case that says you can't do that and then we weren't sure what that meant in state court Hughes the state said yeah same here Wolf V Colorado was the one that first said due process does apply the 4th amendment to the states but we're not sure about the exclusionary rule there's other ways to go and then map the Ohio state no the exclusionary rule does apply to the states there are limitations on the exclusionary rule knock in an ounce if the police don't knock it announce and there's no good reason for them not to not going to announce the exclusionary rule does not apply to knock and announce violations So what is the remedy for not going to announce violations is very hard to find yes so again back to a couple of the scenarios we were looking at the other evening there was a hypo that stated the police could see into a home but it was at night so they were using night vision goggles to be able to see through the Plainview window at that point because it's night vision does that become like null and void I don't know how we can look that up I'm sure there are cases on night vision goggles there I know I would say that's probably less like Plainview when they're using sophisticated tactical equipment but I can also see a justification for it because you're able to see it but I think we were trying to figure out because we were talking about a situation where they were using like infrared with the oh gosh what are those little airplane things what are those things going drones I can't remember the name of them specifically thank you yes using infrared with drones it wouldn't be very similar to the same thing as using the case on the infrared is called somebody look it up I'll keep going is called Kyle OK ello I think that's the name of the case that we didn't do in here but I think that's that's not Plainview OK there's some there's an interesting question as to whether it's a search right because it's not showing me all this private information it's not like looking in your phone I can't use a heat seeking thermal whatever and find out if you're gay or Jewish or Catholic or white or black or you know I can't find out anything about you by using a heat seeking device so several people thought man when that Carlo case hits they're going to say the police can use thermal imaging all the time and it came back and said no that's too much information that's not like a dog sniff dog says dog is like a binary choice drugs no drugs I mean if you believe all the dog hype that's what they're doing so at least theoretically alright let's get back to the exceptions on the inclusionary rule Hudson yeah well we know that we just did it and then there was a good faith exception where the police thought they had a good warrant but it turns out the the the CI was unreliable and all of a sudden there's a good faith exception that has a lot of exceptions to the good faith exception and so those are all written here it applies unless a reasonably well trained officer would have known that the search was illegal all of the circumstances including whether the warrant application of previously been rejected by different magistrate look at that case USB Leon exclusionary rule still applies if the judge was misled or was reckless as to the truth or if the judge abandoned the judicial role altogether so that no reasonably well trained officer should rely on the warrant what the good faith exception is supposed to be constrained to is legit good faith somebody emailed me over the weekend and said hey this Tennessee have a good faith exception sadly yes over the last four years the the Tennessee Supreme Court has been adopting various versions of the good faith exception there's lots of exceptions to that I'm not going to get into all that it's fairly complicated and how closely we track the federal government but we basically have a good faith exception too and then simple negligence is also we have that too in Tennessee is also part of the really part of the good faith exception if you want to think about it that way the police computer said the warrant was active it wasn't it should have been recalled and they said look where it's where it's simple isolated negligence the kind of thing that I guess the court thought was excusable deterrence will not outweigh substantial societal cost and that's the whole deal with the exclusionary rule right it's this whole beer it is under Hudson exclusionary rule should only be applied where deterrence outweighs substantial societal costs does not apply when it won't detur the police and then we got into attenuation which we just did but I know some of you struggled with the idea and the cases don't make it very easy on you because it sure sounds like it ought to be easy Brown versus Illinois says hey there's three factors and then New York versus Harris sort of ignores the factors and then we go back to Utah B street which picks up the factor so if your law student you're going what's the law here the only way I can say if you're trying to figure out what the law is if I were writing a memo for a partner in a firm and I was an associate I would have to write up you know if you're worried about attenuation there's really three factors in this one factual scenario the United States Supreme Court ignored them and the factual scenario was this when the police have probable cause to arrest this is a quote from the case and it's on the outline in the and on the twin I mean not that one it's on the PowerPoint when police have PC to arrest the exclusionary rule does not bar use of a statement made by the defendant outside the home even if the statement is after arrest made in the homes without an arrest warrant so that's pretty narrow set of circumstances if you think about it the police have probable cause but don't have a warrant and they arrest you in the home it's straight up you have to be patient or whatever say whatever that case was Peyton versus New York or something it straight up that case I have probable cause to arrest you in home I do not get a warrant and I arrest you in the home that by itself is bad but does that taint a subsequent statement made later outside the home and the answer is no based on this case otherwise every other factual scenario we've looked at are the Brown factors which are time intervening circumstances and flagrancy of the official misconduct right professor frog yes with your three factors for Brown does it have to be one or the other or the other or does it need to be all three because in strife it was the state had 1/2 of them but strife had won the third one an in the end they gave it to stripe so or I don't even sure if I'm pronouncing his name um where do we draw that line an is it an auroran and I'm just a little confused at that point yeah I think it's probably right to be confused that's 'cause they didn't tell us I mean I guess based on the cases we read which are Brown and Aqua saying street but whatever strife it looked like when it's 21 whoever got the two wins but I don't know that that's right and in fact I think in strife the dissenting judge said actually see the factors all going for the defendant so I don't know you just weigh all the factors and you see how it turns out is this where we would kind of use that totality of circumstances to help us decide at that point yeah I think you'd weigh the factors that's what you do OK thanks that's all I can give you I can't if the if the case law were clearer or if they were and there might be a million cases that you could use this president but I bet if there are there are a million that also would would contradictive know the factors and how they work and no the factual scenario where they didn't use factors we also talked about an independent source that is that was that case Murray where I said all the law and orders are based on that during or as a consequence of an unlawful search but later obtained independently from lawful so basically if there's a bad search and they can they can get to the evidence with a good search it still can be admissible the bad search doesn't taint you take the constant going out in a different way and then inevitable discovery I wrote just for you to people race ipsa loquitor what I mean by that is the thing speaks for itself it's inevitable discovery right if it would be inevitably discovered little bit longer than I thought but I'm going to do this quickly for those of you who are still hanging around this is an actual exam question from last midterm I did last year at this time before we knew covid was a thing hold on a second remove your spaces other way alright detectives are investigating AJ that should just say J that's a typo for me cutting and pasting for dealing drugs from his house detectives take their trusty drug dog to Jays house and they notice that he has left a garbage bag on his back deck police take the dog on the back dragon deck and the dog alerts to the presence of illegal drugs police then go to the front door and knock on the door Jay opens the door and police ask him whether he is in fact dealing drugs from his house he says no and slams the door while the door is open police can see into the kitchen where they see a digital scale on the kitchen cabinet based on all the information above the police apply for a search warrant the judge reviewing the search warrant application denies the war is the judge correct why or why not OK I really personally see four issues there OK anybody want to bark him out he went on his back deck with the drug dog right and is that is that OK no why because that's the curtilage that's that's the facts of Florida versus Jardine it was a deck right I couldn't make it any clearer more parallel discharging it was deck so that's the problem what's next what are the police do then knocked on his door is that permissible yes it seems like it is right even though they just violated the law all over the place then they go to the front so that's a knocking talk that is permissible you wouldn't be counted off for writing that it's not a key to this question but it's there then what happens what's the next issue a question him directly about whether or not he is in fact dealing drugs good point I didn't even think of the questioning but that's right we have not studied Miranda so I didn't get into all that with you all but right that's a good point then what happens while the doors open they get nosy alright put it a different way they put they search into his home and tried to use it as a Plainview reasoning well I like the way you think but I think a better way might be just to say you know they did see something in Plainview but all they saw was a digital scale which is that is**

**Here's one thing about essay questions it's typically not a big deal which way you go right the question is was the judge correct or incorrect you getting mad is not any points for me I don't care which way you go I wrote the judge is incorrect but I think I changed my mind while I was writing it because the police have probable cause I wrote will see if I'm right first although the police are allowed to search garbage left on the road because the courts have held there's no reasonable expectation of privacy in garbage looking wrote the gourds have also held the taking a dog on curtilage to sniper houses and impermissible search here the police took the dog on the back deck which is the exact behavior condemned in Florida versus jordynne somebody earlier asked me if they had to know a case name and I said no but it's a good shorthand here's an example where I used it as a shorthand but you don't need to know it you can also just say you can't do that it's curtilage the police didn't go to the front door which when considered separately is permissible as a knocking talking because police are doing what the general public can do by knocking on the door so so this behavior is permissible standing alone when they see the scales they've seen drug paraphernalia the problem for the police is that the quote incriminating nature of the scales is probably not immediately apparent because scales have a legitimate use too however and then I got into attenuation and this is what attenuation means right did their initial illegal problem on the back screw up the rest of the good stuff that they did well if you think that they're out you might think that they're out anyway at this point because scales are not incriminating so they're done they get nowhere but I would still write up attenuation if I'm answering this on the bar exam because I'm the bar exam the trick is and for me too frankly is to use buzzwords is to use the legal doctrines I mean those bar exams people are grading thousands of matter time and they don't have time to really get into the nuances of what you write at least I don't give them credit for maybe they do so I'm trying to quickly hit the points in the buzzwords and show that I can analyze this problem I wrote however if the incriminating nature of the evidence were immediately apparent than the exclusionary rule might still keep the evidence out depending on how attenuated the Plainview siding was from the illegal dog sniff to evaluate attenuation we look at prefactors temporal proximity circumstances and purpose and flagrancy the misconduct here not much time elapsed and the only intervening circumstances was just they were but maybe circumstance was the new investigative tactic employed by the police also nothing in the fact suggests the police Vega restricted regions so it all cuts in favor of the defendant that's actually not true probably but I wrote this quick probably the last one cuts in favor of the police the intervening circumstance jury out on in the time cuts in favor of the defendant but see how the answer doesn't matter but you can tell when you read my answer to that question that I got to the point quickly I didn't gloss over anything analyzed each issue as best I could OK and it's an it's loosely following Iraq now if you want to really strongly follow Iraq you would say the first issue some people do bullet points on their answers which I find unnecessary but if you want to do it that's OK with me let's say issue 1 you know if the dog Smith allowed and then they'll go through that that's a fine way of separating it out for me if you want but that's what these that's what these things look like that was one of two on last year's exam an I'd say most people got the dog 1/2 the people got the paraphernalia and then a smattering of people talked about attenuation and the knock until but the dog was kind of obvious to most people I would say if you just take it and just sort of number the issues as they come up and just answer yes or no the answer doesn't matter what matters is analyzing the problem on the previous 40 whatever questions the answer really matters but it's going to be so clear that there's not going to be an argument but on this on the one hand on the other hand if you can see here's I wrote the judge one of the judge do the judge denied the warrant I said the judge is incorrect I'm saying the judge should have granted the Laura and then I go around and kind of changed my mind 3 times and sort of misapplied the factors I would still give myself 100 on this because I went through the analysis on each of these right that's what I'm looking for it's not rocket surgery but it does take you do need to slow down and think about it I can tell you there's only one discussion K1 discussion question but it's got a little more meat to it so I could have done two made it one OK**

**14% of the class got that right bad question that's out we're not going to count that and then I'm going to get some that are on the line that are going to tell me maybe the questions OK but we didn't teach it very well and so at the end of it we sort of go back and see how many points it should count but I would say it's going to be about 10% of the test so some of that still to be determined exactly I could there's a chance it's 12 points it just depends on it depends on on how many points have to add to the test I always have to add points or I've always had to maybe you guys little since going keeps talking about how hard the test is maybe you guys are sufficiently scared that I don't have to I'm going to yeah right before you do that let me real quick let me tell you last year alot of the students after the midterm were \*\*\*\*\*\*\*\* at me saying then that was hard and So what I started doing is uses showing them after each class last year for the final I would show them the previous years final based on that class and it was 100% they got it right because they were sitting in the class and had just learned it it's not hard I swear to God this test is not hard if you know this stuff there aren't any like super duper tricks in it it's it's questions but based on this material based on the material and it's not a perfect test and will adjust**

**Teeth gnashing or something please do you know manipulate your computers appropriately because I guess that was a real problem there were some problem with exam software people didn't get to see all of something and I know you guys were all struggling with that so make sure you see everything but it's about 45 somewhere in there I don't remember the exact number of questions and then and then a long essay go ahead who was asking me a question I had a question this is about when someone's pulled over for a minor traffic violation and say you didn't make a turn signal can an officer order you out of the car 'cause I think in a case where somebody had a gun on their belt behind them but they were just pulled over for a routine traffic stop and he the officer had a policy of making everybody get out of the car he um so if you have a gun that was not visible or anything you get out of the car is it something personal well I think we had a case actually that yeah so I think if I remember correctly part of the I mean when you say can the cop do it the question to me is has he exceeded his Terry stop when he does that and I think there's pretty clear case law that part of a Terry stop can be stepping out of the car the police officer can require that legitimately as part of a Terry stop it still part is still subject all the Terry rules right so you know once he starts parading around sticking you in the back of his car do jumping jacks touch your nose recite the alphabet backwards from M to F or whatever they do when you're drunk now that's going to be maybe more than the purpose of the stop depending do you as a really fascinating part of Terry because they start with pulling over for some traffic violation and then the police have to justify not asking you to step out of the car but asking you to jump through hoops and be a trained seal for the DUI tests right for all the field sobriety tests and so in the hearings it's interesting to watch because all the parties know what's going on usually the defendant in the audience don't know but what the police are trying to say is at every stage I was only doing what was permissible to that point so I pulled him over speeding I didn't think he was drunk when I walked up to the car it smelled like a brewery he had bloodshot watery eyes and slurred speech that's what every DUI warrant says something like that so I asked him to participate in the field sobriety tests which he did voluntarily all are reasonable at that the first point he only had reasonable suspicion for the stop which in my opinion would also allow him to ask you to step out of the car but that's it but when he approached he got reasonable suspicion to see if you were drunk which would have justified a further stuff then at some point when you're trying to hop on one leg and recite the alphabet you fall over and you curse the officer and you throw up then you've given him probable cause to arrest for DUI so that's great so say you I think there was a case where it was say 2 in the morning in a high drug zone so somebody's pulled over for a routine like not not putting on their right turn signal when they take a right and and maybe this guy was sitting at a stop sign for 20 seconds which seemed or was he doing that and then so he was pulled over he didn't have his signal on but maybe it's 2:00 AM and it's in a high drug zone then it was considered reasonable because of the circumstances of it being 2 in the morning and a drug zone right I don't recall that case that case was in this class it might have been in the footnotes or something yeah I don't recall the case but fair enough well um I guess it's not on the test so I'm good no but I mean I I think a full understanding of it is good and I think I think you're asking a good question I think there's if I remember right and it's been awhile since outlook there's pretty good case law that says part of a reasonable suspicion stuff even without anything other than a traffic violation can include asking to step out of the car that is not necessarily additional seizure that goes beyond the initial Terry style OK great that answered yes very good thank God like I said I'm subject to being contradicted on any of these things at anytime and my feelings won't be hurt but I'm pretty sure I'm right about that alright**