

**U.S. Immigration and Customs Enforcement
Homeland Security Investigations Training**

**HSI Academy
Legal Division**



Fourth Amendment

Student Guide

XXXXXX

HSI Special Agent Training

6th Edition (2018)

ENFORCEMENT LAW COURSE

Fourth Amendment

I. Motivation

As discussed in the previous Chapters, the SA has a great deal of legal authority to draw upon when collecting evidence to enforce criminal provisions. Despite that authority, the Constitution clearly limits the manner in which law enforcement may go about collecting evidence for use in criminal prosecutions. The most notable examples can be found in the Fourth and Fifth Amendments of the Constitution. As a general matter, the Fourth Amendment acts as a limit on government efforts to obtain physical evidence, while the Fifth Amendment does so with respect to statements. Failure to comply with the Constitutional limitations just mentioned will result in a variety of sanctions.

II. Objectives

Terminal Performance Objective – Given a set of scenarios, demonstrate how to analyze Fourth Amendment search and seizure issues in the field per the United States Constitution and Fourth Amendment law.

EPO	OBJECTIVE
1	Define seizure and search.
2	Examine the Fourth Amendment's General Rule.
3	Explain the Fourth Amendment's Warrant Exceptions.
4	Describe the Fourth Amendment's Probable Cause Exceptions.
5	Apply Agency Policies and Directives to Fourth Amendment seizures and searches (including Use of Race Guidelines).

III. Review of the Past

Identify the sanctions that may result from failure to properly comply with the Fourth Amendment.

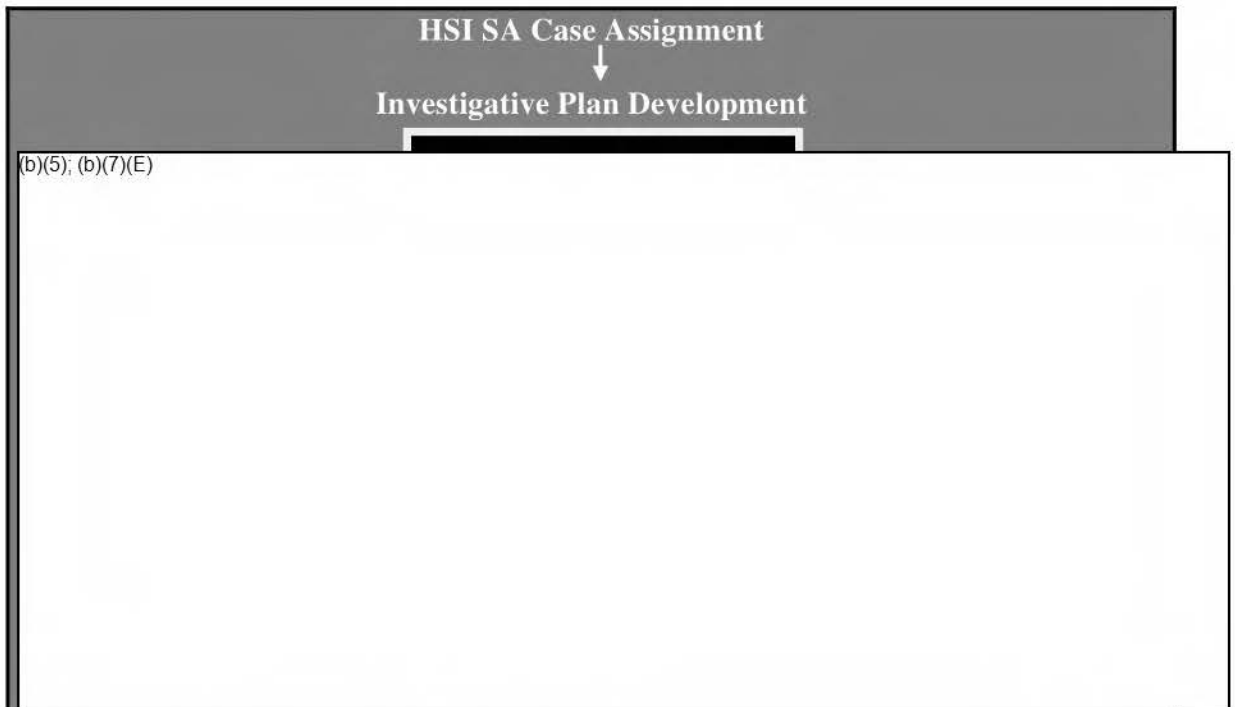
1. **Exclusionary Rule:** Generally, the government may not use any unlawfully obtained evidence in a criminal trial. Any evidence collected in violation of the Constitution will likely be suppressed (excluded) from use at trial.
2. **Fruit of the Poisonous Tree:** This doctrine extends the reach of the exclusionary rule to other evidence which is tainted by an earlier violation of the Constitution. Thus, illegally seized evidence cannot be used as the means of obtaining still more evidence.

3. **Employment Consequences:** A SA may be disciplined if he violates the Constitution, statutes, regulations or policies in the execution of his duties. The sanctions may range from a reprimand to termination of employment.
4. **Personal Lawsuit:** In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court held agents may be sued for violating the Constitution. When a SA commits a Constitutional tort, he may be personally responsible for any monetary damages that the court awards to the plaintiff.
5. **Criminal Prosecution:** In addition to being prosecuted for state criminal offenses related to unconstitutional actions (such as assault), a Federal officer could be prosecuted for violating 18 U.S.C. § 242 (“Deprivation of rights under color of law”) or 18 U.S.C. § 241 (“Conspiracy against rights”).

Having the ability to accurately apply the rules discussed next will allow the SA to avoid these sanctions.

IV. Advanced Organizer

This Chapter and the Chapter on Border Search Authority address the lawful ways in which the SA collects physical evidence. *See SDR 4th A-1, Law Course, Search and Seizure, April 2010 and SDR 4th A-2 HSI Search and Seizure Handbook, HSI HB 10-05, August 18, 2010.*



(b)(5); (b)(7)(E)

V. Define seizure and search (EPO 1).

- A. Fourth Amendment – generally regulates the government’s collection of physical evidence and states:

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.

(b)(5)

B. Seizure Defined

- 1. Seizure of an object: Government interference with a possessory right/interest.

- a. *Government* – All government personnel and anyone who is acting under the direction of, or with the help of, government. (b)(5)

(b)(5)

- b. *Interference* – This must be meaningful. (b)(5)

(b)(5)

- c. *Possessory right/interest* – When the interference serves to affect the individual’s ability to control, use or benefit from the object.

Key question: (b)(5)
 (b)(5)

Example: (b)(5); (b)(7)(E)
 (b)(5); (b)(7)(E)

Example: (b)(5); (b)(7)(E)
 (b)(5); (b)(7)(E)

- 2. Seizure of a person: Government interference with a person’s freedom of movement under circumstances where a reasonable person would not feel free to leave or to end the encounter with the government agent.

The Ultimate Question – (b)(5)
 (b)(5)

- 3. Consensual Encounter – Government interferences with people, during which a reasonable person in such a position would feel free to leave or end the encounter at a time and in a manner of their choosing. (*See seizure definition above.*) Government may engage in such encounters with **no suspicion** of wrongdoing. In order to prevent the encounter from turning into a seizure, government must honor the person’s wishes to leave and/or not answer questions posed.

4. Types of Seizures

- a. Seizures that require no suspicion (temporary)

- 1) Border Detentions
 - 2) Immigration Checkpoints
 - 3) Vessel Document Checks
 - 4) DUI/License Checkpoints
- b. Seizures that require reasonable suspicion (temporary) – referred to as an Investigative Detention or Terry Stop
 - c. Seizures that require probable cause (more permanent)
 - 1) Arrest of people
 - 2) Seizures of objects for forfeiture or evidence of criminal behavior
 - 3) Seizures of places for forfeiture

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

C. Search defined – Since the Jones case in 2012 there have been two definitions of the term “search” for Fourth Amendment purposes resulting in two “search” tests: The *Katz REP Test* and the *Jones Trespass Test*. According to *U.S. v. Jones*, 132 S. Ct. 945 (2012), the act of installing a GPS device on a target’s vehicle, and use of that device to monitor the vehicle’s movements, constitutes a Fourth Amendment search. See, *SDR 4th A-3 and 4th A-4 Jones GPS Tracking Device Guidance*. See also, *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

(b)(6); (b)(7)(E)

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

- a. Reasonable Expectation of Privacy (“REP”) has been defined by the Supreme Court as any situation in which a person has a *subjective* expectation of privacy (i.e., does the person think that the situation is private) that is *objectively reasonable* (i.e., would society agree that the person has legitimate reasons to expect privacy under the existing circumstances).

- 2. SA “trespasses upon” a protected area for a specific purpose.
 - a. Trespasses Upon includes (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

 - b. Protected Area – this is specifically identified in the language of the Fourth Amendment: “persons, houses, papers, and effects.”
 - 1) House includes the home’s curtilage
 - 2) Effects include objects like cars, sheds, etc.

 - c. Specific Purpose – includes two situations:
 - 1) To gain information or
 - 2) An attempt to find something.

Two Tests:

(b)(5); (b)(7)(E)

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

D. Demonstration

(b)(5); (b)(7)(E)

VI. Examine the Fourth Amendment's General Rule (EPO 2).

Option 1
Comply with General Rule Requirements
1. Warrant
2. Probable Cause
3. Act in Reasonable Fashion

A. A search or seizure is reasonable if conducted with:

1. A warrant issued by a neutral/detached magistrate

“... [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.”

2. Supported by Probable Cause; and,
 3. Executed in a reasonable manner.

*This is sometimes referred to as the **Fourth Amendment's general rule.***

B. Federal Warrants

(b)(5); (b)(7)(E)

1. A warrant may be issued for any of the following:

a. Evidence of a crime
 b. Contraband, fruits of crime, or other items illegally possessed

- c. Property designed for use, intended for use, or used in committing a crime;
 - d. A person to be arrested or a person who is unlawfully restrained
2. There are four primary federal warrants identified in Rule 41 of the Federal Rules of Criminal Procedure:
- a. Seizure/Arrest – **Form AO 442**
 - b. Search Warrant – **Form AO 106** – *Sample Application for Search Warrant at SDR 4th A-5; Form AO 93* – *Sample Search/Seizure Warrant at SDR 4th A-6; Form AO 93A* – *Sample Search and Seizure Warrant on Oral Testimony at SDR 4th A-7*
 - c. Warrant Seeking Electronically Stored Information
 - d. Warrant for a Tracking Device **Form AO 102** – *See Sample Application for a Tracking Warrant at SDR 4th A-8*
3. A federal warrant (search or arrest/seizure) consists of three parts:
- a. The actual warrant
 - b. The affidavit of probable cause which is attached to the warrant

Note: (b)(5); (b)(7)(E)
 (b)(5); (b)(7)(E)

- c. The inventory/receipt is also attached to the warrant. (b)(5); (b)(7)(E)
 (b)(5); (b)(7)(E)

4. How to obtain a federal warrant per Rule 41 of the Federal Rules of Criminal Procedure.

- a. (b)(5); (b)(7)(E)
- b.

(b)(5); (b)(7)(E)

c.

d.

e.

5. How to execute a federal warrant per Rule 41 of the Federal Rules of Criminal Procedure.

a. (b)(5); (b)(7)(E)

b.

c.

6.

a.

(b)(5); (b)(7)(E)

Example: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

- b. Policy and Directive can impact the reasonableness of a search or seizure executed pursuant to a warrant.

Example: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

c.

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

C. Demonstration

(b)(5); (b)(7)(E)

VII. Explain the Fourth Amendment’s warrant exceptions (EPO 3).

Option 2
Warrant Exceptions
~~1. Warrant~~
2. Probable Cause
3. Act in Reasonable Fashion

A. There are four court-created Warrant Exceptions (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

B. Warrant Exceptions

1. Arrest in Public
2. Plain View Seizure
3. Mobile Conveyance Doctrine
4. Exigent Circumstances

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

C. Demonstration

(b)(5); (b)(7)(E)

VIII. Describe the Fourth Amendment’s Warrant and Probable Cause Exceptions (EPO 4).

**Option 3
W and PC Exceptions**

~~1. Warrant~~
~~2. Probable Cause~~
3. Act in Reasonable Fashion

A. There are eight court-created Warrant and Probable Cause Exceptions. To comply with these rules, the

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

B. Warrant and Probable Cause Exceptions

1.	Search Incident to Arrest
2.	Consent
3.	Investigative Detention/Terry Stop
4.	Terry Frisk
5.	Inventory Search
6.	Protective Sweep
7.	Administrative/Regulatory Search
8.	Border Search Authority

(b)(5); (b)(7)(E)

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(b)(5) ; (b)(7)(E)

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(b)(5); (b)(7)(E)

Note: The Border Search Exception will be discussed in detail in the Border Search Authority Chapters.

The courts have not created an Exception to the Fourth Amendment’s reasonable execution requirement.

C. Demonstration

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

IX. Apply Agency policies and directives to Fourth Amendment seizures and searches (including Use of Race Guidelines) (EPO 5).

A. First Amendment

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

1. 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 of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. (b)(5); (b)(7)(E)
- 3.

- 4. Free Speech – law enforcement activity must not diminish a person’s ability to communicate a message in words or deeds. A proper investigative activity in this regard:

(b)(5); (b)(7)(E)

- 5. Religious Practice – law enforcement activity that impacts religious practice must be engaged in for an authorized purpose and take into consideration the proper time, place, and manner of execution.

- 6. Peaceful Assembly – law enforcement activity must recognize the breadth of this protection. The right protected includes public demonstration, postings on group websites, recruiting others to a cause, marketing a message, and fund raising.

- a. *Laird v. Tatum Rule*: The government action cannot engage in conduct that would reasonably deter the exercise of this right. [*Objective Test*].

- b. Investigative activities allowed:

(b)(5); (b)(7)(E)

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

- c. Investigative activities disallowed:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

- d. Least Intrusive Method – selecting the least intrusive means to gather information given the available options. Factors to consider:

(b)(5); (b)(7)(E)

B. Guidance Regarding the Use of Race by Federal Law Enforcement Agencies

The Department of Homeland Security's policy is to prohibit the consideration of race or ethnicity in our daily law enforcement activities in all but the most exceptional instances. The following is the Department's official policy on this issue:

“Racial profiling” concerns the invidious [that is, offensively unfair] use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement activities. It is premised on the incorrect assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity. DHS explicitly adopt[ed] the Department of Justice’s “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.” It is the policy of the Department of Homeland Security to prohibit the all but the most exceptional instances, as defined in the DOJ Guidance consideration of race or ethnicity in our daily law enforcement activities in.

Two standards in combination should guide use by Federal law enforcement officers of race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity in law enforcement or intelligence activities:

1. (b)(5); (b)(7)(E)
- 2.

(b)(5); (b)(7)(E)

HOMEWORK: Read the DOJ Guidance at SDR 4th A-14 prior to the next day’s class.

See SDR 4th A-13 DHS Management Directive 3500, 5-19-04; SDR 4th A-14 DOJ Use of Race Policy, 12-14; SDR 4th A-15 DHS Commitment to Race Neutrality, 6-1-04; SDR 4th A-16 Mechanisms to Mitigate the Risk of Racial Profiling, 4-17-09; SDR 4th A-17 DOJ Guidance on Use of Race by Federal Law Enforcement Agencies, June 2003; and SDR 4th A-18 DHS Commitment to Nondiscriminatory Law Enforcement and Screening Activities, 4-26-2013.

- C. DHS Use of Force Policy. (See, SDR 4th A-19, 4th A-20, and 4th A-21-1 to 4th A-21-8).

Rule: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

- D. DHS Use of Deadly Force Policy. (DHS Policy on the Use of Deadly Force, SDR 4th A-22).

Rule: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

Disabling vehicles – firearms cannot be used solely to disable moving vehicles, vessels, aircraft, and other conveyances, except during maritime law enforcement activities. However, if the vehicle is being used as a weapon to harm the SA, then the SA is permitted to eliminate the threat by shooting at the driver.

Warning Shots are not permitted, except as follows:

- (1) (b)(5); (b)(7)(E)

(2)

(b)(5); (b)(7)(E)

E. HSI Encounters with Diplomats. (See, SDR 4th A-23 Law Course, *Diplomatic Immunity Chapter, 2010* and SDR 4th A-24 *State Department Guidance to Diplomatic Immunity*).

1. Diplomatic Immunity – International Law principle by which certain foreign government officials are not subject to the jurisdiction of host country courts and legal authorities.
2. United States and US law enforcement are legally bound to ensure that privileges and immunities embodied in the Vienna Convention on Diplomatic Relations (VCDR) are respected and followed. According to the Constitution (Article VI, clause 2), treaties are the “supreme law of the land.”
3. Properly designated diplomatic agents and family members forming part of the diplomatic agent’s household may not be handcuffed (except in extraordinary circumstances), arrested, or detained.
Exception: U.S. Nationals, U.S. citizens, legal permanent residents, and foreign nationals permanently resident in the U.S. diplomatic immunity.
4. Identifying those with diplomatic immunity. The United States extends immunity to the individuals mentioned above and the State Department issues identification cards (color coded) that provide a picture, diplomatic classification, and immunities extended to each of those persons. The State Department identification cards are shown below:

U.S. DEPARTMENT OF STATE IDENTIFICATION CARDS

The United States Department of State's Office of Protocol, issues identification documents to foreign government personnel who are entitled to immunity. Samples of the identification cards are provided here. Because there are different degrees of immunity, law enforcement officers should read carefully identification cards presented to them. During business hours (8 a.m. – 5 p.m. EST) questions regarding an individual's status or immunity should be referred to the Office of Protocol at (202) 647-1985 or (202) 647-1727. After business hours, please contact the Diplomatic Security Command Center at (571) 345-3146 or toll-free at 1-866-217-2089.

BLUE bordered cards are issued to diplomatic officers and their families. they are entitled to full criminal immunity and may not be arrested or detained.

BLUE bordered cards are issued to UN diplomatic officers and their families. they are entitled to full criminal immunity and may not be arrested or detained.

GREEN bordered cards are issued to embassy administrative and technical staff employees and their families. This card signifies that the bearer is entitled to full criminal immunity and may not be arrested or detained.

GREEN bordered cards are issued to embassy service staff employees. This card signifies that the bearer is entitled to immunity for official acts only.

5. Consular Posts – Consular personnel perform tasks such as issuance of travel documents, attending to the difficulties of their own nationals who are in the host country, and promote commerce of the sending country. Vienna Convention on Consular Relations (VCCR/1963) grants very limited privileges and immunities to consular personnel. Consular personnel possess the following types of cards:

RED bordered cards are issued to career consular officers. This card signifies that the bearer is entitled to immunity for official acts only.

RED bordered cards are issued to career consular employees. This card signifies that the bearer is entitled to immunity for official acts only.

RED bordered cards are issued to consular officers/employees and their families from countries with which the U.S. has special agreements. They are entitled to full criminal immunity and may not be arrested or detained.

RED bordered cards are issued to honorary consular officers. This card signifies that the bearer is entitled to limited immunity for official acts only.

The image displays four sample Consular Identification Cards, each with a red border and a photo of the bearer. Each card includes the following information:

- Number:** 4004-0154-52
- Expires:** 7/31/2015
- DOB:** 1/1/1901
- Name:** DIPLOMAT, JOHN DOE - SAMPLE -
- Title:** CONSUL GENERAL, ADMINISTRATIVE OFFICER, DEPUTY CONSUL, HONORARY CONSUL
- Mission:** CURIPANIA - CONSULATE
- Location:** MIAMI, FL; LOS ANGELES, CA; NEW YORK, NY; CHICAGO, IL
- SEE REVERSE SIDE FOR STATEMENT OF IMMUNITY**

Each card also features a specific immunity statement and contact information for law enforcement inquiries and return protocols.

6. International Organizations personnel typically enjoy only official acts immunities as provided by 22 U.S.C. § 2881, the International Organizations Immunities Act. This legislation grants immunities to senior executives within such organizations similar to those granted Diplomatic Agents. Example: Secretary General and Assistant Secretaries-General of the United Nations. Another notable organization includes the Organization of American States headquartered in the US.

F. Demonstration

(b)(5); (b)(7)(E)

X. Student Practice

(b)(5); (b)(7)(E)

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

XI. Summary

A. Seizure and search

1. Seizure can be of an object or person.
2. Search tests include Katz REP and Jones Trespass.

B. Fourth Amendment general rule:

1. Warrant must be issued.
2. Must have probable cause.
3. Search or seizure must be executed in a reasonable manner.

C. Warrant exceptions

1. Arrest in public
2. Plain view seizure
3. Mobile conveyance doctrine
4. Exigent circumstances

D. Warrant and probable cause exceptions

1. Search incident to arrest
2. Consent
3. Investigative detention/Terry Stop
4. Terry frisk
5. Inventory search
6. Protective sweep
7. Administrative/Regulatory search
8. Border search authority

E. Policies, directives, and constitutional limitations

1. First Amendment
2. Use of race
3. Use of force

4. Use of deadly force
5. Encounters with Diplomats
6. Prosecutorial discretion for persons who came to the U.S. as children

Integration

The fourth Amendment and Border Search Authority Chapters address the lawful ways in which the SA collects physical evidence.

Terminal Performance Objective – Given a set of scenarios, the student will demonstrate how to analyze Fourth Amendment search and seizure issues in the field per the United States Constitution and Fourth Amendment law.

EPO	OBJECTIVE
1	Define seizure and search.
2	Examine the Fourth Amendment’s General Rule.
3	Explain the Fourth Amendment’s Warrant Exceptions.
4	Describe the Fourth Amendment’s Probable Cause Exceptions.
5	Apply Agency Policies and Directives to Fourth Amendment seizures and searches (including Use of Race Guidelines).

Motivation

The HSI mission is an important one, but it must be done reasonably and legally. As a Special Agent, it is imperative that you understand the laws and policies that govern your professional behavior, specifically the Fourth Amendment. Your ability to accurately apply the rules we discussed will enable you to more effectively perform your job and avoid sanctions.

Test or Final Activity

You will be tested on your knowledge of the Fourth Amendment as it relates to searches, seizures, and warrants on the legal multiple-choice exam after the Sentencing Guidelines Chapter. However, your ability to address these legal questions will be tested during other practical exercises and each time you conduct a search or seizure.

References

Fourth Amendment Chapter Student Drive References:

- 4th A-1, Law Course, Search and Seizure, April 2010
- 4th A-2 HSI Search and Seizure Handbook, HSI HB 10-05, August 18, 2010
- 4th A-3 Jones GPS Tracking Device Guidance
- 4th A-4 Jones GPS Tracking Device Guidance
- 4th A-5 Sample Application for Search Warrant
- 4th A-6 Sample Search/Seizure Warrant
- 4th A-7 Sample Search and Seizure Warrant on Oral Testimony
- 4th A-8 Sample Application for a Tracking Warrant
- 4th A-9 Chimel Rule Checklist
- 4th A-10 DOJ Guidance on Gant
- 4th A-11 “Ruses”
- 4th A-12 ICE Inventory Search Guidelines
- 4th A-13 DHS Management Directive 3500, 5-19-04
- 4th A-14 DOJ Use of Race Policy, 12-14
- 4th A-15 DHS Commitment to Race Neutrality, 6-1-04
- 4th A-16 Mechanisms to Mitigate the Risk of Racial Profiling, 4-17-09
- 4th A-17 DOJ Guidance on Use of Race by Federal Law Enforcement Agencies, June 2003
- 4th A-18 DHS Commitment to Nondiscriminatory Law Enforcement and Screening Activities, 4-26-2013
- 4th A-19 *Graham v. Connor*, 490 U.S. 386 (1989)
- 4th A-20 *Tennessee v. Garner*, 471 U.S. 1 (1985)
- 4th A-21-1 to 4th A-21-8 DHS Interim Use of Force Policy, 7-7-04
- 4th A-22 DHS Policy on the Use of Deadly Force
- 4th A-23 Law Course, Diplomatic Immunity Chapter, 2010
- 4th A-24 State Department Guidance to Diplomatic Immunity
- 4th A-25 Exercising Prosecutorial Discretion Memorandum, June 15, 2012
- 4th A-26 Memorandum edit
- 4th A-27 Civil Immigration Enforcement Priorities Memorandum, 11-20, 2014