



**Walking the Line –**

Understanding 4th Amendment Limits & Protections for Searches by Law Enforcement

Presented by  
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**Today's Presenters**



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**WALKING THE LINE** 

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**Curtilage & the Fourth Amendment**

Robert A. Callahan

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## Curtilage

- Rights protected by the Fourth Amendment are for “people to be secure in their persons, houses, papers, and effects . . . .”
- Where does curtilage fall within these protections?

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## Curtilage

- Supreme Court cases defining curtilage:
  - *Hester v United States*, 265 U.S. 57 (1924) - Held that protection of Fourth Amendment does not extend to open fields.
  - *Oliver v United States*, 466 U.S. 170 (1984) – Held Fourth Amendment protects “curtilage” of a house.
- Extent of curtilage determined by factors which bear upon whether an individual may reasonably expect the area in question should be treated as the home itself.



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## Central Inquiry

- “Whether the area harbors the intimate activity associated with the sanctity of a man’s home and the privacies of life.”
  - *United States v Dunn*, 480 U.S. 294 (1987) – Barn, located approximately 50 yards from fence surrounding a ranch house, not within curtilage of the house – facts and factors.

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## Central Inquiry

- *Florida v Jardines*, 569 U.S. 1 (2013) – Whether using a drug-sniffing dog on a homeowner’s porch to investigate contents of a home is a search – area immediately surrounding and associated with home is treated as part of home itself for Fourth Amendment purposes.



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## Definitions

- Area around home is “intimately linked to the home, both physically and psychologically, and is where privacy expectations are most heightened.”
- “The front porch is the classic exemplar of an area adjacent to the home and to which the activity of home life extends.”



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## Invitations

- Law enforcement officers have an “implicit license” to approach the house by front path, knock promptly and briefly wait to be received.
- Complying with terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation’s Girl Scouts and trick-or-treaters.



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**Collins v Virginia,**

**138 S. Ct. 1663 (2018)**

- Whether automobile exception permits police officer, uninvited and without a warrant, to enter curtilage of home to search vehicle parked in curtilage.
- Police officers searching for a stolen motorcycle
- Motorcycle parked at top of driveway, behind front perimeter of house, and enclosed on two sides by car-height brick wall and on third by house.

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**Collins v Virginia**

- Motorcycle was covered by tarp. Officer removed tarp, took photograph of motorcycle, license plate, and VIN to determine it was stolen.
- Court analogized area where motorcycle was parked to a front porch, side garden or area outside a front window.

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**Collins v Virginia**

- This was “an area adjacent to the home and to which the activity of home life extends.” “An area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.”



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**Morgan v Fairfield County,**  
**903 F. 3d 533 (6<sup>th</sup> Cir. 2018)**

▪ **Facts:**

- Street Crime Reduction and Apprehension Program (SCRAP) unit received anonymous tips defendants were growing marijuana and cooking meth.
- SCRAP unit decided to do knock and talk – standard practice – surround house before knocking on door by stationing officer at each corner of house, approximately five to seven feet from house.

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**Morgan v Fairfield County**

▪ **Issue:**

- Whether forming a perimeter around house intruded on curtilage of plaintiffs
- “No Trespassing” signs in front window of house and on vehicle parked on property
- Neighboring homes each approximately 300 feet away with limited sight lines
- No residents across the street or behind plaintiffs’ house.

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**Morgan v Fairfield County**

▪ **Holding:**

- Officers invaded curtilage of the house. Area five to seven feet from house was within home curtilage. “Easily understood that arm’s length from a house is a classical exemplar of an area adjacent to the home and to which the activity of home life extends.”
- “The law seems relatively unambiguous that a backyard abutting the home constitutes curtilage and receives constitutional protection.”




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**United States v Coleman,**  
**2019 W.L. 1967705 (6<sup>th</sup> Cir. May 3, 2019)**

▪ **Facts:**

- Tracking device placed on criminal defendant's vehicles at condominium complex. Defendant asserted his driveway at condominium was within curtilage.

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**United States v Coleman**

▪ **Holding:**

- The area was not within the curtilage.

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**United States v Coleman**

▪ **Facts:**

- Condominium complex composed of approximately 40 residential units scattered across several streets.
- No gate or fence at entrance to condominium – small sign at entrance stated “Private Property” but did not forbid outside visitors. Residents of condominium could have visitors without requiring permission.

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### ***United States v Coleman***

- **Facts:**
  - Criminal defendant’s unit in building shared by three other families, and his driveway was shared with a neighboring family – there was no gate, fence, or hedgerow surrounding criminal defendant’s condominium unit.
  - One of the vehicles to which tracking device was attached was parked in front of criminal defendant’s garage a few feet onto driveway, other vehicle was parked across street.

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### ***United States v Coleman***

- **Holding:**
  - Criminal defendant did not have reasonable expectation of privacy in common area of his condominium that was unlocked and open to public.



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### **Resolving Curtilage Inquiry**

- Four factors to analyze:
  - Proximity of area claimed to be curtilage to home
  - Is area included with enclosure surrounding home?
  - Nature of use to which area is put
  - Steps taken by resident to protect area from observation by people passing by



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### Take Away

- Identification of curtilage is fact intensive, using four factors:
  - Proximity of area to home
  - Whether area is within an enclosure around home
  - Use of area claimed to be curtilage is put
  - Steps taken to protect area from observations by others

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### Take Away

- Areas that **ARE** curtilage:
  - Front porches
  - Areas within very close proximity to house (at least seven feet or arm's length)
  - Backyards
- Look for fences and enclosures around house, no trespassing signs, privacy fences, hedgerows, etc. to block view into area claimed to be curtilage.



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### “Knock-and-Talk”

- “Knock-and-talk” – Tactic used by law enforcement to knock on door and attempt to talk to individuals inside.
- Knock-and-talk, by itself, is not an unreasonably warrantless search. *Florida v Jardines*, 569 U.S. 1 (2013)
- Sixth Circuit recognizes knock-and-talk tactics as legitimate investigative technique. *United States v Thomas*, 430 F. 3d 274 (6<sup>th</sup> Cir. 2005)

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## “Knock-and-Talk”

- Knock-and-talk investigative technique has been noted by courts to “be easily subject to abuse, and has received its fair share of criticism.” *United States v Mills*, 2019 W.L. 1510958 (E.D. Mich. 2019)
- Knock-and-talk is “generally permissible” as long as it is consensual. *Smith v City of Wyoming*, 821 F. 3d. 697 (6<sup>th</sup> Cir. 2016)

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## “Knock-and-Talk”

- Problems arise when knock-and-talk can no longer be deemed to be consensual – good recent case on knock-and-talk, *United States v Mills*, 2019 W.L. 1510958 (E.D. Mich. April 5, 2019)
- **Facts:**
  - Search warrant being executed on apartment #8.
  - Two detectives perform knock-and-talk at adjoining apartment #4.
  - Two knock-and-talks were attempted.

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## “Knock-and-Talk”

- First knock executed “with presence.” Officer testified, “We want you to know that we are here and we would like you to come to the door ... it’s the police, we’re the police, and we’d like you to come to the door.”
- After knock with presence, police officers remained at door for two to three minutes.
- Ten minutes later, police officers again did knock with presence.



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### Smith v City of Wyoming

- Court holds encounter resulting from this knock-and-talk encounter was non-consensual, and a seizure.
- “A police officer’s attempt to perform knock-and-talk may become coercive and exceed the scope of a consensual encounter if the officer asserts his or her authority, refuses to leave, or otherwise makes the people inside feel they cannot refuse to open up.”




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### Overbearing Tactics

- Law enforcement use of “overbearing tactics” may include show of authority that individual reasonably believes he has no choice but to comply.

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### Overbearing Tactics

- Overbearing tactics identified by court include:
  - Threatening presence of several officers
  - Display of a weapon by officer
  - Some physical touching of person
  - Use of language or tone of voice indicating compliance with request might be compelled




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### **United States v Mills**

- *Mills* court contrasted the facts with *United States v Crapser*, 472 F. 3d. 1141 (9<sup>th</sup> Cir. 2007), where there was a “single polite knock on the door.” The officers asked occupant to open door, no demand was made to open door, and there was no affirmative assertion of their authority. Encounter occurred in middle of day and lasted about five minutes.

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### **United States v Mills**

- In *Mills*, “After Rosario and Butler did not receive an answer after knocking on the apartment door the first time, they should not have gone back to the apartment to attempt a second knock-and-talk. Once an attempt to initiate a consensual encounter with the occupants of a home fails, the officers should end the knock-and-talk and change their strategy by retreating cautiously, seeking a search warrant, or conducting further surveillance.”

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### **United States v Mills**

- Because individuals were both seized through non-consensual knock-and-talk, it was an investigatory detention, which required that officers have reasonable, articulable suspicion of criminal activity to justify seizure.
- The court in *United States v Mills*, stated, in a footnote “[t]his case illustrates why the concerns about the improper use of and execution of knock-and-talk encounters are justified.”




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### Consent To Search

- Warrantless search is reasonable if based upon consent.
- Consent to search must be unequivocal, specific, and intelligently given, and uncontaminated by any duress or coercion.
  - *United States v Beauchamp*, 659 F. 3d 560 (6<sup>th</sup> Cir. 2011)



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### Factors Determining Consent

- Factors to determine whether consent to search was free and voluntarily given include:
  - Characteristics of consenter, including age, intelligence, and education of consenter, and whether consenter understood the right to refuse to consent and his/her constitutional rights. *Harris v Klare*, 902 F.3d 630 (6<sup>th</sup> Cir. 2018)

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### Factors Determining Consent

- Characteristics of any detention of consenter, including its length and nature, use of coercive or punishing conduct by police, and more subtle forms of coercion that might flaw judgment of individual. *Id.*
- Consent to search that is obtained after illegal seizure may be tainted and invalid.



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## Illegal Seizure?

- Factors for considering whether an initial illegal seizure has become attenuated are:
  - Length of time between illegal seizure and consent
  - Presence of intervening circumstances
  - Purpose and flagrancy of official misconduct
  - Whether suspect was read his Miranda rights before he consented.
  - *Beauchamp, supra.*




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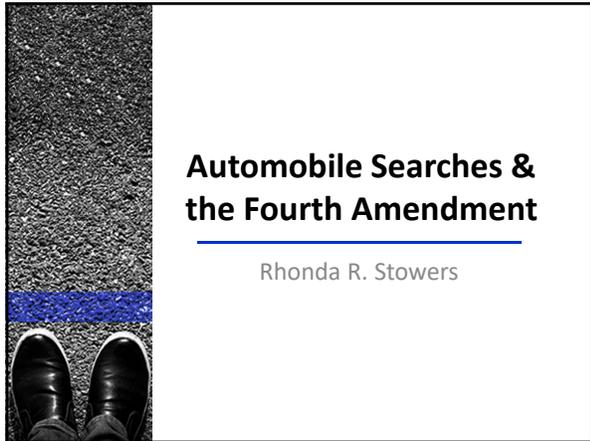
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## Automobile Searches & the Fourth Amendment

Rhonda R. Stowers




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## Automobiles & Fourth Amendment

- “A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile.” *New York v. Class*, 475 U.S. 106, 112 (1986)
- However, “the State’s intrusion into a particular area, whether in an automobile or elsewhere, cannot result in a Fourth Amendment violation unless the area is one in which there is a “constitutionally protected reasonable expectation of privacy.” *Id.*




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## Privacy Expectations

- Supreme Court has held that character and use of an automobile results in a lower expectation of privacy:
  - Function is transportation, not often a residence.
  - Not usually a repository for personal effects
  - Travels public roads/places

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## Privacy Expectations

- Occupants and its contents are in plain view.
- Subject to governmental regulation and controls
  - Periodic inspections
  - Licensing requirements



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## Lower Expectation of Privacy

- Due to this lower expectation of privacy, law enforcement may search a vehicle without a warrant if they have probable cause to believe that the vehicle contains evidence of a crime.
- So there's no need for consent, but ...
  - May be simpler, faster and less burdensome
  - Eliminates questions of validity
  - Likely doesn't hurt



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### Initial Stop – 4th Amendment Standards

- In order to effect a traffic stop, an officer must possess either:
  - Probable cause of a civil infraction
  - Reasonable suspicion of criminal activity.
  - *United States v Lyons*, 687 F.3d 754, 763 (6th Cir. 2012)




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### Probable Cause

- “reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion.”
  - *Smith v Thornburg*, 136 F.3d 1070, 1074 (6th Cir.1998)
  - Furtive behavior alone is not probable cause.
  - Smell of marijuana no longer probable cause?




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### Reasonable Suspicion

- More than a mere hunch, but less than probable cause, and considerably short of preponderance of the evidence
  - *US v Lyons*, 687 F.3d 754 (6th Cir. 2012)
- Intrusion must be reasonably related in scope to the situation.




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### Routine Stops

- During the stop, can I:
  - Ask questions unrelated to the stop? YES!
- Unrelated inquiries are ok, as long as:
  - Do not measurably extend the detention and
  - Responses are voluntary

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### Routine Stops

- During the stop, can I order driver out of car? YES!
- During the stop, can I search locked containers inside car with probable cause? (mostly) YES!
  - *Carter v. Parris*, 910 F.3d 835 (2018)

\*Caveat: must have reason to believe that evidence would be in the location searched

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### Routine Stops

- During the stop, can I delay the search after an arrest until back at the station? (generally) YES!
  - You can also perform an inventory search
    - Intended to protect property in custody and prevent claims of lost, stolen or damaged property

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## Routine Stops

- Only allowed where the vehicle is lawfully in police custody
- Must be conducted pursuant to standard police procedures
- Cannot be for the purposes of investigation



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## What About Passengers?

- Passenger, like driver, can be ordered to step out of the vehicle during stop.
- Passenger typically does not have legitimate expectation of privacy in another's vehicle.
- BUT passenger may have an expectation of privacy as to their belongings in the vehicle
  - Passenger may object even if driver consents.

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## What About Passengers?

- Search incident to lawful arrest
  - Intended for officer safety and evidence preservation
  - Doesn't require a formal arrest, but...
    - Formal arrest must follow quickly "on the heels" of the search
    - The fruits of the search are not needed to establish probable cause

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## What About Passengers?

- Limited to:
  - Reaching distance of the arrestee OR
  - Where there is reason to believe vehicle or container inside it contains evidence of the offense of the arrest



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## Vehicle "Trespassing"

- Attaching GPS device
- Chalking tires



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## Questions?



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