CourtSmart

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OFFICERS QUESTIONS—OUR ANSWERS

Q: I have been getting into recovering heavy machinery due to increased thefts around us. Yesterday I walked onto the front lawn of a residence under construction near the sidewalk where a bobcat was parked. I inspected the serial numbers and found that all were removed and destroyed with a grinder meaning it's most likely stolen. I know I'm in the safe in this instance because I saw from the sidewalk the serial plaque on the side was missing.

If I'm correct, I can walk up onto any property's front lawn as long as it's not gated to check any machinery to make sure it's not stolen? The facts are the property (construction site) belongs to whoever is building the residence. The construction equipment is most likely not tied to the owner of the property being built. In this case, it was a landscaping company

A: The Fourth Amendment protects the area of premises where a person has a reasonable expectation of privacy (REP). When officers enter or intrude upon areas where a person has a reasonable expectation of privacy the officers have conducted a "search."

The only ones with REP are the owner(s) of the property (or their "overnight" guests), so there is probably no reasonable expectation of privacy (REP).

The only reservation is that a suspect has REP if he is "an overnight guest" in a home. See *COLLINS V VIRGINIA*, 138 S Ct 1663 (2018). Is this like being an overnight guest -- in other words, is the fact that the owner of the property ALLOWS the suspect to put the machinery on the property create an expectation of privacy?

We would suggest that you can go where the mailman would feel comfortable going.

There are cases -- in other states -- that forbid officers to walk on the grass to go look at VINs in cars.

This is a much closer case than one would think at first blush and since there is no case on point in Illinois, you are going to have to follow the advice of your ASA or city attorney.

Q: We had a woman on a lawful traffic stop for several petty offense violations refuse to identify herself or provide a driver's license. She refused to acknowledge she was the registered owner and the DL image on file was not a great match according to our officer. She was warned she would be arrested if she did not identify herself and she told the officer she was under no obligation. She was not combative in any way when she was arrested and her driver's license was located inside her purse that came with her to the PD. Once identified, she was processed for obstructing and issued her traffic citations (4 in total for registration violations and expired driver's license – all petty offenses). The State's Attorney, after a year of continuances, dismissed ALL charges. The basis for his dismissing the charges was his belief that under *People v. Fernandez* he had no ability to convict her on the obstructing charge. He further suggested she was not required to comply with our demand for identification. I have no idea why the other charges were dismissed. I was under the impression that a suspect subject to a lawful stop was required to identify themselves.

A: According to 625 ILCS 5/ 6-112, the driver of a car in Illinois shall have his license or permit in his immediate possession at all times when operating the car. Additionally, upon demand from a police officer, the driver SHALL display it. The statute also provides that "no person **charged with violating this section** shall be convicted if he produces in court satisfactory evidence that a driver's license was issued to him and was valid at the time of the arrest." (emphasis added).

The legislature has provided a penalty for failure of a driver to produce a driver's license -a petty offense with a maximum fine of $500.00.

The statute that codified TERRY in part states:

Sec. 107-14. Temporary questioning without arrest.
(a) A peace officer, after having identified himself as a peace officer, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense as defined in Section 102-15 of this Code, and may demand the name and address of the person and an explanation of his actions. Such detention and temporary questioning will be conducted in the vicinity of where the person was stopped.

HOWEVER, the legislature did NOT provide a remedy for failure of a person to identify himself in a non-traffic TERRY stop**.**

People v. Fernandez states that during a TERRY stop refusal to give one's name is not obstructing a peace officer. *Fernandez* was a police citizen encounter that was NOT in a vehicle.

Bottom line: Failure to produce a driver's license during a **TRAFFIC** stop is a crime. Failure to give one's name during a **non-traffic** TERRY stop is not a crime.

IS THE SUPREME COURT GOING TO CHANGE ITS POSITION ON QUALIFIED IMMUNITY?

Context

The Unites States Supreme Court (USSC) reverses a majority of the cases that they consider on appeal. The USSC has generally sided with police officers on issues of excessive force and qualified immunity.

We have insisted previously that only the United States Supreme court can abolish or change its position on qualified immunity. Whether the court is going to do that is still up in the air.

LOMBARDO V CITY OF ST. LOUIS

Facts

St. Louis police officers arrested Nicholas Gilbert for trespassing and failure to appear in court. Officers brought Gilbert to a police station and placed him in a cell.

An officer saw Gilbert place a piece of clothing around his neck and the bars on his cell in an apparent attempt to hang himself. Three officers entered the cell and handcuffed Gilbert's hands behind his back. Gilbert began kicking at the officers and banging his head against the bench. After Gilbert kicked one of the officers in the groin, the officers called for more help and for leg shackles. More officers arrived, so there were six officers in the cell. Gilbert was handcuffed, and his legs were shackled. The officers moved Gilbert to a prone position, face down on the floor. Three officers held Gilbert's limbs down at the shoulders, biceps, and legs. At least one other placed pressure on Gilbert's back and torso. Gilbert tried to raise his chest, saying, "It hurts. Stop." After 15 minutes of struggling, Gilbert's breathing became abnormal. Officers found no pulse, so they started chest compressions, etc. Gilbert went to the hospital where he died.

The Federal District Court

Gilbert's parents sued the police under Section 1983 alleging that the police had used excessive force. The District Court (trial court) granted summary judgment to the officers finding (also) that they had qualified immunity because they did not violate a constitutional right that was clearly established at the

time of the incident.

The 8th Circuit Court of Appeals

The 8th Circuit ruled there was no constitutional violation and held that the officers deserved qualified immunity. The court found that no jury could find that the officers used excessive force.

The United States Supreme Court

The Supreme Court ruled that excessive force cases must obviously be analyzed under *GRAHAM V CONNOR*, 490 US 386 (1989); then the Court abandons that criteria.

While instructing lower court to not apply the factors mechanically, The Court appeared to lay out more criteria that lower courts must consider from *GRAHAM:*

- the relationship between the need for the use of force and the amount of force used;
- the extent of the plaintiff's injury;
- any effort made by the officer(s) to temper or limit the amount of force;
- the severity of the security problem at issue;
- the threat reasonably perceived by the officer;
- whether the plaintiff was actively resisting.

KINGSLEY V HENDRICKSON, 567 US 389, 397

The Court was most concerned that the 8th Circuit found the officers' actions were constitutional in using the "prone" positioning for 15 minutes after Gilbert had been handcuffed and shackled.

There were also additional facts the USSC felt the 8th Circuit needed to consider -- such as, that Gilbert had already been handcuffed and his legs were shackled, and there was evidence in the record that officers placed pressure on Gilbert's back even though St. Louis instructs its officers that that level of force can cause suffocation of a prone person.

The Court remanded the case telling the 8th Circuit to clarify their ruling in light of the above questions, particularly ensuring that the 8th Circuit understands that officers should not position handcuffed and leg shackled suspects on their stomachs just because they are resisting.

Training Tips

1. The Court specifically stated that it had "no views as to whether officers used unconstitutionally excessive force or, if they did, whether Gilbert's right to be free of such force in these circumstances was clearly established at the time of his death."
2. Justice Alito dissented, in an opinion that was joined by Justice Thomas and Justice Gorsuch. In Justice Alito's view, the Eighth Circuit applied the correct legal standard and made a judgment call on a sensitive question. In his opinion, the officers had a reasonable basis for using some degree of force to restrain Gilbert.
3. This ruling is not only unfair to the 8th Circuit, but it is unfair to every officer, attorney and judge in America who have to deal with this issue. Again, the Supreme Court has shown it is incapable of making a decision that directs lower courts, attorneys and (most importantly) officers in what the law is in excessive force cases.
4. As we have continued to insist, most federal courts place more emphasis on the **threat** factor of the *GRAHAM* criteria than the resistance factor. The USSC is subtly saying that in the *LOMBARDO* case. Don't forget that when it comes to subduing suspects particularly if you are going to use intermediate force or lay a handcuffed suspect on his stomach.

WHEN DOES THE SMELL OF CANNABIS SUPPORT THE SEARCH OF A CAR?

Context

There have been a number of cases decided by the Illinois Appellate Courts and the Illinois Supreme Court on whether the smell of cannabis provides an officer with probable cause to search a car. Before the legalization of small amounts of marijuana, the courts held that the odor of cannabis allowed police officers to search a car. The most recent case from the Illinois Supreme Court on this was *People v. Hill* discussed in the Training Tips below.

***People v. Lindsey*, 2021 IL App (1st) 192208-J**

Facts

Two police officers were on patrol in Chicago. While at an intersection, the officers saw Lindsey driving a car and operating a cellular phone. After making a traffic stop, the officers approached the car and smelled cannabis. One officer asked Lindsey to lower his window. Lindsey opened the window a few inches but due to the window tint the officer could not see inside the car. The officer asked Lindsey to exit the car. Lindsey refused, became evasive, and started to make calls from his cell phone. Lindsey refused to exit for six (6) minutes until some friends and family arrived in another car. Lindsey then tossed the car keys to one of them. The officers then retrieved the keys from that person. Lindsey was handcuffed and placed in the squad car. Officers then searched the car, unlocked the glove box with a key, and found a loaded pistol and drugs in the glove box.

Lindsey was charged with being an armed habitual criminal. He asked the trial judge to suppress the evidence the officers found during the search of the glove box.

Trial Court

The court denied Lindsey's request to suppress the evidence found during the vehicle search. The trial court found the officers had a right to stop Lindsey's car as they saw him violate a municipal ordinance-using a cell phone while driving. After the traffic stop, the officers smelled cannabis which gave them a right to search the car. Linsey was convicted and sentenced to prison.

Linsey appealed and argued that there was no testimony that the officers were trained or experienced in detecting the odor of cannabis. Since there was no evidence of that training and experience, the search of the car was not supported by probable cause.

Appellate Court

The Appellate Court found that since Lindsey never argued that the officers did not have sufficient training and experience in detecting the odor of cannabis he forfeited (gave up) that argument on appeal.

The court stated that the smell of cannabis supports probable cause to search a vehicle.

The court stated additionally that the "totality of the circumstances" supported probable cause to search the car -even if they did not consider the smell of cannabis. The court specifically noted the following:

- Lindsey refused to exit the car for 6 minutes.
- Lindsey did not lower his window when requested and when he did, the window was only lowered an inch.
- Lindsey became evasive.
- Lindsey made phone calls rather than complying with the officers' requests.
- When family and friends arrived, Lindsey tossed them the keys.

The court found that the defendant's conduct would give a reasonable person the impression that Linsey was hiding something and to believe the car contained evidence of criminal activity.

The Appellate Court found that the trial court was correct in not suppressing the evidence and Lindsey's conviction was affirmed.

Training Tips

1. Officers should read the cases on the odor of cannabis in The Illinois Officer's Legal Source Book, Volume I, pages 286-288
2. The Illinois Supreme Court had the chance to decide whether the odor of cannabis alone was sufficient to give officers the legal right to search a car. See *People v. Hill* on page 286. However, the court did not answer that question. Instead, the court found that under the specific facts of that case, the search of the car was lawful. In a footnote in that opinion, the court did state that the odor of cannabis was a factor in looking at the totality of the circumstances known to the officer. The court implied that the smell of cannabis was not sufficient (constitutionally) to search a car. We would stress taking a conservative approach and document any observations you make during a traffic stop, such as occupants reaching down under the seats, their behavior and statements.
3. This case held that the odor of cannabis supports "probable cause" to search a vehicle. The court also found that even without the odor of cannabis, the totality of the circumstances justified a warrantless search of the car.
4. Under 625 ILCS 5/11-502.1, medical marijuana must be in a sealed, odor-proof and child-resistant container. This makes it difficult for a person to avoid a search of their car if the officer smells marijuana.

CAN A PERSON OBSTRUCT A PEACE OFFICER FOR FAILING TO IDENTIFY HIMSELF DURING AN INVESTIGATION?

Context

Officers know that in Illinois a person does not need to identify himself during a TERRY stop and that the failure of a person to identify himself is not a crime. Most cases and issues arise when officers arrest a person for obstructing a peace officer for failing to provide or give identification.

What if the police are investigating a serious crime and a suspect refuses to identify themselves?

***People v. Hall*, 2021 IL App (1st) 190959**

Facts

The police received a dispatch of a domestic disturbance and possible kidnapping- including a description of the suspect, his vehicle and location and the description of a female passenger. An officer in the area saw the car with two occupants in it and began to follow the car. The officer activated his lights but the car kept driving for another 30 seconds. The car pulled into a gas station and stopped in front of a gas pump. Hall got out of the driver's seat and headed inside the station. The officer (who was in full uniform) yelled at Hall that the officer needed to speak with him. Hall continued inside the station and the officer followed him. Hall told the officer he had the wrong guy. The officer asked for identification and Hall said he wasn't going to give the officer anything.

As Hall left the station, four other officers arrived and were checking on the well-being of the female passenger in Hall's car. Hall began walking toward one of the other officers who was speaking with the female passenger. The first officer who spoke with Hall in the gas station yelled at Hall that he needed to speak with him. Hall ignored this and began swearing and telling officers to get the f*** away from his car. One of the officers at the car told Hall to get back and pushed Hall five to six feet. Hall approached this officer again and was detained. Shortly after Hall was detained, the officers learned that Hall was not the suspect they were looking for as the female passenger said she was fine. Hall was asked again to identify himself, but he refused. However, officers knew Hall's name before he was released.

Hall was charged with Obstructing a Peace Officer for "refusing to obey lawful commands to produce identification and/or to identify himself." This charge was based only on the encounter with the first officer and not for Hall's actions after he left the gas station and approached the officers speaking with

the female passenger. Hall was convicted and he appealed.

The Appellate Court:

The court found that the officer was performing a lawful act and that Hall knew he was a peace officer. The only issue, in this case, was whether Hall's conduct toward the first officer was obstructive. The court found that Hall was uncooperative and argumentative but that alone is not sufficient to violate the law.

The Court cited in *People v. Fernandez,* and noted that the law has held that an initial failure to provide basic identifying information is not criminal.

The court held that the evidence was not sufficient to show Hall obstructed a peace officer. Hall's conviction was reversed.

Training Tips

1. The Appellate Court cited *People v. Fernandez.* In *Fernandez*, a movie theater employee stated that a man would not leave the theater after it closed. Police arrived and saw the man, Fernandez, standing outside of the theatre. Fernandez would not give the officer his name so Fernandez was arrested and charged with obstructing. The Appellate Court ruled that the failure to give one's name during a TERRY stop is not a crime in Illinois. Please read the *Fernandez* case in The Illinois Officer's Legal Source Book, Volume I, pages 54 and 72.
2. On the day of the trial, the prosecutor in this case tried to file a second charge of Obstructing a Peace Officer against Hall for approaching the car and interfering with the other officers attempts to speak with the female passenger. The trial judge denied that request, so the case went forward only on the allegation of the failure by Hall to identify himself. There was no charge filed for obstructing a peace officer for Hall approaching the car after being told to stop and failing to do that.
3. Even if the prosecutors were allowed to file another charge would Hall have been guilty of obstructing a peace officer for being told to stop and approaching the car twice? Remember that under the law when a person obstructs a peace officer his actions have to "materially impede" the officer in performing his duty. It is questionable as to whether Hall's actions "materially impeded" the officers.
4. On January 1, 2023, the Resisting or Obstructing a Peace Officer statute will change. The new law provides that a person cannot be charged with resisting a peace officer if there is not an underlying offense for which a person was subject to arrest.

WHAT EVIDENCE IS NEEDED TO PROVE A PERSON IS IN CONSTRUCTIVE POSSESSION OF A WEAPON?

Context

There are a number of crimes for possessing contraband. For instance, unlawful possession of a controlled substance, unlawful possession of a weapon by a felon, etc. There are two ways a person can possess contraband in Illinois. “Actual possession” means that the person has actual and immediate control over an item. “Constructive possession” means that a person has the power and intention to exercise control over an item. In the vast majority of constructive possession cases, the evidence is proven by circumstantial evidence.

***People v. Davis,* 2021 Il App (3d) 190040-U**

Facts

Police officers executed a search warrant at the residence of Davis. Davis lived there with his fiancée. In Davis’s bedroom, police officers found a firearm, ammunition, and proof of residency. The firearm was found between the mattress and the box spring. Davis had been previously convicted of a felony and was charged with unlawful possession of a weapon by a felon.

During Davis’s trial on that charge, Davis’s fiancée testified that Davis’s 17-year-old son lived with them for several months and he stayed in the bedroom with his friends the night before the search warrant was executed. She denied knowing anything about the firearm the police found. The prosecutor played a videotape of the fiancée's interview after the search. During that interview, she told the police that no one lived with her and Davis and that only her and Davis slept in the bedroom.

The jury found Davis guilty and the trial judge later sentenced him to prison. Davis appealed claiming that he was not proven guilty beyond a reasonable doubt for possession of the weapon.

The Appellate Court

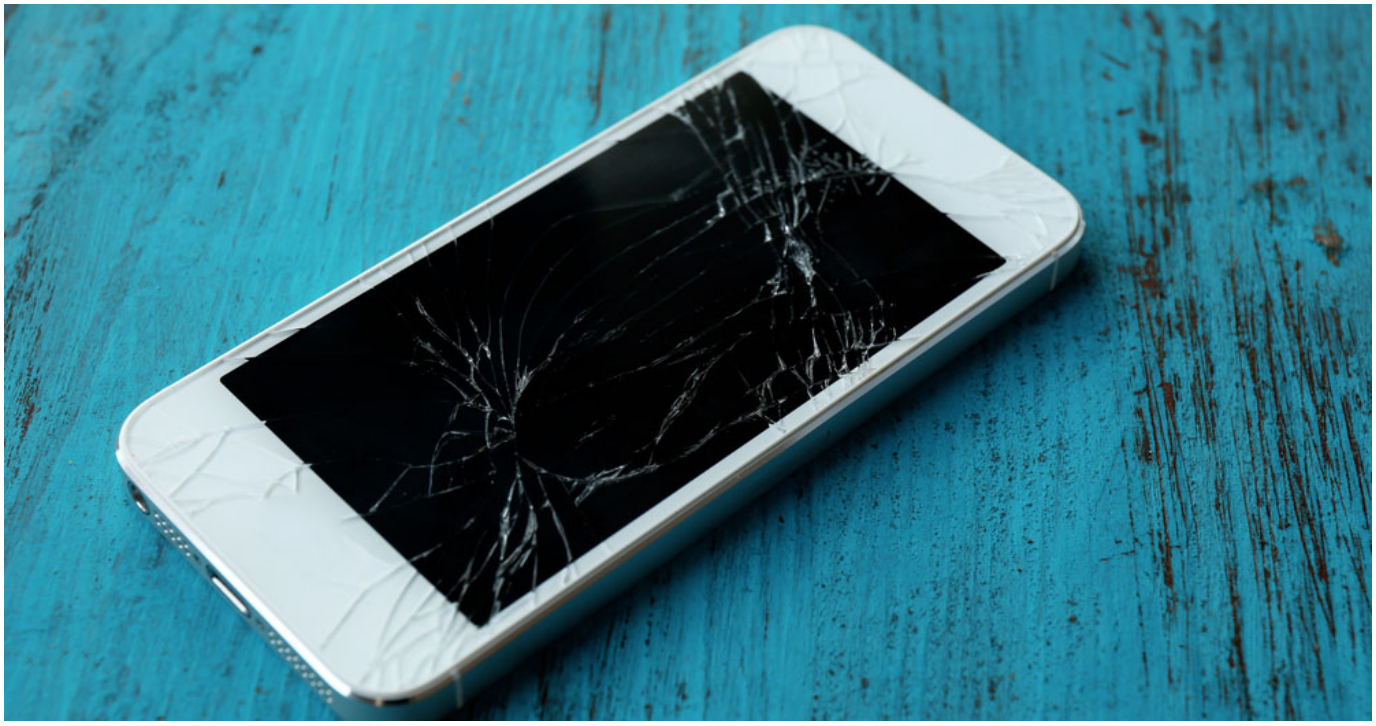
The court stated that constructive possession may be proved by evidence that the defendant had knowledge of the item's presence and had immediate and exclusive control over the area where the item is found. Proof that a defendant had control over the premises where the item is found gives rise to an inference of knowledge and possession of that item. A defendant's proved habitation in the premises where an item is found is sufficient evidence of control of the location to establish constructive possession.

The court found that the officers recovered the firearm in Davis's bedroom along with proof of his residency. During her interview with the police, Davis's fiancée said only she and Davis stayed in the bedroom and that she had no knowledge of the firearm. The court held that this evidence gave rise to an inference that Davis had knowledge and possession of the firearm. The Appellate Court affirmed Davis's conviction.

Training Tips

1. The police did a very good job of interviewing and recording Davis's fiancée's statements before she had a chance to speak with him and get their "stories straight." It is critical that police officers interview everyone they can to "lock" in their statements before charges are brought. In this case, the interview ended up hurting Davis and strengthened the prosecutor's case.
2. I am sure you have heard this dozens of times from prosecutors- get video or recorded statements of the witnesses. This is particularly true in domestic situations where experience teaches us that family and friends of a defendant will change their stories in an effort to help the defendant once the case proceeds to trial.
3. Why do prosecutors want written and signed statements or video recorded statements? In Illinois, the law allows a prosecutor to introduce handwritten or video recorded statements as evidence during a trial if the witness changes or recants their previous statements. The law refers to these as "substantive" statements. The jury is then allowed to consider these handwritten or recorded statements as if the witness said those ON THE WITNESS STAND. The jury then can consider both the witnesses prior recorded statement to the police AND their testimony on the witness stand. The jury then decides which statement (the earlier recorded statement or their testimony on the witness stand) is truthful. Most of the time, the jury will believe the earlier recorded statement.
4. It is easier to prove that a person has actual possession of contraband when the item is found on that person (i.e. pants pocket). The tougher cases are when officers stop a car or execute a search warrant and contraband is found in the car or in a home. It is important that officers collect evidence, such as mail addressed to the person at the address, AND interview as many persons on scene as possible.

CAN THE GOVERNMENT DISPOSE OF PERSONAL PROPERTY IN THEIR CUSTODY?



Context

Police departments have a right to seize property from a person they arrest. After seizure, the police are allowed to manage that property. If the property is evidence, the police will secure and store it until it is needed for court or until court orders it to be destroyed.

Police officers also seize personal items from a person who is arrested- such as jewelry, wallets, identification cards, etc.

What happens when the police destroy personal items taken from a person and then destroy those items?

Conyers v. City of Chicago

Facts

Conyers and several other unrelated persons had personal property seized by the Chicago Police after they were separately arrested. This property included personal items such as cellular telephones, bracelets, and rings. Conyers and the others were transferred to the Cook County Jail and the City kept their property at their Evidence and Recovered Property Section. Every arrestee received a receipt for the property that was taken and also received a Notice to the Property Owner or Claimant. The notice detailed their rights and directed them to a website. The notice provided that if a person did not collect their property within 30 days of its seizure, it would be considered abandoned and sold or destroyed. The notice also allowed the person in custody to have a third person claim their property if they were still incarcerated. Conyers and the others never claimed their property within 30 days of their arrest so the City destroyed the property.

Conyers and the other persons whose property was destroyed filed a lawsuit against the City of Chicago under section 1983 claiming the City's policy was unconstitutional. The federal trial judge ruled in favor of the City and Conyers appealed.

The Seventh Circuit Court of Appeals

The court noted that the City had a right to seize and inventory property upon arrest. Likewise, the City was allowed to manage the seized property.

The court found that the City of Chicago was allowed to consider the property abandoned. The court stated that the City did not seize the property intending to keep it permanently. The original seizure was for safety at the jail and not to punish the owner. Finally, the court found the 30-day limit reflected the practical constraints on storage capacity.

The court found that the detainee knows exactly what has been taken and when that occurred. Second, the arrestee is notified of how to get his property back and how quickly that must occur. Finally, the court noted that the notice provided by the City provides that if the property was not claimed it was considered abandoned. Abandoned property does not belong to anyone and the City is allowed to dispose of it.

The court affirmed the dismissal of Conyers's lawsuit.

Training Tips

1. You should be familiar with your department’s policies and procedures for disposal of items that you obtain from an arrestee.
2. REMEMBER- this was a case about the disposal of property that was not evidence in a case.
3. Officers should talk with their States Attorney’s office regarding destruction of evidence as there are a number of statutes on this topic.

QUESTIONS AND ANSWERS—FOR THE AUGUST EDITION OF COURTSMART

1. Pole cameras that videotape activities occurring in a suspect's yard are unconstitutional. - False
2. If a suspect erects a fence (or takes other measures) to protect his privacy, a pole camera videotaping activities inside the fence might be unconstitutional. - True
3. If officers have probable cause to believe a suspect committed a murder and is in the home of his girlfriend, the officers should obtain both a search warrant and an arrest warrant before entering the home, if possible. - True
4. The courts in Hardimon failed to consider a number of factors related to exigencies as required by the Illinois Supreme Court to be considered in the determination as to whether the officers were faced with exigent circumstances. - True
5. Suspects generally have an expectation of privacy in their offices such that officers should obtain a warrant to search it. - True
6. A private person / snitch (non-governmental) who brings officers crime-related evidence obtained from a suspect's office, where the person / snitch is not an agent of the government, the evidence will generally be admissible, even if the person / snitch illegally stole the evidence. - True
7. If a person is shot and dying, he / she can state who shot him / her and that statement is admissible in court as a dying declaration. - True
8. Generally, the suspect in a show-up should not be handcuffed. - True
9. If possible, the witness or victim should be taken to the suspect for a show-up. - True
10. Officers questioning a suspect who does not speak English must be very careful to ensure that the suspect understands the warnings and every question. - True