Cases and materials in this introductory chapter will establish the foundation for understanding of the constitutional principles discussed in the rest of the text, and their application to criminal investigations:

- Three things necessary to be proved in every criminal prosecution; three forms of proof; and three categories of defenses.

- How and why provisions of the federal constitution control many aspects of investigative procedure.

- The four amendments to the Constitution that broadly apply to law enforcement activity.

- Consequences of constitutional violations by police, including suppression of evidence and civil liability.

- Relationship between the Constitution and other provisions of law, including state constitutions and court decisions.

- The concepts of federal supremacy and independent state grounds, and their interplay in criminal cases.
Background

There was a time when standard investigative procedures followed by law enforcement officers were largely established by experienced officers, on the basis of acquired common experience. Later, state statutes undertook the task of defining criminal procedure. But since the decade of the 1960s, criminal investigations have increasingly been dictated by decisions of the United States Supreme Court, interpreting the federal Constitution.

In fact, the Supreme Court has issued more than 300 opinions since 1960 that directly or indirectly control many basic aspects of police work, including detentions, arrests, searches, entry into private residences, seizure of evidence, interrogation of suspects, and obtaining eyewitness identification evidence.

This body of decisional law has grown so large and so complex that it almost defies comprehension. Mastery of the constitutional rules and exceptions governing criminal investigations presents an ongoing challenge to peace officers, educators, lawyers and judges alike.

In decades past, police training included an almost-superficial coverage of the constitutional laws affecting criminal investigations, but this approach will no longer suffice. Today's officers must be thoroughly grounded in the full range of decisions that control both the admissibility of evidence they collect and their potential exposure to ruinous civil liability.

This text is designed to cover every important aspect of investigative constitutional law, with summaries of leading Supreme Court opinions and discussion in plain language of how the rules from such cases apply in everyday police work. An understanding of these materials is essential to the lawful and effective discharge of criminal investigative responsibilities in the Twenty-first Century.

The “Three Threes” of Criminal Investigation

To understand the significance of the various constitutional principles that apply to criminal investigations, it’s helpful to begin with the broad framework of criminal cases. Rules can only make sense when they’re seen as attempts to carry out specific objectives, to help achieve a predetermined goal. In criminal cases, the goals are discovery of the truth, exoneration of the innocent, and conviction and punishment of the guilty.

As our system has developed, the essential principles can be grouped into three categories of basic concepts, each having three primary features.

First, what are the three components that must be established in every criminal case?

1. The elements of the crime. Every criminal offense will have two or more elements that must be shown to constitute the crime. The typical elements of forcible rape, for example, are that the perpetrator accomplished an act of sexual intercourse with another, without the victim's consent, by means of force or fear. Unless each of these elements can be proven, there can be no conviction. Therefore, the investigator will seek admissible evidence of each of the elements in order to put together a chargeable rape case.

2. Jurisdiction of the offense. Even if it could be proven that a rape had occurred, a prosecutor has no authority to prosecute and a court has no power to adjudicate any case unless it is established that the crime occurred within the designated jurisdiction. Jurisdiction has both temporal and geographical requirements: the crime must be charged within the statutory time limit (statutes of limitations vary, and may not apply to capital crimes and other serious offenses); and at least some portion of the planning, preparation or execution of the crime must have occurred within the court's geographical area (city, county,
district, state or other statutorily-designated area). The investigator therefore needs to identify the evidence that will show the time and place of commission of the crime.

3. **Identity** of the perpetrator. Assuming that admissible evidence will prove each element of the commission of the crime within the agency’s jurisdiction, there must also be proof that the person arrested, charged and tried is the person who committed the crime.

The three components of every criminal case that must be proven by admissible evidence are the crime **elements**, **jurisdiction**, and **identity** of the perpetrator.

The second group of threes that the investigation must take into account are the means of proof. There are three basic forms of evidence that may be used to establish the components of a criminal case.

1. **Physical** evidence, sometimes called transfer or trace evidence. This category includes such things as items of property (guns, knives, drugs, stolen property, cash, etc.), fingerprints, semen, hair follicles, bite marks, bodies, and anything else that could be photographed, collected, examined or tested, and presented in court. The nature of the particular evidence sought by the investigator will depend on the nature of the crimes under investigation and the apparent circumstances of commission. The search for and seizure of physical evidence will be a significant aspect of the investigation.

2. **Testimonial** evidence. Victims, other eyewitnesses, those involved in the investigation and experts can be called upon to give evidence of what happened. The investigator will therefore try to identify, locate and interview all potential witnesses whose testimony might help to establish the components of the crime, or might be relevant to an anticipated defense.

3. **Confession** evidence. The most powerful evidence of the commission of a crime and the identity of the perpetrator is generally the confession (or partial confession, referred to as an “admission”) of the person who committed the crime. The investigator will make every lawful effort to obtain an admissible confession from the suspected criminal.

The three kinds of defenses to criminal charges are the third group of threes. A defendant can assert one or more of these.

1. “**No crime was committed.**” If any one of the essential elements cannot be proven, then the acts did not constitute a crime. In the example of the forcible rape, for instance, a defendant could claim that the complainant consented. Since lack of consent is an element of the crime, a jury that had a reasonable doubt on this issue could not convict a defendant of forcible rape.

   Or, if specific intent were an element of a crime (such as murder), where the perpetrator must be shown to have intended a particular act or consequence (such as causing the victim’s death), inability to prove this intent would preclude conviction.
Example: A well-known example of the “no-crime” defense was the Michael Jackson child-molestation case.

2. Misidentification. “If the crime was committed, someone else did it.” This variety of defense is sometimes called the “SODDI defense,” for “Some other dude did it.” The alibi is a variety of this defense, where the defendant presents evidence that he was somewhere else when the crime occurred.

Another common defense of this sort is the third-party culpability defense, in which the defendant presents evidence suggesting that a codefendant or some uncharged or even unknown person committed the crime. Challenges to scientific evidence, such as fingerprint or DNA analysis, are also attempts to undermine the prosecution’s identity evidence, to raise a doubt as to whether it was the defendant or someone else who committed the crime.

Examples: Notorious examples of this defense are the O.J. Simpson and Robert Blake murder cases.

3. “There is a legal bar to conviction.” Even if all of the acts that would normally constitute a crime can be proven to have occurred and it is clear that the defendant was the person who committed the acts, there are a variety of ways for a defendant to invoke constitutional or statutory excuses or bars to his conviction. This category includes the following:

- ex post facto prohibition (conduct cannot be retroactively criminalized)
- statute of limitations (the crime occurred too far in the past)
- speedy trial rules (trial was delayed too long after charging)
- discriminatory prosecution (the law is applied selectively to some offenders but not to others)
- entrapment (the government induced the defendant to commit the crime)
- insanity (because of mental defect, defendant couldn't appreciate the wrongfulness of his actions or conform his conduct to legal requirements)
- minority (defendant was below a statutory age of accountability, such as 12, 13 or 14 years)
- duress (someone forced defendant to commit the crime)
- necessity (includes self-defense, defense of others, and survival)
- lawful duty (state executions and police arrest powers, for example)
- mistake of fact that negates criminal liability (statutory-rape defendant reasonably believed victim's professed age of consent, for example)
- immunity from prosecution (certain diplomatic officials).

Example: An example of the application of a legal defense to prevent prosecution was seen in the Supreme Court decision Stogner v. California, holding that criminals, including accused
pedophile priests, could not be prosecuted under newly-extended statutes of limitation, retroactively applied.

Three avenues of defense are non-commission of a crime, misidentification of defendant, and legal bar to prosecution or conviction.

Application of the Constitution to Criminal Investigations

If the criminal investigator has an understanding of the components that must be proven in a criminal case, plus the forms of evidence that may be used for proof, and the theories of defense that may be presented, he or she can identify the investigative procedures that will be most likely to develop the facts needed to establish the criminal case and to negate false defenses. However, criminal investigations are also subject to certain restrictions, requirements and prohibitions that result from Supreme Court decisions construing various provisions of the Constitution. These concepts must also be understood and followed during the investigation of a criminal case.

In many instances, the constitutional rules are the same for both federal and state officers; in a few instances, there are differences as to which constitutional provision will apply.

Direct Application to Federal Officers

As originally written and construed, the Constitution was intended to place restrictions on the power of the federal government to affect the lives and activities of the citizens. Those provisions that restrict governmental officials, such as the Fourth, Fifth, Sixth and Eighth Amendments, were understood as applying directly to federal officers, but not to local officers (city, county and state officers).

For example, the Eighth Amendment prohibition of excessive bail applied to federal defendants, but not to state defendants. The ban on cruel and unusual punishment allowed federal courts to invalidate excessive sentences meted out to federal convicts, but not to state convicts. And although most states had similar or identical language in their own constitutions, state courts could interpret these provisions differently than their federal counterparts.

There was originally a real “dual sovereignty” system that allowed investigators to “forum shop” when a suspect’s crime violated both state and federal law (such as the robbery of a federally-insured bank). The applicability of some constitutional rules would depend on whether a federal or state forum was selected for the prosecution of the case, and whether federal or state investigators collected the evidence.

Criminal procedure provisions of the Constitution apply directly to federal officers.

Application to State Officers via the Due Process Clause

For almost 200 years following ratification of the Constitution and the Bill of Rights (first 10 amendments), local officers’ investigative activities were subject only to the restrictions of state constitutions and statutes. But the groundwork for applying the provisions of the US Constitution to state criminal cases was laid (even if unintentionally) after the War Between the States, with ratification of the Fourteenth Amendment.
The Fifth Amendment, applicable only to the federal government, includes a provision that “No person shall... be deprived of life, liberty, or property, without due process of law.” To address the recalcitrance of some of the former Confederate states, a similar due process clause was included in the Fourteenth Amendment. This clause applies directly to the states, by its express wording: “No state shall... deprive any person of life, liberty, or property, without due process of law.”

Exactly what this clause meant to those who drafted it, and to those who approved its inclusion in the Constitution in 1868, remains a matter of debate. For nearly 100 years, Supreme Court majorities saw no reason to believe that this clause was intended to graft onto state criminal cases the rules that had previously applied only to federal officers and courts.

But in the decade of the 1960s, under the leadership of Chief Justice Earl Warren, the Supreme Court decided that the Fourteenth Amendment due process clause “incorporated” the guarantees of the Fourth, Fifth, Sixth and Eighth Amendments, as interpreted by the federal courts. In other words, the court decided (often by 5–4 votes) that “due process of law” includes the court’s own interpretations of the federal constitutional restrictions, making them applicable to state and local investigators, prosecutors and judges.

Instead of simply declaring in one single case that the criminal procedure provisions of the federal Constitution had been incorporated in the Fourteenth Amendment due process clause (a bolder move that might have provoked a constitutional crisis), the Warren court moved methodically, in one case after another, taking a piecemeal approach by applying one provision at a time, until the full range of federal constitutional procedures had been grafted onto state criminal processes, as shown by the following list:

- 1961—Fourth Amendment exclusionary rule. (Mapp v. Ohio)
- 1962—Eighth Amendment ban on cruel and unusual punishment. (Robinson v. California)
- 1963—Sixth Amendment right to counsel. (Gideon v. Wainwright)
- 1964—Fifth Amendment prohibition against compelled self-incrimination. (Malloy v. Hogan)
- 1965—Sixth Amendment right to confront adverse witnesses. (Pointer v. Texas)
- 1966—Fifth Amendment exclusionary rule. (Miranda v. Arizona)
- 1967—Sixth Amendment right to speedy trial. (Klopfer v. North Carolina)
- 1967—Sixth Amendment right to compulsory process to compel the attendance of witnesses. (Washington v. Texas)
- 1968—Sixth Amendment right to jury trial. (Duncan v. Louisiana)
- 1969—Fifth Amendment prohibition of double jeopardy. (Benton v. Maryland)

The last of these cases, Benton, was issued on June 23, 1969, which by coincidence was the same date on which Chief Justice Earl Warren retired from the court.

The significance of this string of “incorporation” decisions cannot be overstated. The vast body of search-and-seizure decisions, which today control much of what local police may and may not do, would apply only to federal officers if it were not for Mapp. Miranda warn-
ings could not have been imposed on state officers except for Malloy. The US Supreme Court could not review state death-penalty cases or restrict the death penalty to a select few categories of murder if Robinson had not held the Eighth Amendment applicable to the states. It was Gideon that necessitated creation of “public defender” offices in the states and counties. Etcetera.

In fact, with the exception of the Fourteenth Amendment rulings affecting the exclusion from evidence of involuntary statements and overly-suggestive identifications, the entire body of constitutional cases discussed throughout this book would not apply to state and local investigations and prosecutions, except for the decade of incorporation rulings listed above.

In effect, this series of rulings brought about a far-reaching transfer of power over criminal cases, removing final oversight from the states and transferring it to the federal courts. Whereas the US Supreme Court previously had authority to review only federal criminal cases (and those state cases involving a claim of direct Fourteenth Amendment error), the Warren-led “incorporation” rulings now gave the Supreme Court (and lower federal courts hearing habeas corpus petitions) final say-so over any state prosecution where a defendant made a claim of constitutional error.

The fact that this massive federal takeover of state criminal procedures was accomplished without a new constitutional amendment or congressional mandate caused many in the country to charge that the court had overstepped its authority, and even led to calls for the impeachment of Earl Warren. The uproar died down after Warren’s retirement from the court, but absent any further amendment to the Constitution to reverse the court’s adoption of the “incorporation” doctrine, the states have been left with no choice but to comply with federal rulings.

In practical terms, the reality for all criminal investigators today, whether federal, state, county or municipal, is that rulings of the US Supreme Court under the Fourth, Fifth, Sixth and Eighth Amendments are binding in both criminal investigations and prosecutions and civil rights lawsuits. Criminal procedure has been federalized, and this is why every criminal justice student and in-service officer must be aware of and comply with the constitutional rules promulgated in the many Supreme Court decisions discussed in this book.

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**By means of the Fourteenth Amendment “incorporation doctrine,” the Supreme Court made the criminal procedure provisions of the federal constitution applicable to state investigations, prosecutions, sentencing and punishment.**

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### Relevant Constitutional Provisions

Although the bail, fine and punishment provisions of the Eighth Amendment affect prosecutions and sentencing, the four amendments having the most relevance for criminal investigators are the Fourth, Fifth, Sixth and Fourteenth Amendments.

### Fourth Amendment

“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.”
This amendment is typically described as having two clauses—the “unreasonable search and seizure clause,” and the “warrant clause.” In a series of cases covered in the next twelve chapters, the Supreme Court has given numerous guidelines as to what makes a search or seizure unreasonable, and what makes a warrant valid or invalid. Additional Fourth Amendment cases are decided in almost every Supreme Court term, adding new rules and exceptions that the active-duty officer must integrate into his or her working knowledge of Fourth Amendment principles.

Fifth Amendment

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The three components of the Fifth Amendment applicable to all civilian criminal cases are the privilege against compelled self-incrimination (which is the object of the Miranda rule), the double jeopardy prohibition, and the due process clause.

Sixth Amendment

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

Though several of these provisions relate to the trial of a case and have no direct impact on the investigation of crimes, two of them do. As discussed in Chapter 19, the right to counsel and the right of confrontation impose restrictions on the admissibility of some statements obtained from criminal suspects, victims and witnesses.

Fourteenth Amendment

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”
The “equal protection” clause prohibits selective enforcement of the law, such as detentions or arrests based on a racial profile, for example. But it is the “due process” clause that has more wide-ranging impact on police investigations. As discussed in Chapters 20 and 21, concepts of due process control the admissibility of confessions claimed to have been coerced by state officers through overbearing interrogation practices, and also control admissibility of pretrial identification where it is alleged that the ID procedure was impermissibly suggestive.

Interchangeable Rulings

As is apparent from a comparison of the wording in the Fifth and Fourteenth Amendments, they both contain almost-identical versions of a due process guarantee. The Fifth Amendment due process clause applies only to federal officers. (Schweiker v. Wilson) The Fourteenth Amendment due process clause expressly applies only to state officers (“No state shall deny….”) Because the Fourteenth Amendment already imposes a due process requirement directly on state officers, there was no need to “incorporate” the Fifth Amendment due process clause onto the states via the Fourteenth Amendment due process clause.

But for the sake of uniformity, the Supreme Court has said that the same standards of due process should apply in both federal and state cases; therefore, rules derived from Fifth Amendment federal cases on involuntary confessions or suggestive identifications are equally applicable in state cases under the Fourteenth Amendment, and Fourteenth Amendment rulings in state cases are likewise applicable in deciding Fifth Amendment issues in federal cases. (Richardson v. Belcher) Therefore, both state and federal officers are obliged to follow the rules on coerced confessions and suggestive ID, whether those rules arose from state or federal decisions.

Although the Fifth Amendment due process clause applies only to federal officers and the Fourteenth Amendment due process clause applies only to state officers, the rulings under both are interchangeable.

Consequences of Unconstitutional Investigation

Law enforcement officers swear or affirm to bear true faith and allegiance to the Constitution. And “…police officers are expected to obey the law while enforcing the law.” (Spano v. New York) Conducting criminal investigations in a constitutional manner is therefore a matter of basic duty for all peace officers.

But there are additional reasons why officers must know and follow the constitutional rules while investigating criminal activity. Unconstitutional acts can have serious consequences for the prosecution of a case, can subject the officer and his or her agency to potential civil liability, and can even result in the criminal prosecution of the offending officer. Avoidance of these negative consequences, and adherence to the basic duty of obedience to the Constitution, will require officers and their supervisors to have an up-to-date working knowledge of existing decisional law, and to stay abreast of changes that occur with each yearly term of the Supreme Court.

Exclusionary Rules

For all its criminal justice provisions, the Constitution actually only contains one rule regarding the admissibility of evidence, and that is the Fifth Amendment exclusion of compelled self-incrimination. Nor does the Constitution provide a remedy for the violation of its provi-
sions. It simply declares rights and restrictions, and leaves to the legislative branch of government the task of enacting laws to implement its mandates.

But the judicial branch has not been shy about devising remedies of its own, under the theory that the courts have the “inherent power” to control their own functions, which include the conduct of criminal trials. So in *Bram v. US* in 1897, the Supreme Court reversed a murder conviction on the ground that the introduction of a coerced confession at a federal trial violated the Fifth Amendment. A similar exclusionary rule for involuntary confessions was applied to the states in *Brown v. Mississippi*, in 1936, under the Fourteenth Amendment due process clause. Seventeen years after *Bram*, the Supreme Court created a Fourth Amendment exclusionary rule to apply to federal trials, in federal district courts. (*Weeks v. US*)

In the decade of the 1960s, the Warren court not only used the due process “incorporation” doctrine to apply the criminal procedure provisions of the federal constitution to the states, but also created additional exclusionary rules to give practical effect to these provisions. Examples include the *Mapp* rule (which applied the *Weeks* Fourth Amendment exclusionary rule to the states), the *Miranda* rule (a Fifth Amendment exclusionary rule) and the *Massiah, Wade-Gilbert*, and *Bruton* rules (various Sixth Amendment exclusionary rules).

The effect of these various exclusionary rules is to limit or prevent admission of evidence in court if that evidence was obtained as a result of a violation of the defendant’s constitutional rights, or if its use at trial would violate a constitutional right. For police officers, this means that one serious consequence of not knowing, or not abiding by, controlling decisions of the Supreme Court could be the suppression of evidence, which in turn could result in the dismissal of charges or acquittal of a guilty defendant at trial.

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**Constitutional violations by police can cause the suppression of evidence under exclusionary rules.**

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**Civil Liability**

Another potential consequence of police violations of suspects’ constitutional rights is civil liability that could require the officer, supervisors, the employing agency and the governmental unit (city, county, state, United States) to pay costly damages in a lawsuit.

Three years after the Fourteenth Amendment was adopted in the aftermath of the War Between the States, the Congress enacted a statutory scheme known as the “Ku Klux Act,” in 1871. Among the provisions of the Act was a statute that created a civil cause of action for transgressions of the Constitution by governmental officials.

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.” (*Title 42, US Code, §1983*)
Although the statute itself does not provide for suits against federal officers, the Supreme Court has ruled that federal agents can also be sued in their individual capacities for conduct that violates a person’s constitutional rights. (Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics)

Under Bivens or § 1983, officers can be sued for such actions as unlawful detention, arrest, use of force, entry or search, since such violations of the Fourth Amendment, as construed by the Supreme Court in its many search-and-seizure cases, would deprive the plaintiff of his or her constitutional rights. Police liability can also be based on particular violations of the Fifth, Eighth and Fourteenth Amendments.

The Supreme Court also held, in Monell v. Department of Social Services of New York, that the offending officer’s employing agency and chief could also be sued for maintaining an official policy or custom that caused constitutional violations to occur. Civil liability can also be imposed on supervisors and agencies for deliberate indifference to the duty to train and supervise subordinate officers, where such omission results in constitutional violations. (City of Canton, Ohio v. Harris)

Federal law also provides for separate attorney’s fees, over and above any judgment recovered by the plaintiff in a § 1983 case. It is not uncommon that these lawsuits result in verdicts in the range of thousands to millions of dollars. And attorney’s fees typically average several hundred thousand to millions of dollars.

A prevailing § 1983 plaintiff may also obtain declaratory or injunctive relief, meaning that the court can issue an order compelling the department to do something or forbidding the department from continuing to engage in specified conduct.

The threat of civil liability is another important reason why current and accurate understanding of investigative constitutional case law is vital for all officers, and for those who have training and supervisory responsibilities.

- State officers (§ 1983 claims) and federal officers (Bivens claims) can be held civilly liable for constitutional violations.
- Unconstitutional policies or practices (Monell claims) and deliberate indifference to the duty to train and supervise (Canton claims) can subject supervisors and employing agencies and governmental entities to civil liability.

Criminal Prosecution

As if the suppression of critical evidence and the possibility of civil liability were not reason enough for officers to maintain a working knowledge of constitutional cases, the Congress has also provided for the criminal prosecution of officials who violate constitutional rights. Under Title 18, § 242 of the United States Code, officers who violate constitutional rights under color of law can be punished by federal imprisonment for terms from one year to life. (Koon v. US)

Evidentiary Issues

Unfortunately, it is not always enough that officers’ conduct did not violate constitutional rights as defined in Supreme Court decisions—it is also necessary to be able to prove that no violations occurred. Doing it and proving it are two different things.

Knowing that criminal defense attorneys may invoke the exclusionary rule to try to suppress the evidence of their clients’ criminal conduct, and that plaintiffs’ attorneys may bring civil lawsuits years after an event (depending on the civil statute of limitations), officers and
supervisors must be alert to the need to document events in sufficient detail to rebut false claims of unconstitutional behavior.

Audio and video recordings are best and should generally be the preferred form of evidence, especially in homicides and other serious cases. Whether or not field or stationhouse investigation can be taped, reports should be thorough and accurate, including names and addresses of all potential witnesses and their exact statements, a complete description of the suspect’s conduct and statements, and a full recitation of the officer’s actions and observations.

Being mindful of the prospects of suppression motions, as well as civil liability and criminal prosecution in any case where an encountered individual might later claim that his or her constitutional rights were violated, officers and supervisors should routinely ask themselves, “How are we prepared to prove what actually happened, if we're challenged in court?”

**Sources of Constitutional Rules**

There are several sources of the constitutional guidelines that criminal investigators are obliged to know and follow. Both pre-service students and in-service officers should be familiar with the principles discussed throughout this book, and should have a plan for continual updating as future court decisions modify or add to existing law.

**The Constitution and the Supremacy Clause**

The ultimate source of all constitutional rules is, of course, the Constitution itself. With only seven articles and twenty-six amendments, the Constitution directly addresses matters of concern to the criminal investigator in relatively few places.

For example, Article I, sections 9 and 10, set forth prohibitions on *ex post facto* laws. This means that an act that was not illegal when committed cannot be criminalized retroactively, “after the fact” of commission.

The freedoms guaranteed by the First Amendment (speech, press, assembly, and petition) will sometimes place restrictions on law enforcement activities. For example, the Supreme Court has ruled that officers may not lawfully arrest a citizen for merely calling an officer by an offensive name or for using profanity or other objectionable speech. (*Houston v. Hill*) (Though not a constitutional rule, the National Labor Relations Act restricts actions that may be taken against those involved in peaceful labor disputes.)

As noted, the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments place limits on investigative and prosecutorial powers, and extend certain protections to criminal suspects and defendants.

And what gives the federal constitution its overriding authority is the “Supremacy Clause,” set forth in Article VI, Section 2:

“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State notwithstanding.”

The Supremacy Clause makes the Constitution the final authority on any matters covered by it.
Chapter 1: The Constitution and Criminal Investigation

US Supreme Court Decisions

If the only constitutional law police officers were required to know were the parts of the Constitution listed above that directly address criminal investigations and prosecutions, this would be a short book, and police work would be much easier. But the Supreme Court decided long ago that it has the inherent power to issue binding written opinions interpreting those express provisions of the Constitution, and it is this vast body of decisional law that makes up the bulk of constitutional guidelines that will control police procedures indirectly, through the exclusion of evidence and the assignment of civil liability.

In construing claims of violation of the federal constitution, all state and federal courts are obliged by the Supremacy Clause to comply with the decisions of the US Supreme Court. Not even the Congress can overrule Supreme Court decisions interpreting the Constitution. (*Dickerson v. US*).

Federal Circuit Decisions

Federal criminal cases and most civil liability cases are tried in the federal district courts. Appeals from these cases are decided by one of the thirteen federal circuit courts of appeals. These appellate courts publish some of their case opinions, which are then binding on all of the federal district courts within the respective circuit. These rulings are not binding on district courts in other circuits.

In the absence of specific guidance from the Supreme Court on an issue decided by a federal circuit court, state courts may look to circuit opinions for guidance. However, federal court of appeals decisions are not binding on the states. If a state appellate decision makes a ruling that is directly opposite the federal appellate case law, local police officers may face a conundrum. Following the state-court rule will mean that evidence will be admissible in a state criminal trial, but the officer may become subject to civil liability in federal court.
For example, California lies within the Ninth Circuit of the US Court of Appeals. If an officer in California relied on a state-court rule that found no Fourth Amendment violation in ordering a suspect out of his home to be arrested without a warrant, resulting evidence would not be suppressible in a state-court criminal trial. (*People v. Trudell*) However, the officer and his or her agency could be subject to a civil rights lawsuit in federal court, for violating a clearly-established Ninth Circuit rule declaring such conduct to constitute an unlawful “constructive entry.” (*US v. Al-Azzawy*) Therefore, it is incumbent upon local law enforcement officers and those who train and supervise them to be aware not only of state interpretations of constitutional principles, but also of any rulings of the applicable federal circuit court to the contrary.

**State Court Decisions and Independent State Grounds**

The US Supreme Court can only review and decide a few cases each term dealing with investigative procedures. The intermediate appellate and high courts of the fifty states will obviously produce hundreds or thousands of such opinions every year, so most of the criminal justice case law comes from state courts and the federal circuit courts.

Both state court and federal circuit decisions address issues not yet confronted by the Supreme Court, or they apply existing Supreme Court precedent to varying factual scenarios. These state and circuit court cases are not free to deviate from rulings issued by the Supreme Court on constitutional issues, because of the Supremacy Clause.

Most state constitutions have provisions that are similar or identical to those found in the Fourth, Fifth, Sixth and Eighth Amendments. State courts are free to interpret these provisions of state constitutions in such a way as to impose greater restrictions on state officers than the corresponding US Supreme Court decisions impose as a matter of federal constitutional law. This is known as the doctrine of “independent state grounds,” under which “Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution.” (*California v. Greenwood*)

But under the Supremacy Clause, states cannot provide less protection to suspected or accused criminals than the level guaranteed by the federal constitution. (*Cooper v. California*) Nor may states decide issues of federal constitutional law differently than the Supreme Court.

For example, in *Oregon v. Hass*, the Oregon Supreme Court ruled that Oregon could apply a different *Miranda* rule on a particular issue than the US Supreme Court had announced. This decision was reversed by the US Supreme Court, because the Supremacy Clause requires all states to follow Supreme Court rulings on *Miranda* issues, since *Miranda* is based on the Fifth Amendment to the US Constitution.

In the *Hass* decision, the US Supreme Court summarized the rule on independent state grounds and the Supremacy Clause as follows:

“... a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. But, of course, a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them.”

A very few states have chosen to apply their own constitutions in such a way as to provide greater protections to criminals—and thus greater restrictions on police—than the US Constitution provides. In those states, and on those particular issues affected, local officers are obliged to follow the more restrictive state rules when investigating crimes and collecting evidence.

However, the overwhelming majority of states and all of the federal circuits follow the rulings of the US Supreme Court interpreting the federal constitution; therefore, the US
Supreme Court decisions and rules discussed in this text will apply as the prevailing law for all federal officers and most state officers, and will set the minimum standards that must be met by all fifty states and the federal government.

The doctrine of “independent state grounds” permits state courts to base more restrictive police rules on the state constitution, but the state courts must adhere strictly to US Supreme Court rulings when deciding federal constitutional issues.
Terminology Quiz

In the space next to the number of each term in the first column, write the letter of the matching definition or description from the second column.

1. ___ Elements, Jurisdiction and ID a. Due process concept used by the Supreme Court to apply provisions of the Constitution to the states
2. ___ Bivens claim b. Constitutional guarantee against unreasonable search and seizure
3. ___ 6th Amendment c. Doctrine allowing states to apply their state constitutions and laws to provide greater restrictions on police powers
4. ___ Ex post facto d. Civil liability claim against a governmental entity based on unconstitutional policy or practice
5. ___ Physical, testimonial, and Confession e. Includes protection against compelled self-incrimination
6. ___ 14th Amendment f. The three components of a criminal case
7. ___ Supremacy Clause g. The three forms of evidence of guilt
8. ___ 4th Amendment h. Includes the constitutional right to counsel
9. ___ Incorporation Doctrine i. Prohibits retroactive criminalization of conduct
10. ___ Non-commission, legal bar, and misidentification j. Requires the states to provide equal protection and due process of law
11. ___ Monell claim k. Three varieties of defense to criminal charges
12. ___ 5th Amendment l. Civil liability claim based on deliberate indifference to the duty to train and supervise
13. ___ 42 USC § 1983 m. Civil liability claim against federal officers
14. ___ Independent state grounds n. Makes US Supreme Court rulings on constitutional issues binding on all state and federal courts
15. ___ Canton claim o. Federal statute under which civil suits can be brought for constitutional violations under color of law