Fourth Amendment

I. *Was there a search or seizure?*

- General
  - There is a search or seizure when there is a government invasion of your privacy or possessory interest
    - MUST be the government, there is no restriction on private citizen
      - An action by an official is not an invasion of privacy if the government official has a right to be where they were, and the object in question was in plain view.

- **Open Space Cases**
  - 2 Prong test:
    - 1. Has the person manifested a subjective and reasonable expectation of privacy
    - 2. Is this expectation of privacy reasonable in society's eyes/average citizen? (***Katz***)
  - For something to remain private, you must have a subjective belief that it will remain private and it must be a *reasonable* belief that it will remain private.
    - If you turn it over to a third party it is not a seizure, if an ordinary person could see it (*Greenwood*)
  - You do not have a reasonable expectation of privacy in an open field, state laws of trespass do not govern the 4th amendment (*Oliver*)—*open fields*
    - In open fields there is no expectation of privacy no matter how much you fence it because it doesn't contain the intimacy of the house.
  - It is not a search when it is something that an average curious citizen could have been interested in.
  - There is no search if you expose your intimate things to the public (*Riley*—aerial observation)
  - EXCEPTION
    - Search of luggage—no one expects for their luggage to be poked and felt around. Just being in public, you don't give up all your rights – (*Bond*)—Limitation of *Katz*

- **Sensory Enhancement Cases**
  - Drug sniffing dogs are legal within the 4th amendment since they smell the air outside of your luggage; this is not intrusive on privacy rights (*Place*).
  - It is a search when you use a device to obtain information that you would not have obtained otherwise (*Karo*)
    - *If the government surreptitiously installs an electronic device to obtain information that it could **not** have obtained by observation from outside the curtilage of the house, they have seriously violated privacy interests*
    - It is not a search when the beeper is being transported in the car bc there is no expectation of privacy as to our route on a public road—US v. Knotts
  - If the technology used to obtain the information is not available to the general public then it is a search (*Kyllo*).
    - *Thermal imagers constitute a warrantless search because (a) it could not have been found by the average citizen and (b) the average citizen who wanted to protect his privacy could not have done so by average means.*
    - What is available to the average citizen is key→ test for reasonable expectation of privacy

- **Misplaced Trust Cases**
  - You do not have an expectation of privacy in the things that you tell someone else (*Hoffa*)
  - Turning something over to a third party is your bad
  - The 4th amendment affords no protection to a wrongdoer's misplaced belief that another wrongdoer will not betray them (*White*)
  - There is no reasonable expectation of privacy when you are in someone's house for a transactional visit (MN v. Carter)
  - It is not a search if the government informant wears a wire (*Lopez*)
  - Broadcasting/Tape-recording is not a search (White)
  - If a wire is left in a room and the informant leaves, this is a search because it is similar to Karo and revealing information inside the home

II. *If there was a search, did the government have a valid warrant based on PC?*

- **Has to specifically describe the place to be searched and the thing to be seized**

- **Four ways to attack the warrant requirement**

    - (a) The affidavit used to obtain the warrant was false? (Quality of the information)

    - (b) The affidavit was true but insufficient to meet probable cause? (Quantity and sufficiency of the information)
        - To give rise to PC an informant's tip must contain:
            - (1) A sufficient statement of the underlying circumstances from which the informant gained his knowledge, or (**detail of information**)
            - (2) Information supporting the application of officer's belief that the informant is reliable and credible (**reliability of informant**)
                - a. Was the tip obtained in a reliable manner?
                - b. Is there sufficient evidence apart from the corroborating evidence?
                - c. Has the informant had a history of telling the police information, is the nature of the information good enough to show that they are not lying (i.e. someone admitting that they also committed a crime)
        - We now look at the two things above and apply them as a totality of the circumstances (*Gates*—change from *Aguilar-Spinelli*)
        - The government cannot judge subsequent events to justify past warrants even if later information is good information.
        - If the officer is certain that a crime has been committed and there are 3 people in a car, an officer can make a PC inference that all 3 are acting in concert and can arrest all. (*Pringle*)
            - Common enterprise

    - (c) The actual warrant was valid, but it was too broad or different from the PC in the warrant?
        - When it is clear that the scope of the warrant has been exceeded, the search must stop
        - The reasonableness of the search will not be unreasonable if the officers fail to realize the over-breath of the warrant if that failure is objectively understandable (*Garrison*-wrong apartment)

    - (d) The warrant was executed in an unreasonable manner?
        - There are no categorical exceptions to the **no-knock** rule, it is done on a case by case basis (*Richards v. Wisconsin*)
            - The only exceptions when the circumstances are **dangerous** and **futile**
                - Dangerous: if there is concern for the safety of the officers
                - Futile: if the officers are worried that the Δ will flush down the evidence
                - *Felony drug cases* are always an exception
            - DEFENSE: You cannot use unreasonable force—(so that is a defense).

III. *If the search or seizure occurred without a warrant was there an exception to the warrant requirement?*

- **1. Arrests (and seizures of things):**
    - Arrests
        - 1.There is no warrant requirement for public arrests based on PC as determined by a cop, even if the cop could have obtained a warrant without jeopardizing the warrant (*Watson*)
        - 2. If arrested without warrant and being held, police have to have a PC hearing by the magistrate for extended restraint of liberty following an arrest (Gerstein)
        - 3. The hearing must come in a reasonable amount of time 48 hours (*McLaughlin*)
            - Burden of unreasonableness after 48 hours is on the Δ
            - Burden of unreasonableness before 48 hours is on the police.
            - When there's a confession after the arrest and still untimely—court says even then they are not sure if there's a remedy (*Powell*)

- 4. The 4th permits an officer with probable cause to make a felony arrest without a warrant (*Watson*)
- 5. It does not matter if the arrest was unreasonable, all that matters is "was there objectively Probable Cause?"—(*Whren*)
  - A pre-textual search is not invalidated so long as the police had a legal right to make an arrest based upon objective PC (*Whren*)
- 6. You can make warrantless arrests for misdemeanors/fine only infraction (*Atwater*)
  - Defense: If the arrest is made in an *extraordinary manner* (i.e. humiliating arrest, causing injury in the arrest)
- 7. An arrest made on PC is objectively reasonable despite the officer's ulterior motives.

- Arrests in the home
  - You have to have a warrant for this
  - People have a greater expectation of privacy in their homes
  - 1. If it is someone else's house, you need a **search** warrant to arrest them
  - 2. If it is your house you need an **arrest** warrant.
  - 3. Unless there are **exigent circumstances**, the police are required to have an arrest warrant before entering a suspect's home to make an arrest (*Payton*)
    - Defense: exigent circumstances (I.e. you know Δ may flee and destroy evidence)
  - 4. You cannot arrest someone in their home for a misdemeanor (*Welsh*)
  - 5. You have enough time to arrest an overnight guest in the home of another
  - 6. To arrest someone in the home of another person, cops need a **search** warrant for that home if they use any evidence of the other parties' home. (*Steagald*)
    - If there is no search warrant for a person, a police's discovery of narcotics, in that person's home with an arrest warrant for someone else must be suppressed.

- Searches incident to arrest
  - 1. Any lawful custodial arrest justifies a full search of the arrestee's person and clothes because there is a diminished expectation of privacy (*Robinson*)
    - Even if the officer knows its not dangerous he can look through it
  - 2. Generally, a search must be contemporaneous to an arrest, unless the police had a good reason to do it later as soon as it became practical (*US v. Edwards*—no extra clothes in prison)
  - 3. A warrantless search incident to arrest may extend only to the person of the arrestee and the area within his immediate control- grab distance. (*Chimel*)
    - Area from within which he might gain possession of aweapon or destructible evidence.
    - DEFENSE: police cannot create their own exigent circumstances (i.e. here police got an arrest warrant but not a search warrant)
  - 4. Officers can do a protective sweep of adjoining spaces incident to arrest (*Buie*)
    - They need reasonable suspicion that someone is in another room to search it
    - Look into closets or other spaces immediately adjoining the place of arrest from which an attack may be immediately launched—cannot open a drawer bc people don't hide here.
  - 5. A search is determined to be reasonable in light of the circumstances
  - 6. The police cannot create their own exigent circumstances
  - 7. An officer may, after making a lawful arrest of an occupant of an automobile search the passenger compartment of the automobile incident to that arrest. (*Arizona v. Gant*)
    - Search of the vehicle is okay when:
      - A) In situations that are fluid and the Δ can get to the car at the time of the search
      - B) When there is reasonable belief that the car has evidence of the arrest

- **2. Automobiles and other movable objects:**
  - **Autos are inherently exigent because of their ability to mobilize**
  - **PC is still required**

- 1. Any vehicle that is readily mobile and subject to the pervasive laws regulating motor vehicles maybe searched, without first obtaining a search warrant, so long as there is probable cause to support to the search, except if it is being used as a home (*Carney*).
- 2. Police may search a closed container in an auto without a warrant if they have PC to search the container (*Acevedo*).
  - PC must extent to the portion of the car that the police want to search.
    - When the police know where the contraband is, they cannot search the rest of the car (unless glove compartment is within "grab distance"—search incident exception) because PC has not extended there
    - IF the police do not know where it is, they can search the whole car
    - With automobile exception—the finding of 1 thing can extend search to other parts of the car because it can create PC for another—discovery at one stage can give u PC for search of another place.
- 3. You do not need individualized PC to search multiple containers in a vehicle regardless of whether they belong to the passenger or driver (*Wyoming v. Houghten*)
  - A purse carried on your person does not automatically get searched when it is on your person.

- **3. Limited Exception of Person and Things:**
  - *Terry Stops*
    - Analysis
    - 1. Was there a forcible stop or seizure? Was there a detention at all?
      - Totality of the circumstances under an objective test
    - 2. Was there **reasonable suspicion** to justify the stop? Was it justified at its inception?
      - Inception: Specific and articulable facts justifying a suspicion that the suspect is armed and dangerous
      - Scope: Cops can search pockets if they have reasonable suspicion to believe that the suspect has an unusual weapon
        - Do the circumstances justify the inception OR
        - Was there reasonable suspicion to frisk?
    - 3. If justified, was it too long or intrusive? Was the search incident to stop conducted unreasonably? Did that right disappear because they were too invasive?
      - Stop was too long (Defense)
      - Pat down was too intrusive (Defense)

  - *Was there a stop/detention at all?*
    - An investigative stop must be temporary and last no longer than is necessary to effectuate the purpose, must use the least intrusive methods possible to verify or dispel their suspicion in a short period of time (*Royer*)
    - If the stop is voluntary there is no seizure (*Drayton*—Greyhound bus)
      - Voluntary: if a reasonably person would not feel free to decline the officer's' request for the encounter.
    - There is no seizure if the government did not terminate your freedom of movement through a means that was intentionally applied (*Hodari*—ran away)
    - Greyhound checks: not a detention because reasonable people could feel free to decline the officer's request (*Drayton*).
    - ARGUMENTS
      - Δ: intimidating
        - Exceeded Terry stop and no Reasonable Suspicion
      - govt: consensual
        - Did not Exceed Terry stop and was based on Reasonable Suspicion.

  - *If yes, was it reasonable/based on Reasonable Suspicion?*
    - **Need reasonable suspicion** for a Terry Stop
    - It is not reasonable to seize someone if they are just in the presence of drug dealers (*Cibron*)

        - An anonymous top is not sufficient to give an officer authority to make an initial stop unless it contains some indicia of the reliability of the tipster, such as the prediction of future activity corroborated by police surveillance (*JL*).
        - Considerations that are relevant for reasonable suspicion are presence in a high crime area and evasive behavior. Therefore unprovoked flight is suggestive of some wrongdoing (*Wardlow*)
            - Defense: Unprovoked flight
        - You must have suspicion for each person that you search
        - It is ok to detain someone while you search their home
        - Terry stops are unlawful if they are prolonged beyond the time reasonably required to serve its lawful purpose (*Caballes*)
        - Terry authorizes pat down of outer clothing—there needs to be reasonable suspicion that someone is armed and dangerous to pat down their clothes (*Brendlin*)
        - When an anonymous top tells you someone is armed—that is not enough reasonable suspicion to detain them and pat them down (*Florida v. JL*—plaid shirt case)

    - *If yes initially, did that right disappear because they were too invasive?*
        - The detention of luggage is the same as a person since you cannot travel without your luggage. The detention must be as brief as possible (*Place*)
        - Past 20 minutes is no longer a limited detention (*Sharpe*)
            - Also consider: was there more physical force used than necessary?
            - Did the cops wave their guns?
        - Dog sniff is not a search because it is conducted in a reasonable time frame because you're not held much longer than a traffic stop (which is equated with a Terry stop) (*Caballes*)
        - Detaining luggage for 90 min is too far (*Place*)
        - When a search is not reasonably limited in scope to the accomplishment of the only goal which might have conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man—it violates the 4th amendment (*Sibran v. NY*)
            - Terry authorizes only placing hands in outer pockets and then after this limited exploration for arms can thrust hand in pockets. eeling
            - In Sibran, 8 hrs after watching Δ, police officer then reached into his pocket.

- **4. Administrative and Regulatory Searches:**
    - 1. There must be some limitation on the officers
    - 2. There is an exception to PC and the warrant requirement
    - 3. Reasonable suspicion/individualized suspicion or a policy issue must be at the root
    - 4. It must go beyond ordinary criminal law enforcement

    - Two types
        - General Regulation: Intrusion is on the general public
        - Fact Specific: Invasion of specific people per regulation.

    - 2 questions to ask
    - 1. Is a warrant required or is the discretion of the police limited?
    - 2. Is the search reasonable? (Public interest v. intrusion on the individual)

    - *Police Station Searches*
        - At the station house, it is entirely proper for the police to remove and list or inventory property found on the person or in the possession of an arrested person who is the be jailed—its to protect police—so they have a record of items—don't give contraband to Δs (*Illinois v. Lafayette*)
        - An inventory of a motor vehicle that is impounded and the containers therein pursuant to established police department administrative policy doesn't violate the 4th prohibition of unreasonable searches and seizures (*Bertine*).
            - Defense: not conducted in *good faith*

- *Building Searches*
  - To search a building you need an area warrant (*Cammara*)
    - When there is no risk, officers who want to search private houses for building code violations need a warrant to do so because there is a higher expectation of privacy and the intrusion of privacy is very high.

- *Business Searches*
  - A highly regulated business such as alcohol, tobacco, and firearms can be searched without a warrant and also junkyards. (*Burger*)
    - Need a warrant for standard procedure in restaurants and businesses to make sure that employees are being treated properly. (Barloughs)

- *Car Searches*
  - **Detaining a car is a seizure**
  - 1. A car search to look for illegal immigrants on a known route is ok, this application is restricted to border policing (*Martinez-Fuerte*)
  - 2. There is a strong governmental interest in catching drunk drivers, so sobriety checkpoints are okay
  - 3. A vehicle checkpoint program whose primary purpose is to detect evidence of criminal wrongdoing is not sufficiently separate to pass constitutional muster, this was only general crime control (*Edmund*).
  - 4. Warrantless drug interdiction stops are valid administrative searches because of **special needs** to reduce drug use.
    - Officers need a special need: ordinary crime control is not a special need
    - Defense: ordinary crime control

- *People Searches*
  - It is ok to test customs officials since they work for the govt and the govt is fighting drugs (*Treasury Employees v. Von Raab*).
  - Schools have an interest in drug free students so you can be searched at school without a warrant, this is a setting in which a warrant just wouldn't work (*New Jersey v. TLO*)
    - Reasonable suspicion for search of purse in school.
  - It is ok to automatically drug test train employees involved in an accident (*Skinner*).
  - School drug testing is reasonable since students have a lesser expectation of privacy, and the intrusion is minimal
  - It is reasonable to drug test students that want to participate in extra curricular activities as a means of deterring drug use (*Board of Education v. Earls*)
  - If it is not related to some criminal reason it is not ok (*Ferguson—pregnancy testing case*)
    - An administrative search *doesn't* take place when hospitals arbitrarily test pregnant women in hospitals and hand over that information to police—that is crime control, not special needs.
  - The interest of controlling prisoners is higher when they're in prison and once they are out, the institutional concern is gone and a new concern of recidivism emerges. (*Samson*)
    - The sole purpose of *crime control* is not *sufficient*

- **5. Consent Searches:**
  - **You cannot truly consent if you are not given a choice to say no.**
  - **Exception to warrant requirement based on reasonableness**
  - Standard: **whether a reasonable person would have felt comfortable to say "no"**

  - 2 Questions
  - 1. Was it **freely and voluntarily** given?
    - Not due to duress or coercion, expressed or implied
    - The consenter need not know that he had a right to refuse, but this can be a factor in determining if it was freely given (*Bustamonte*)
      - It doesnt matter what the cop was trying to do or what Δ was thinking—we care about reasonableness

- 2. Did the **person** who gave consent **have the apparent authority** to do so?
  - Did the cops reasonably belief the third party had authority? (*Bustamonte*
  - A warrantless entry based on consent of a 3rd party is reasonable, and thus valid under the 4th amendment, so long as it was objectively reasonable for law enforcement to believe that the third party had the right to give consent (*Rodriguez*)

- If the cops get a "no" from anyone who has authority at the door, they **cannot** go in (*Randolph*)

IV. *If there is no exception, does the exclusionary rule apply?*

- Definition
  - Evidence collected in violation of a Δ's constitutional rights is inadmissible
- Generally
  - Due Process: 14th amendment, 5th if it's a federal prosecution
  - The exclusionary rule requiring evidence gathered in violation of the 4th to be excluded from criminal proceedings applies equally to both state and federal government (*Mapp*)
- New State of The Law
  - Hudson v. Michigan: "Times have changed argument" there are more civil remedies and we should use exclusionary rule to punish police.
- **TEST**: If the evidence is obtained as a result of an unreasonable search or seizure, then it is tainted. This includes future evidence.
  - 1. Defendant will always argue exploitation of illegality—**fruit of the poisonous tree**
  - 2. State will argue attenuation.
- Fruits of the poisonous Tree (*Wong Sun v. US*)
  - Applies only to physical (non-testimonial) evidence. Physical evidence or verbal statements during period of unlawful detention
    - Important to do a chronology—know what the justification at each moment in the chronology

- **Exclusionary Rule doesn't apply if:**
  - **Good Faith**: If the warrant was not based on PC, the evidence should be evaluated if the police officer acted in good faith in securing it. (*Leon*)
    - Police reliance: Evidence obtained in searches based on apparently valid warrant or statute need not be valid:
    - So standard is good faith.
  - If **administrative error**—unless system was recklessly maintained—cannot suppress it (*Herring v. US*—extension of Leon)
  - **Inevitable discovery**: evidence that would inevitably be discovered by legal means is not subject to the fruits doctrine.
    - (i.e. in Christian burial speech, Δ implicated himself in telling the police where the evidence was. Even though the police would have found the evidence eventually, they could not necessarily prove that Δ knew were it was)
  - **Independent Legal Source**: Evidence can be admitted if the same evidence is received from an independent legal source
  - **Living Witnesses** cannot be excludes because you can never know if they would have come forward absent the illegal search
  - **Intervening Act of free will by Δ**: (CA v. Hodari—throwing down evidence)
  - **Too Attenuated**: If the illegal means were sufficiently separated from the evidence, the taint is attenuated and the evidence can be admitted—(*Harris v. NY*)
    - Miranda rights do not necessarily attenuate the taint (i.e. brown arrested w/o warrant or PC, read his rights then confesses. Ct said not attenuated enough)
  - It is **not in trial**: The Exclusionary Rule does not apply to other types of proceedings because deterrent effect is served at police level.
    - Does not apply to grand jury because it is not an adversarial process
    - Doesn't apply to parole hearings.

- **Exclusionary rule will apply if:**
  - (a) It is based on false or reckless information (*Leon*)

- (b) It wasn't a neutral magistrate
- (c) Barebones affidavit was submitted and no reasonable cop would have thought that was enough.
- (d) It is not based on PC and the cop didn't use good faith in securing it (*Leon*)
- (e) To overnight guests who are the subject of an illegal search because it would have violated their expectation of privacy (*Minnesota v. Carter*)

Police Interrogations and Identification Procedures

I. Police Interrogations

- **Confessions must be voluntary!**
- **<u>There are 3 Constitutional Challenges</u>**

- Does the police behavior shock the conscience (14th)
  - Language: **it was not voluntary, it did not come of his own free will, was coerced**

  - If the police have overreached, then the confession can be excluded
  - The goal is to make the confessions reliable, deter the police from misconduct and prevent the state from taking advantage of a suspect (*Ashcroft*)
  - Denying a request for an attorney or using trickery to elicit information, especially that which is already known violates the 14th amendment (*Spano*)
    - Trickery as to a loved one, bff, family member.
    - But when police use trickery to get a suspect to speak about another crime of burglary when they suspected him of murder even though his sister had retained counsel for him—this was not as bad as Spano and Ashcroft—(*Moran v. Burbine*).
  - **Personal Liberty v. Police Interest**
    - **Balancing test** of the methods used to obtain the confession (*Fulminante*)
  - A confession is not rendered inadmissible merely because the police failed to inform the suspect that a lawyer tried to contact him or because the police did not grant the lawyer access, although egregious police misconduct may violate constitutional due process (*Moran*)

  - 14th challenge hinges on **involuntariness**—focus on what the police—were their actions inherently coercive?
    - Outrageous police behavior used to overcome the will of the Δ
    - Physical violence
    - Threats
    - Length of time (36 hrs—Ashcroft)
    - Tactics used to tug at Δ's heart strings (Spano-bff)
    - Not letting someone have contact with attorney he didn't know about is not a violation of HIS constitutional rights

  - Exclusionary Rule
    - Exclusionary Rule: Can exclude statement AND physical evidence
    - Public Safety
    - Inevitable Discovery

- When is something excluded according to the 6th?
  - 6th amendment test: **deliberate elicitation** of a statement by government without counsel when the adversarial process has begun.
    - Doesn't kick in until charged, indicted, or arraigned
  - If you are a charged suspect, you have a right to an attorney during questioning (*Massiah*)
  - The right to counsel is violated if incriminating statements are obtained from the accused after judicial proceedings have been initiated and counsel retained (*Christian Burial Case*)
    - Here was *coercive* because it was not <u>voluntary</u> and <u>knowing</u>.
  - After the 6th right to counsel attaches to an offense, it also attaches to other offenses that, even if not formally charged, would be considered the same offense because each requires the same proof of facts (*Cobb*)
-
  - 1. If the Δ is making spontaneous statements to the police and they are just sitting there listening you cannot exclude it (*Kuhlman*)
    - The defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks
  - 2. If he reinitiates conversation, all bets are off, and police **can** question a Δ in absence of a lawyer (*Patterson*)

- 3. The Δ has the burden of showing that the police and their informant set the stage for someone to be set up in a situation in which they would admit certain things (*Henry*).

- Violation means suppress fruits and statements, unless inevitable discovery (Williams II)
- Right comes into play only after adversarial process has begun. Because this is an adversary process, police can't go sneaking behind your back. Counsel must be there to protect u
- 6th only applies to crimes Δ has been charged with including lesser crimes (i.e. you **can** question a Δ about a separate crime, even if it related, that he has not been charged with
- **No public safety exception with the 6th**
- After indictment, 6th amendment rights come into play, and Δ can waive 6th amendment rights if fully aware and *Miranda* warnings can make Δ fully aware of 6th amendment rights. (*Montejo*)
- Δ can waive 6th rights, if fully aware and Miranda warnings can be sufficient to make Δ aware of that
  - Waiving Miranda also waives 6th amendment rights. (*Patterson*)
- You cannot preemptively assert your right to counsel—so cannot waive rights ahead of time (*Montejo*)
  - After indictment (6th amendment rights come into play), Δ can waive 6th amendment rights if fully aware and Miranda warnings can make Δ aware of 6th amendment rights.
- Δ cannot preemptively assert rights to counsel and cannot wait them ahead of time (*Montejo*)

- Exclusionary Rule
  - Exclusionary Rule: Fruits of the poisonous tree
    - Can suppress statements but not physical evidence (*Patane*)
    - Standing
  - Inevitable Discovery
  - No Public Safety Exception with 6th amendment

- When do you exclude a statement based on the 5th?
  - About being **compelled** and requires **1) custody** and **2) interrogation**.
  - If a reasonable person believes this isn't a temporary situation and this will go on and *Miranda* rights have been violated
  - If you **invoke your right to attorney**—cannot come at you with another crime
    - When counsel is requested, interrogation must cease and officials may not re-initiate interrogation without counsel present, whether or not the accused has consulted with his attorney
  - If you **invoke right to silence**—then can come at you with another crime

  - If a statement is taken before or in the absence of *Miranda* rights
    - 1. You have the right to remain silent
    - 2. Anything you say can be used against you in a court of law
    - 3. You have the right to speak to an attorney and have an attorney present during questioning
    - 4. If you cannot afford an attorney, one will be provided for you at the govt's expense

  - Analysis
    - (1) Take down legal argument→ standard being used
    - (2) Take down factual argument

    - a. Involuntary or coerced statement cannot be used to impeach
    - b. You cannot use silence to impeach a witness
    - c. You can re-question someone if time has passed and you give them a new set of warnings
  - Two elements needed to make *Miranda* apply: Custody and interrogation

  - ***Custody***:
    - Substantial interference with your rights to move around freely
    - **TEST**: **would a reasonable person believe that this is temporary**? (i.e. Terry Stop)
      - **If not temporary**, **then Miranda warnings** are required

- That he couldn't leave in a short time? That his movement had been interfered with?

- Roadside questioning is not a stop
- Even if a suspect is in police custody, police officer's statements are not deemed interrogation unless they are either express questions or equivalent statements which are reasonably likely to elicit an incriminating response, and in fact do elicit such a response (Innis)
- Grand jury: you are not in "custody" within the meaning of Miranda because the citizens will protect you and you will not feel compelled to talk (*Washington*)
- Interrogation under Miranda refers not only to express questioning, but also to any words or actions on the part of the police that the police should have know was reasonably likely to elicit an incriminating response. (*Innis*).
  - Terry stop is not custody—Yarborough v. Alvadavo

- ***Interrogation***
  - **TEST: Was it reasonably foreseeable that a police statement or action will elicit an incriminating response** (The court is not concerned with police motive)

  - Mirada safeguards come into play whenever it *should have been known* that their conversation would have brought about this incriminating response/statement by the Δ (*Rhode Island v. Innis*).
  - Chitchat conversation may or may not elicit incriminating response—Arguable.
  - Questioning from a cop only
  - The questioning must be the type that a reasonable cop would know would get a response
  - Miranda warnings are not required when the suspect is unaware that he is speaking to a la enforcement officer and gives a voluntary statement (*Perkins*)
  - 6th amendment doesn't apply because not charged yet
  - If Δ re-initiates questioning, all bets are off—not a violation to re-advise them and resume questioning.

- Exclusionary Rule
  - Exclusionary Rule
    - Can suppress statements but not physical evidence
      - Cannot suppress physical fruits of Miranda confession but can suppress physical fruits of a coerced confession (*Patane*)
    - If its only a Miranda violative confession (1st time), then 2nd second confession is not suppressed
    - If it's a true 5th amendment violation (true coercion—grabbed and shaken), then fruits of 2nd confession are suppressed.
    - Fruits: unconstitutional action by police
  - Public Safety
  - Inevitable Discovery

- **Fifth Step: Does the 5th Amendment Exclusionary Rule apply?**
  - This is different from the 4th amendment because it is listed in the constitution.
  - Applies to testimonial statements , not physical evidence (PA v. Muniz)
  - FOPT doesn't apply
  - The Fruit of the poisonous tree is NOT applicable to Miranda
    - Miranda is not a constitutional violation so evidence collected as a result of a Miranda violation is not "fruit of the poisonous tree" that must be suppressed under the exclusionary rule
  - Exclusionary rule really looks to the validity of the waiver, and are there attenuating circumstances dissipating the taint of the lawful arrest
- 6th amendment ER
  - Statements taken in violation of Messiah are admissible to impeach a D who testifies.

- Interests safeguarded by desire to prevent perjury.
- You cant rely on an involuntary statement

- ***Public Safety Exception—Waiver***
  - Questioning prompted by concern for "public safety" (*Quarles*)
  - Police may ask questions reasonably necessary to ensure public safety without reciting *Miranda* warnings and suspect's replies are admissible (*Quarles*
  - Not involuntary if they give him his 4 rights and nothing else
  - If police officers ask questions reasonably prompted by a concern for public safety, *Miranda* is not required.
    - Balance threat to society v. Δ's rights for *Miranda*
    - Allowed bc *Miranda* is just a prophylactic rule—it is not constitutionally required

- ***Assertion of Rights—Waiver***
  - 2 ways:
    - (a) Stay silent
    - (b) Ask unambiguously for an attorney
  - Once a suspect requests counsel, police may not reinitiate questioning unless counsel is present (*Minnick*)
  - Recent Case (2/24): Maryland v. Shatzer: Edwards doesn't disable police forever, **14 days** after you've asked for counsel, you can have them come back at you because that's enough time to shake off coercive effects.
  - If a suspect refuses to answer questions, the police must stop questioning, but may restart later under some circumstances (*Moseley*)
  - When a suspect asserts his right to counsel, the police cannot "try again." He may not be subjected to further interrogation until he has counsel or he does something to start the contact again (*Edwards*)
    - Once a Δ has **requested counsel**, interrogation may not be initiated on **any** charge without counsel being present
    - If defendant remains **silent**, can question on a different charge.
  - The Δ has to give **valid** and **voluntary** waiver of his rights before the cops can question him again.
  - If a suspect requests counsel and dialogue ensues with the police, the police may be deemed not to have initiated thus avoiding *Miranda*. (*Bradshaw*).
    - Initiating v. just asking a q: "what will happen to me?"
      - Ct. said initiation
  - Waiver has to be voluntary and intelligent
    - Usually met with Miranda
    - **When you waive your Miranda rights, you waive your right to counsel too. You do not need a counsel present to waive your right to counsel!!**
    - However once a relationship with counsel begins, counsel must be present!

- ***Failure to Warn, Fruits and Re-advisement***
  - Any unwarned admission must be suppressed
    - But Miranda does not have a fruits doctrine. Therefore, any subsequent admissions made after Miranda was given is only excluded if it was involuntary (*Siebert*)—[careful bc 5th A does include fruits]
      - Rule 1: If its only a Miranda violative confession (1st time), then 2nd confession **is not** suppressed
      - Rule 2: If it's a true 5th amendment violation (true coercion grabbed and shaken), then fruits of 2nd confession **is** suppressed
  - There is no violation of Miranda or the 5th until the police try to admit a statement at trial.
  - Evidence to suppress must be out of your mouth.

        - A suspect who has once responded to unwarned yet un-coercive questioning not thereby disable from waiving his rights and confessing after he has been given the requisite *Miranda* warnings (*Elstad*).
        - 5th amendment doesn't say anything about *physical evidence*—it says nothing about your pistonl *only statements that self-incriminate (*Patare*).

    - ***Congress's attempt to repeal Miranda***
        - Miranda announced a constitutional rule, which Congress may not supersede legislatively (*Dickerson*).

II. Identification Procedures

- (5th: you can argue it violates your right to self-incrimination, but physical IDs do not trigger the 5th)

- The 6th amendment Right to Counsel
- 2 stages
- 1. Suppression of the out-of-court ID
- 2. Suppression of the in-court ID because it is tainted by an illegal out of court ID

- You apply taint with **totality of circumstances** to find out whether he can ID him in court
- It is ok if there is an independent basis for the ID

- The 6th is violated if the right to counsel has attached and an out of court ID is done without the attorney present (*Wade-Gilbert* rule)
    - The 6th right to counsel if indicted and charged and line up is a **critical stage**—(*Wade*)
    - There is a per se rule that any ID without the presence of counsel must be excluded as evidence at trial
    - **Except**
        - 1. The ID was pre-indictment because it happens before formal charges issued (*Kirby*)
        - 2. It was a photo array and not a line up, since the environment can be recreated at trial (*Ash*)
            - Right to counsel only when the Δ is present.

- 14th Amendment: Due Process Argument
- If the ID is so suggestive and conducive to irreparable mistaken identification then it violates Due Process (*Stovall*).
- What matters: is if the identification is **reliable** (*Manson v. Braithewaite*).
- Even if a witness' identification is based on suggestion and is unnecessary, it does not violate the Δ's DP rights if it is reliable based on the totality of the circumstances (*Manson v. Braithewaite*)
    - Its not about your right to counsel because Δ is not charged, purely about DP. If it's a **bad procedure**, then can always challenge on DP grounds (*Manson v. Braithewaite*)

- Analysis
    - Δ: unreliable ID → i.e. no time to view pictures, Δ had an accent? Etc
        - Wants to do a fruits analysis and say that this unreliable ID should be thrown out because it s fruit of unconstitutional behavior.
    - π: reliable ID→ very specific ID, good description, no pressure on him to make an ID

- Totality of the Circumstances Test to Determine Reliability
    - 1. Opportunity to view the criminal at the time of the crime
    - 2. The degree of attention
    - 3. The accuracy of prior description at the confrontation
    - 4. The level of certainty demonstrated at the confrontation
    - 5. The time between the crime and confrontation

Investigation by Subpoena: Two constitutional Challenges

5th amendment: No person shall be compelled in any criminal case to be a witness against himself.
You can challenge a subpoena on 4th amendment grounds if its too broad or burdensome.

- 4th amendment
  - General Rules
    - You can only bring a 4th amendment claim for a subpoena if it is really broad and sweeping in its terms (*Hale*)
      - Also *Davis*, when they rounded up all black youths since they were black
    - A subpoena is not a seizure (*Dionisio*)
    - In criminal or forfeiture proceedings, courts may not order Δs to produce documents which will be used to incriminate them, under the 4th ban on unreasonable search and seizure (*Boyd*)
    - Grand juries may subpoena witness's personal testimony and voice exemplars, without showing such subpoenas are reasonable (*Dionisio*).
      - Coming to a grand jury is different than a custodial arrest—not out to get you, they are neutral lay citizens—no 4th amendment privacy interest when responding to the subpoena—everyone must respond (*Dionisio*)
      - *No privacy interes*t in your <u>voice</u> (i.e. voice examplar) (same as your fingerprints and handwriting), because you expose them to people all the time. (*Dionisio*)
    - The 4th limitation was described as requiring that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance would not be unreasonably burdened (*See*)
  - Limits
    - Subpoena just cannot be so sweeping so as to be too burdensome on the burden subpoenaed
      - Limited in scope
      - Relevant in purpose
      - Specific in directive
    - No limit of the power of the grand jury to force the production of those aspects of the person generally exposed to the public, such as the voice, fingerprints, appearance (voice exemplar-Dionisio)
    - A subpoena to appear before a grand jury is NOT a seizure. It is not like an arrest. Therefore don't need PC bc this is a civilized process in front of jurors who are not out to get anything. Just trying to investigate

- 5th amendment
  - General Rules
    - 5 questions
      - No "person" is limited to individuals
      - A voluntary writing is not compelled
        - Voice recordings are available to everyone and are not covered (*Dionisio*)
        - Miranda warnings need not be issue to grand jury witnesses, and their false answers are punishable as perjury, even if the question was improper
        - The act of producing documents in response to a subpoena has communicative aspects that may constitute self-incriminating testimony that is protected by the 5th (*Fisher*)
      - In any criminal Case
        - You can plead the 5th if it may lead to criminal sanctions
      - Witness
        - Giving testimonial information (i.e. documents)
        - There is no right in papers
        - There is a potential exception for personal papers

        - If the production of documents is so sweeping it amounts to answering rogs or admitting to things that the prosecution may not even be aware of it can be protected (*Hubbell*)
    - Against himself
        - False statements to the grand jury may not be suppressed in prosecution for perjury (*mandujano*)
- Immunity
    - **Transactional Immunity**: Witness will never be prosecuted
    - **Use and Derivative Use Immunity**: You can be prosecuted even if the evidence against him is not from himself
        - The burden is on the police to show that the evidence used to prosecute the person is not from what they were told
    - You can be forced to testify if you are just granted use and derivative use immunity (*Kastigar*)
        - The only right that you have is that they will not use what you said—but we can still prosecute you with other evidence that didn't come out of your mouth
        - Burden of proof is shifted to the prosecutor if they use your testimony as a lead
            - In federal system, prosecution will submit evidence before getting immunity—so proof of evidence they had before.
- Business papers
    - No matter what you write, it can be subpoenaed—even a diary, what was on your hard drive—everything you write can be subpoenaed and you no 5th amendment right to it because you weren't compelled to write it. (*Fisher v. US*)
    - There is no 5th but there might be a right to refuse production, but not for the content
    - TEST: would the production amount to an admission
        - Hubbell: so broad that the Δ's was answering rogs.
        - By turning them over—even if 13000 documents, you're saying 1) you have them, 2) you possess them, and 3) you're authenticating them
- Protections
    - The 5th amendment protects against compelled testimonial statements made regarding your *private thoughts* for use in court
        - This does not include voice exemplar or turning over private papers or any material product unless the SC has decided that the papers are protected
    - The 5th A protects Δ from the production of incriminating materials when production would amount to an admission of their existence.
        - Does it amount to an acknowledgement of document's existence, Δ's possession, or authenticity?
            - If Δ's production of documents will contribute to the prosecution's case, in any of the 3 ways above, cannot use it
            - The broader the request the harder it is for the govt to say that they would have found them anyways
    - Must be a person raising the objection on behalf of himself (cannot assert someone else's 5th Amendment rights—*Fisher v. US*)
        - No 5th amendment claim—when a notice is turned over to your attorney, and you, the Δ, have no 5th amendment right because you are **not** being compelled to do anything against yourself. (*Fisher v. US*).
            - This is a claim for attorney client privilege and not a 5th amendment claim
    - Subpoenaed party is not entitled to Miranda warnings re: testimony for grand jury proceedings.
    - Witness can maintain 5th A right not to give incriminating testimony i.e. protecting you from being convicted out of your mouth, but not from being embarrassed.
        - Immunity!!

Defendant's Right To Counsel

- The defendants right to counsel and to waive counsel

    - Generally
        - Standard for competency to stand trial: Δ must be able to understand the nature of the proceeding such that he should be able to assist his lawyer in defending him. Due Process. (*Indiana v. Edwards*)
        - Once you have an attorney, the tactical presentation of your case is up to your attorney (*Jones v. Barnes*)
            - Δ's rights:
                - 1) Whether to plead guilty
                - 2) Whether to take the stand
                - 3) Whether to waive his right to jury trial
                - 4) Right to an appeal
                - 5) Right to present him self
                    - (First 4 apply when Δ has an attorney)
        - With mentally ill patients pleading guilty and running a trial are separate things and its more difficult and takes more to conduct a trial—so Δ can be competent enough to stand trial but not competent enough to conduct his own trial (*Gadinez v. Moran*)

    - **6th amendment right to counsel** (at trial)
        - BRIGHT LINE RULE. The indigent Δ as a 6th amendment right to counsel for any felony and any misdemeanor where there will be incarceration even if sentence is suspended. If the judge does not sentence someone to jail, there is no constitutional requirement for counsel (*Arbisinger/Scott*-Gideon!!!!)
        - The 6th Amendment right to counsel (through the 14th) requires states to appoint counsel for indigents (*Wainright*)
        - The right attaches when it becomes adversarial.
        - In parole or probation revocation hearings, you do NOT get counsel
        - When you're brought in before the court and your liberty has been restrict in any way (i.e. with bail), then the adversarial process has begun and your right to counsel has attached. (*Rothgery v. Gillespie County*).

    - **14th Amendment: Due Process**
        - BASE RULE. **Due Process** says that you get counsel if you NEED it (case by case determination), but not required if you are not going to get jail time. You are only entitled to more if you are getting jail time (6th A)—*Halbert* and *Ross*
            - Defense will argue that counsel is needed, prosecution will argue that it is a misdemeanor with no jail time and not needed.
        - Also requires provision of other things i.e. psychologist, investigator, when you NEED it as judged on a *case by case* basis. Makes threshold showing of need

    - **14th Amendment: Equal Protection**
        - Right to counsel on first appeal (as of right, not subsequent discretionary appeals unless you NEED counsel) – (*Douglas*)
            - This is an EP argument, not a 6th amendment argument because the 6th Amendment says that the accused should have a right to counsel at trial and not appeal. Trials are different than appeals. This is an EP argument because it is about the comparison of treatment between groups of people—rich and poor
            - DP argument is when the process is unfair. Did he NEED an attorney?
        - Do not have automatic right to counsel in discretionary appeal brought by Δ since the govt is not hailing Δ into court. Δ is the moving force—seeking not defense but advocacy. He is trying to undo something for which he had protection (*Ross v. Moffit*)
            - Most of the time, you do NOT NEED COUNSEL for discretionary review (therefore the 14th amendment doesn't get you it)

        - You do get counsel if there was a real problem with your case or it is an important social issue
    - Difference between right of first appeal and discretionary review
        - Right of First Appeal: only want to how legal error
        - Discretionary Review: necessarily raising different arguments other than legal error
- If Δ pleads guilty he still has a lawyer on his first appeal (*Halbert v. Michigan*).
- Δ may have a constitutional Due Process right to a mental health expert if he needs it (*Ake v. Oklahoma*).

- **6th Amendment Right to Self Representation**: You have a right to refuse counsel and represent yourself if you want to (*Faretta*)
    - Court must first get **waiver**. Waiver must be:
        - A) Knowing and intelligent. Unequivocal. Must not only understand rights he is waiving and impact of doing so. Don't have to be capable of putting on a good case though.
        - B) Must be a complete waiver, not just for part of the case
        - C) Timely
        - D) Unequivocal.
    - Standard for competency to stand trial
        - Δ has a constitutional Due Process right not to be tried if mentally ill
        - Δ must be able to understand the nature of the proceeding such that he should be able to assist his lawyer in defending him
        - *Δ can be found competent to stand trial but not competent to plead guilty*! (*Indiana v. Edwards*).
    - Court can appoint a **standby attorney** to **assist** or take over if you need them to even over Δ's objection (*McKaskle v. Wiggins*)
        - When standby counsel intervenes in the case too much…violation.
            - Outside the view of the jury. Only q is whether counsel undercut Δ's strategy.
            - In front of the jury: 2 considerations
                - Did counsel undercut Δ's strategy?
                - Did counsel create an appearance that Δ was not in charge?
        - Remedy: automatic reversal.
    - Reasons for self-representation
        - The Δ has limited right to control conduct of counsel. Only on the following does the Δ have complete control (i.e. counsel must have consent and cannot object to asserting the following):
            - Pleading guilty
                - Attorney admits guilt in order to contest the penalty phase. Not the functional equivalent of a guilty plea (*Florida*)
            - Waiving jury trial
            - Right to be present
            - Testifying on his own behalf
            - Waiving appeal
        - 6th Amendment says that Δ has a right to run his own case. If Δ has a problem with how attorney is running the case, should fire the attorney.

- Adequacy of Representation: The 6th Amendment says you have a right to counsel and if ineffective, you may not have a fair trial. We want the *appearance of fairness*.

  4 possible challenges

    - **1) Government interference with the attorney client relationship**

- The indigent Δ has no right to choose counsel or retain a particular counsel if there is a state interest in appointing a different counsel and is capable (i.e. Cannot object to a change in PD) (*Morris v. Slappy*)
    - But if court orders Δ not to confer with counsel—then violation
- Government violates the right to effective assistance when it interferences in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.
- Court cannot deny Δ the right to meet with counsel during overnight recess in the middle of testimony.
- 1) Δ's right to picking counsel is qualified by the trial judge who gauges what the conflict is and 2) lots of deference should be give to trial judge (*Wheat v. US*)
    - Iredale lawyer case: when a lawyer seeks to represent multiple Δs , ct must see if there's serious conflict of interest, if not obvious and no one objects, judge can go forward, if obvious—judge cannot go forward)
- EXAMPLES: it's a violation of 6th amendment if Δ is ordered not to meet with counsel (*Getters*)

- **2) Presumed Ineffectiveness**
    - The court can *infer* ineffectiveness for objective factors in an extreme case (*Powell v. Alamaba*)
        - (*Cronic case—court* did not *find presumed ineffectiveness—bc counsel only had 30 days to prepare and wasn't experienced in that area of law—but no presumed ineffectiveness—he's an attorney that's enough*)
        - Lawyer drunk/sleeping at trial (*Jabor*)
            - With presumed IEC—no prejudice needs to be proved
        - Court appointing unprepared, out of state counsel
        - Late appointment of inexperienced counsel in a complex case **does not** give rise to a *presumption* of ineffectiveness. Counsel had never handled a case like things
        - When own attorney admits to guilt, there may be tactical reasons. This is not ineffectiveness (*Florida v. Nixon*—and when the lawyer has not physically left—need to prove actual ineffectiveness not presumed ineffectiveness—and cannot show deficiency when the lawyer made a strategic decision that was good enough).

- **3) Actual Ineffectiveness** ***Usual Challenge
    - **Strickland Test**. Counsel made errors so serious that Δ was not receiving 6th amendment right to counsel (LOOKS AT THE RELIABILITY OF THE RESULT, rather than conduct of the government)

        A. **Counsel's performance was "deficient"—unreasonable representation under prevailing professional norms** (**heavy presumption in favor of reasonableness of attorney conduct**—good to argue though)

        - For the deficient performance, objective standard of reasonableness→Reasonable competent lawyer at that time.
            - Norms can vary depending on the local
            - Expert witnesses
            - Judicial Knowledge
            - PD. It is reasonable that there might not be enough resources to research everything (although this was the minority opinion in *Rompilla*)
            - Failure to investigate a case (*Rompilla*—should have found favorable mitigation evidence. There doesn't have to be a nexus between the duty that is violated and the prejudice that is found).
            - Even when deficient representation is negative, even when the proper representation would have been wrong—no harm no foul
            - Unreasonable failure to advise and defend – *Padilla*—that is deficient

AND

- B. **Reasonable probability that this deficiency resulted in <u>prejudice</u> to the Δ**

    - Was here a reasonable probability that it would have come out differently if the trail was fair—about 30%
    - It was modified to reasonable probability to what were you entitled—(*Lockhart*)
        - This mean <u>sufficient to undermine our confidence in the outcome</u>. This is less than the preponderance of evidence
        - If you haven't lost anything you were **entitled to**, then there is <u>no prejudice</u> **** (*Lockhart v. Fretwell*)
            - No entitlement if attorney fails to argue a, then valid point of law that is overturned by time of appeal (*Locker*)
            - No entitlement to perjure yourself. The right to counsel is not violated when the counsel doesn't want to present perjured testimony
        - Presumption of reasonable jury: no allowance for irrational, emotionally charged decisions
        - In reality, a reasonable jury becomes a reasonable judge. After the fact, how can a judge sit in and decide the death-worthiness ofΔ
        - Ex. If counsel is sleeping, indulge a presumption of prejudice. Equivalent to having no attorney at all

- **4) Conflict of Interest**. What is a conflict? Who decides? And what do we mean by representing adverse interests?
    - The court is not supposed to place an attorney in an obvious conflict of interest. When there is a possibility of conflict, the court should inquire. If it doesn't, 6th amd violation
        - When the trial judge is not aware of conflict, then the court has no duty to inquire. On appeal, only look to see if there was IN FACT a conflict
    - Test.
        - Was there an <u>actual conflict of interest</u> (*Strickland*)
        - Defendant must rove that the conflict <u>actually affected the performance</u> (*Mickens*—case where lawyer used to represent Δ's victim).

        Presumption if ineffectiveness if you can prove these!!! Don't have to show a reasonable probability that affected the result

        Mickens. Two threads to Δ's argument
        - Cuyler v. Sullivan rule. Taking advantage of conflict of interest. Leads to a <u>limited</u> presumption of prejudice when conflict is shown. OR
        - Conflicted attorney is the equivalent to having no counsel.

            (Better for the Δ to win on this because the remedy is conviction reversed and dont have to show prejudice. It is conclusively presumed. Don't have to get into actual adverse intent)

    - Sullivan is about inquiry. Defendant cannot challenge judge's <u>failure to make an inquiry</u> unless there was an objection made by the Δ, thereby putting the judge on notice. Δ's attorney has to raise conflict because the attorney would know best. Otherwise, Δ is forced to prove through an actual showing of conflict (*Mickens*)
        - WHEN THERE IS NO OBJECTION, NO DUTY TO INQUIRE
    - Court has substantial discretion to change counsel to avoid conflict of interest. They can refuse waivers of conflict of interest WRT criminal Δ's chosen counsel both in actual and potential serious conflicts of interest (*Wheat*). Court gives substantial deference to trial court judge.
        - Comeback for defense counsel is that the govt is manufacturing false conflict and interfering with right to proceed with counsel of choice

- Joint representation should be treated differently than successive representation. Right now there is only a prophylactic rule against joint representation (*Mickens*).

The Prosecution

I. The Decision to Prosecute

- Generally
  - 3 problems when prosecuting someone
    - (1) If prosecute someone who is not guilty
      - Will have a fair chance to fight this at a preliminary or PC hearing
    - (2) If do not prosecute someone who is guilty
      - Not limited
      - US Attorney has the discretion whether or not to prosecute—separation of powers issue—enforcement of law is an executive power, not a court given power
    - (3) If prosecute someone for the wrong reason

- When the prosecution decides to prosecute: subject to 2 limitations

1. Equal Protection: The prosecutor has complete discretion in the decision to charge

- 1) He cannot **discriminate on the basis of class** (i.e. EPC) (*Yick Wo v. Hopkins*)
- 2) There was **discriminatory intent** in prosecuting certain classes under the statute
- So to show Equal Protection violation, must show 2 classes of people similarly situated are being treated differently (Statistical things) and must be intentional (Discriminatory intent). (*Armstrong*)

2. Vindictive Prosecution—Due Process claim

- If harsher sentence on retrial, there's a presumption of vindictiveness (*N. Carolina v. Pearce*)
  - EXCEPTION: if evidence no one knew about the first around or bw 1st and 2nd trial Δ did something outrageous
- If in the 2nd trial, the **jury** gives a harsher sentence than the judge in the 1st trial, then **no presumption** of vindictiveness bc jury is not angry about Δ taking an appeal like judge is.
- A prosecutor cannot increase a Δ's charge (i.e. from misdemeanor to felony) upon appeal bc a Δ chooses to exercise his rights and take an appeal. (*Blackledge v. Perry*)
  - HOWEVER, if there is no resolution to that first case yet, there is no presumed vindictiveness if the prosecutor raises the charge during the plea phase. (*US v. Goodwin*)
    - I.e. during Pre-Trial

II. The Right to Speedy Trial

- Generally
  - 2 constitutional rights
    - Speedy Trial right of 6th amendment
      - Balancing four factors
      - Triggering factor: length of delay
    - 14th amendment: due process
  - Must distinguish between 2 time frames
    - (1) Any delay until trial itself
    - (2) Time frame between crime and filing of charges
  - Must distinguish between:
    - (1) Constitutional rights
      - 6th amendment right to speedy trial
      - 14th amendment—due process
    - (2) Statutory rights – not talking about it here
  - Interests being protected
    - Δ's interest being served here:
      - Getting rid of that cloud over your head
      - Legal base based interest: people disappear as more time goes on, case gets worse
      - Legal restraints while waiting for trial: i.e. in jail, or if on bail maybe cannot leave country
    - Societal interests protected here:
      - Getting potential criminal interest off the streets

        - Prosecution witnesses may disappear and/or forget.
    - So not strictly a constitutional right because its an interest that belongs to the state as well
- **Remedy**: If Δ wins on speedy trial: drop all charges/indictment and he goes free
    - If complaint: delay is too great, cannot start all over again—bc longer delay.

- **The 6th amendment right to a speedy trial**
    - Standard for a 6th Amendment Claim (*Barker v. Wingo*)—**balancing test**
        - **(A) Length of Delay**
            - Benchmark for delay: how long does it usually take to make the case for that crime
            - Presume prejudice when the delay is very long (*Doggett*)
        - **(B) Reason for Delay**
            - Taking advantage of Δ? Not necessary for the outcome
            - Was it deliberate? Neutral? Valid reason?
            - If the delay is due to governmental negligence then the right to a speedy trial has been violated (*Doggett*)
            - If there's a case filed and its refilled, the speedy trial clock runs from the second trial and not the first. (*Lockhart*)
        - **(C) Δ's responsibility to assert his right**
            - Δ has the responsibility to assert his right—can still win though if silent (*Dogget*)
                - Cannot waive constitutional rights by silence but silence is an indicator of how Δ felt about the speed of the trial
        - **(D) Prejudice to Δ--3 interests**
            - (1) Prevent oppressive pre-trial incarceration—**legal restraints**
            - (2) Minimize anxiety and concern of accused—**Pittel Cloud—***Barker v. Wingo*
            - (3) Limit the possibility that defense will be impaired—**witnesses**
            - Speedy trial right begins as soon as 6th amendment attaches when formal charges are filed or when arrested and has to appear before a judge (US v. McDonald)
                - When charges are dropped there is no Pittel cloud and no legal restraint.
                    - This time dos not count as part of speedy trial clock (*McDonald*)

- **The 14th Amendment right to a speedy trial under Due Process**
    - To win a Due Process delay claim, Δ must show both:
    - **(1) Government wrongdoing, AND**
        - Was there something other than investigative delay/was it done in bad faith?
        - A Δ cannot be prejudiced by investigative delay (*Lovasco*)
        - Δ must show prosecution Deliberately delayed for some impermissible purpose
    - **(2) Prejudice**
        - Was there prejudice by the delay? –(Case by case)

III. The Prosecutorial Duty to Disclose Evidence

- Generally
    - The prosecution must provide evidence that would have a reasonable probability of changing the outcome of the trial (*Brady/Strickland*)
        - The burden is on the Δ to prove this.
        - If prosecution uses perjured testimony—very likely to be reversed
    - The prosecution has a duty to disclose favorable and material evidence regardless of whether the Δ did or did not ask for it. (*Kyles v. Whitley*)
        - We are also talking about evidence that was available to the police—anyone on the police team.
        - Material evidence: if there is a **reasonable probability of a different result** if Δ had the evidence (Same standard as *Strickland*)
        - Δ does not have to show that an acquittal is more probable than not.

- **Five aspects of the rule that the court spells out for a Due Process violation**:
    - **(1) Test is reasonable probability doesn't require preponderance of evidence** (less than 50%)

- **(2)** Test is not if there's enough evidence to sustain the conviction—**Test**: **is the case weakened enough that a jury may not have come back with that verdict**?
- **(3) Is there harmless error of review?**
  - Constitutional error may be found **harmless beyond a reasonable doubt**.
- **(4) Do not look at evidence item by item to see if it would have made a difference—look at it all together**
- **(5) Doesn't matter if prosecutor didn't know about it (if any member of the team—i.e. cops) knew about it, then DP violation**
  - Good faith is unimportant
  - DP violation if Δ van prove police acted in bad faith when evidence was no there and it might have been unfavorable, but if its only police negligence, then Δ loses (*Arizona v. Youngblood*) – must establish **bad faith**—more than negligence

IV. Pleas and Plea Bargains

- Generally
  - You can challenge the plea and not the process
  - **Crime control Model, VERSUS**
    - Guilty pleas are necessary and efficient—desirable bc virtually all who plead guilty are—meaning we shouldn't have appellate courts second guessing guilty please, so except in the most exceptional cases—should be final
  - **Due Process Model**
    - Guilty pleas are not necessarily a good thing bc trials are what show us who is actually guilty. Many are coerced from fear of death penalty or incarceration-so we should have safeguards of guilty pleas and appellate review is encouraged.
  - **VALID PLEAS**:
    - (1) For a plea to be legitimate it must be **intelligently** and **voluntarily** made
      - If the prosecution has coerced the plea then it might be involuntary (*Bordenkircher*)
        - But cannot presume vindictiveness from the give and take negotiation common in plea bargaining bw the prosecution and the defense, which arguably possess relatively equal bargaining power. (*Bordenkircher*)
      - While Disclosure of favorable evidence may be necessary for trial, it is not necessary during plea bargaining because it's a bargaining process—(*Brady v. US*)
        - So cannot say not disclosure of favorable evidence as grounds for challenging voluntariness (*Brady*)
    - (2) Δ must be competent (*Indiana v. Edwards*)
    - (3) Judge must inform the Δ/advise the Δ of the penalties and rights he is giving up (i.e. right to not incriminate yourself, right to confront witnesses, jury trial, and nature of the charge)
    - (4) Record must be made
    - (5) Must be done in open court
  - **CHALLENGING PLEAS**:
    - (1) Must be done by a competent person
    - (2) Must be done openly in court and record of it by judge
    - (3) Must be intelligent and voluntary **** MAIN CHALLENGE
    - Even if all are met Δ can challenge still if:
      - Challenge 1: Constitutionality
        - For constitutional reasons DA had no right to try the case at all (i.e. double jeopardy)
        - Blackledge v. Perry
      - Challenge 2: Voluntariness challenge
        - (A) Can still make a voluntariness challenge even if it complies with Boiken buy saying the government "leaned on Δ too much" (i.e. take this plea and I wont beat the crap out of you and then Δ heard everything from judge and followed Boiken v. Alabama)
        - (B) Voluntariness Challenge: The agreement was not upheld by prosecution (*Santabello*)

        - If bargain is kept—look at Ks evaluation—what was agreed upon and what was done
    - (C) If judge does not advice on direct consequences of plea, then voluntariness challenge valid
        - But if judge does not advice on indirect consequences, still valid
        - (Δ cannot say "judge I'm actually innocent, but I'll plead guilty—not a voluntariness challenge) – because part of normal give and take of plea-bargaining. (*Hayes*)
- Challenge 3: Ineffective assistance of counsel—deficiency and prejudice
    - 6th amendment case—recent Kentucky case—Honduran US resident for 4 years—charged with transporting pot—plea worked out and counsel said don't worry about INS—they wont deport you—then the INS came and he was deported—6th amendment violation bc deficiency and prejudice
    - Standard same as in Strickland
        - Did they act reasonably under prevailing professional norms and was there a reasonable probably Δ would have plead **not guilty** otherwise?

- **Prosecution and Plea Bargaining**
    - Prosecution cannot threaten_____ to get a plea
        - 1. Cannot make choices based on unjustifiable standards
        - 2. Cannot make threats about 3rd parties
        - 3. Cannot threaten with force
        - 4. Cannot misrepresent the law
        - 5. Cannot take bribes
    - Prosecution duty
        - When the Prosecution reaches a plea with a Δ, it must not dismiss the agreement that was reached and recommend something to the court that is entirely different (*Santobello*)
    - Plea bargain is like a Contract
        - Plea bargains are decided like contracts—can have anticipatory repudiation of plea agreements (*Ricketts v. Adamson*).
- Defense
    - Competent counsel
        - If Δ is represented by competent counsel he cannot collaterally attack procedural errors that occurred before entering plea (*Mabry v. Johnson*)
            - Exception: (Challenge 1): He can collaterally attack if it goes to the right of the case to even be in court—cannot validly plea to a case that shouldn't have been in court.

Trial by Jury

I. Right to trial

- When do you have a 6th amendment right?
  - You have a right to a trial in serious cases and felony cases (*Munis v. Hoffman*)
    - Serious cases are when the crime is punishable by **more than 6 months in jail** (pretty strict rule, must be consecutive. (Money has not much to do with it)
      - Union that has violated a court order and has 13,000 members—union is not entitled to a jury trial because it is trivial and serious crimes are ones with jail time and you cannot jail a union.
    - We determine "petty" by potential sentence v. actual sentence→ except in criminal contempt prosecutions because there's no maximum sentence for us to gauge (*Blanton v. city of Las Vegas*)
  - Other than the fact of a prior conviction (because you've already gone to the jury), ANY fact that increases penalty for a crime beyond statutory maximum (NOT MINIMUM because judge already has the power to give this sentence) must be submitted to a jury and found beyond a reasonable doubt (*Blakeley*)
    - This DOES NOT include MITIGATING factors or MANDATORY MINIMUM
  - 12 angry men
    - Jury must be at least 6 members (*Williams v. Florida*)
    - 6 member jury must be unanimous—5/6 is not ok (*Burch v. Louisiana*)
    - 10 out o 12 member jury is constitutional (*Appadaca v. Oregon*) –probably ¾ vote

- Sentencing Factors
  - The court looks to what factors increase the maximum not the minimum (*Apprendi*)
  - If there is an aggravating factor that results in a serious increase, the jury must decide about the existence of the aggravating factor as well as the crime (*Apprendi*)
  - A judge cannot find for an aggravating circumstance that increases something to death without going to a jury first (*Ring*)

II. Jury Selection

- There are 4 points in the jury selection process where constitutional issues arise

- **1. Selection of jury venire** (people who are called into court house)
  - **14th Amendment**
    - Equal Protection Argument: Jurors have a 14th EP right to challenge discrimination in the venire
      - **Analysis**
        - (1) Challenge to statute on its face = calling legislature racist
        - (2) The challenge to the statute on its application =calling executive racist
          - Here, the court denies challenge to statute on its face
        - A citizen should not be denied the right to be on a jury because jurors themselves have an Equal Protection right when they are not allowed to serve. (*Carter v. Jury Commission*).
  - **6th Amendment**
    - Fair Cross Section Argument: Δ has a 6th amendment right to jury drawn from the cross-section of the community [This argument only applies to jury venire—who you bring into the jury pool]— *Taylor*
      - **Analysis**
        - (1) Must show there's a distinctive group, and
        - (2) Their representation is not fair and reasonable (statistics), and
        - (3) Underrepresentation is a product of state selection system—is caused *systemically*.
          - If Δ can show this—prima facie case
            - Δ DOES NOT have to show that there is a likelihood of prejudice in HIS case

        - State can rebut by showing a significant state interest in the method that they are using which outweighs Δ's interest
    - Cannot exclude women without violation fair cross-section requirement (*Taylor v. Louisiana*)

- **2. Voir Dire Challenge** (Jury venire that are sent out to courtroom and they are questioned to determine whether they are qualified to sit).
    - **14th Amendment Due Process**
        - Certain things are critical and likely to have effect on jury issues. Can only Voir Dire on those that really matter
            - When racial issues are going to be part of the trial, you get to ask potential jurors questions about race prejudice. But there is no constitutional right to VD just because there is an interracial crime. Have to show that race is somehow central to the case (*Ristaino v. Ross*).
        - There IS a constitutional right to Voir Dire on racial prejudice, however, for CAPITAL Δs tried for interracial crimes at the PENALTY phase of the trial. This is because at the guilt phase, they are just determining the elements of the crime. This can be done objectively. But the penalty phase is individualized judgment so bias can creep in (*Turner v. Murray*)
            - Violation = can reverse death penalty but not guilt verdict.
        - When race or capital case—then voir dire is allowed

- **3. Challenge for Cause**
    - **TEST**: Whether they could be open to both possibilities is an appropriate juror
        - You CANNOT exclude people who have an open mind even if they have qualms (*Witherspoon v. Illinois*)
        - You CAN exclude people that cannot evaluate all the facts (*Witherspoon*)
        - Δ is entitled to reversal, if even one challenge for cause was improperly granted.
        - People can be against the death penalty and still serve on the jury, but if it is going to substantially impair them from performing their duties, then we do not want them there. Unconstitutional
    - NO 6TH AMENDMENT RIGHT TO AN IMPARTIAL JURY-- Δ cannot say that people for death penalty are usually anti-Δ because an impartial jury consists of jurors who are willing to consider both sides ("open minded")—and outside of the penalty phase of death penalty phase—this skewing is unimportant (*Lockhart v. McCree*).
        - So skews in penalty phase are more important than any other case.

- **4. Periphery Challenge**
    - Either side—prosecution or defense—can raise a Batson claim—mostly to figure out if men are different than women
    - EPC Claim—race, gender, and religion
        - **14th Amendment—EPC Claim**:
            - **TEST**
                - (1) Create prima facie case—1) intent and 2) actual discrimination
                    - P has actually exercised peremptory challenges to remove from the petit jury members of a certain race: Usually by pointing to the number—i.e. judge has struck 4/5 blacks
                    - Must show that the facts of his case raise an inference that the prosecutor used peremptory challenges to exclude the veniremen on account of their race
                    - Δ must prove Purposeful exclusion of this group.
                - (2) Prosecution (or Δ) must assert neutral reasons for striking a juror—rebuttal
                    - As long as they are race neutral its ok
                - (3) Burden shifts back to Δ (or prosecution)—Burden of Persuasion
                    - 2 kinds of attacks at this phase:
                        - (A) The guy is lying and its all a pretext

        - (B) Reasons prosecution is giving—all a proxy (i.e. I'm not striking all Jewish people just people with the yamakas)

- If defense counsel strikes all whites, it IS still an EPC claim even not it is not the action of the state because the judge is the one who ultimately dismisses jurors and causes him to discriminate (*Batson v. Kentucky*)
- It violates EPC to discriminate on the basis of **gender** with peremptory challenges—i.e. cannot strike on basis of gender when it is a gender matter (and is statistically void—(*JEB v. Alabama*)
    - TREAT GENDER LIKE YOU TREAT RACE
    - You cannot choose on the basis of even valid stereotypes even if it is a statistically advantageous thing to do.
    - Heart of EPC—you can be biased on the basis of stereotypes.

Due Process Concepts Raised at Trial

I. 3 Due Process Challenges

- **1) Due Process Challenge Re: Evidence and Δ's Opportunity to Rebut**
  - If there's strong evidence against a suspect—then cannot introduce third party evidence to rebut that—*(Gregory*)
  - Judge cannot evaluate prosecution's case in isolation by just evaluating prosecution's case—must weigh it against the defense's case (*Holmes v. South Carolina*).
    - You cannot decide what evidence a Δ can bring into a case by simply looking at prosecution's case—must weigh it against the defense's case

- **2) Due Process Challenge Re: Presumption of Innocence Instruction**
  - You are deprived of Due Process, when you do not get a presumption of innocence instruction, when contextually the jury doesn't really see this burden of persuasion being on the prosecution. (*Taylor v. Kentucky*)
    - This case <u>did not</u> say in <u>every</u> case—must instruct jury on the presumption of evidence—not entitled to this constitutionally.

- **3) Due Process Challenge Re: Misconduct**
  - Analysis: Balancing Test –*Darden v. Wainright*
    - 1) How bad was the prosecutor's Conduct
    - 2) How strong was the evidence against the Δ.

  - Due Process Claim: If it was a close case and prosecution's conduct was bad then did they deprive him of a fair trial such that there's a <u>reasonable probability that it would have come out differently</u>.
    - Δ's argument:
      - (1) Prosecution's actions were very bad and influenced the jury
      - (2) No strong evidence against the Δ-- no strong facts—inconsistent
    - Prosecution's argument:
      - (1) Jury wasn't confuse (because prosecutor's statements were not about the evidence—just opinions)
      - (2) Strong evidence against Δ-- judge told jury several times to rule on the evidence.

Double Jeopardy

I. Generally
- Three different goals of the Double Jeopardy Clause of the 5th Amendment
  - (1) Prohibits 2nd prosecution of an offense when they've already been acquitted or convicted
  - (2) Prohibits 2nd prosecution of an offense after they have already been in jeopardy—applies to trial
  - (3) Cannot be punished more than once for the same offense (not our concern)

II. 5th Amendment
- The point of the 5th Amendment Double Jeopardy Clause is that the prosecutor, who has more resources than the Δ, should not be able to keep dragging him through court. Cannot treat the first trial as a warm up.

III. General Rules
- 1. Double Jeopardy bars re-prosecution after conviction or acquittal

- 2. Double Jeopardy bars double punishment for the same offense

- 3. **Collateral Estoppel** (*Issue Preclusion*): If a fact is found against the prosecution, they are estopped from trying to prove that fact at subsequent prosecutions. (*Ashe v. Swenson*)
  - BE CAREFUL: **CE only applies if we are absolutely certain of what the jury found in the first trial**. Where there are multiple issues of fact at stake, CE will not apply.
    - Ex. Ashe was acquitted at the first trial. It was determined that there was insufficient evidence that he was one of the robbers. This was a final judgment on the only issue in dispute.
    - CE doesn't come up often because usually the jury doesn't tell you what issue turned them
    - To avoid Double Jeopardy—put all the charges together in one trial
    - The prosecution cannot claim CE because this would deprive Δ of his right to a jury trial.
  - Brennan: would have liked to have adopted the transaction test which is broader—is better because it would serve the goal of double jeopardy better to limit it all to one case—bring all suits together—(Claim Preclusion Argument)—NOT adopted by the court

- 4. **Blockberger Test** (Same legal elements test)—(*US v. Dixon)*
  - General Rules:
    - Blockberger Test is asking: whether each offense contains an element not contained in the other—if yes, then they are not the same offense
    - If either charge is a lesser included offense of the other, you CANNOT bring a new charge
      - If one of the two has no elements that are not included in the other—Blockberger.
    - If, on the other hand, each charge contains an element that the other does not, then you CAN bring it
    - Generally—use Blockberger—UNLESS criminal contempt

  - 4 proposed tests for what is the "same offense" when **criminal contempt**—(on the scale of broadest to narrowest)—US V. Dixon
    - Use SCALIA—criminal contempt order is part of the elements of a crime that needs to be proved

    - (1) Proof of the same transaction—Brennan
      - Must bring all charges together if they arose from the same transaction or otherwise are precluded from doing so—like Claim Preclusion—a; events are taken together
      - Comes from *Ashe*

    - (2) Proof of the same facts—Souter
      - If you have to prove a fact in the 2nd prosecution that you had to prove in 1st conviction, then double jeopardy applies—Test you get out of *Grady*—

- (3) Proof of the same legal elements—Scalia
  - Criminal Contempt order becomes part of the elements of a crime that needs to be proved—Scalia: look at statutes and court order as elements of the crime

- (4) Proof of the same statutory elements—Rehnquist
  - Look at statute and not criminal contempt order as part of the crime

- (5) Criminal Contempt is never the same as another crime—Blackmun
  - Not even on this chart
  - Contempt of court can never be the same as any other crime because contempt of court is different than any other kind of crime and that wont be Double Jeopardy no matter what.

- Dual Sovereignty Doctrine
  - Dual sovereignty state to state is not allowed but state to federal it is allowed (*Heath v. Alabama*).
  - NEVER SETTLE ANY SUIT IN PARTS—YOU SETTLE IN THE WHOLE.
  - If a prosecution is municipality and state—they are not separate sovereigns—they are both representatives of the state.

IV. Re-prosecution after mistrial
- Generally
  - Balance Competing Interests:
    - Prosecution's interest: prosecutor should get his "**one complete opportunity**"
    - Defendant's interest: his **right to have 1st jury** or judge decide the case.

- Rule/Analysis
  - Cases in which a mistrial has been declared over the objections of the Δ, burden is on the STATE to demonstrate "manifest necessity" for mistrial and there will be no double jeopardy—(*Arizona v. Washington*)

    - **How messed up is the trial**?
      - How prejudicial was the error that caused the prosecution to move for mistrial?
      - Is there a substantial chance that the jury is tainted?
    - **Are there alternatives**?
      - Still may not declare mistrial if there are alternative ways to dispel prejudice or to cure problem (i.e. jury instructions)
        - But instructing the jury to forget that the defense told them that the prosecutor had engaged in misconduct in a previous trial is irreparable introduction of impermissible evidence. Here, no alternative.
          - Δ will argue that this was minor and had no prejudicial effect
    - **Who caused it**?
      - Is the prosecution going to get an advantage? We do not want the state to deprive Δ of his rights; but where it is the Δs fault then it is fair to declare a mistrial

  - If Δ requests mistrial, he **waives** his right to decision by first jury and CAN be retried. This is because the Δ is essentially WAIVING his 5th Amendment right for verdict from first jury. – (*Oregon v. Kennedy*)
    - **Narrow Exception**. Π intentionally causes Δ to seek mistrial (forces him to do so).
      - Essentially aborting trial by misconduct, negating Δ's voluntary motion
        - Δ must show intent by P to force Δ to ask for a mistrial
        - Remedy=dismissal of the case

  - When appealing from mistrial—give great deference to the trial judge

- Re-Prosecutions following acquittals and convictions.
  - Generally

- The government cannot appeal if their winning the appeal would cause a re-trial in violation of Double Jeopardy

- Rules
  - Can retry Δ after convictions
  - Cannot retry Δ after acquittals
    - Acquittal: when the case ended or conviction is reversed due to insufficient evidence. It is an acquittal and Double Jeopardy bars re-prosecution. The government had its chance and did not do its part.
  - Pre trial dismissals are NEVER convictions so Double Jeopardy never applies (*Surfass*)
  - When Δ is tried and found guilty and then judge wrongly grants a **post-trial motion**, no DJ because you can simply reinstate jury verdict (*Wilson* case)
  - When Δ loses in the trial court and he doesn't appeal, he cannot be re-prosecuted (*Burks v. US*)
  - When the Δ creates the result, the government can appeal (*US v. Scott*)
  - When Δ loses and wins on appeal, he can generally be tried again – (*Burks v. US*)
    - Generally, if you win on appeal, you can be tried again because you're waiving your right to stop a 2nd jury
    - EXCEPTION: if grounds for reversal is insufficiency of evidence because prosecution had their full 1 chance and didn't present enough evidence.
  - If Δ makes a motion to dismiss under pre-trial delay and is then convicted, and then the court grants his motion, the government can appeal since if granting that motion is wrong, we reinstate the jury's verdict—so no jeopardy of being tried a second time (*Wilson*)
  - If evidence is admitted in legal error, and without this evidence there is not sufficient evidence to convict, Double Jeopardy does NOT bar retrial because π might have relied on the judge improperly admitting evidence and change his case accordingly (*Lockhart v. Nelson*)
    - **Come back to this rule! Check notes**!
  - If the state brings a charge, and a jury convicts only on a lesser included charge, Double Jeopardy bars the state from retying the *greater* offense because there is an **implicit** acquittal. (*Green v. US*)