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# Constitutional Concerns & Incorporated Rights

Overview of Criminal Procedure: Constitutional Concerns

* **Definition:** Figuring out the legally req’d process. Package of rights afforded to ∆
* **Due Process (14th):** Process they’re due. Prevents states from arbitrarily depriving citizens from life, liberty, or property
* **Purpose:** Protects rights that are so fundamental, that it is unfair to deprive one of them (a.k.a. fundamental fairness)
* A package of rights that guarantees ∆ got the process he was due
* **Guilty Plea:** 1) Waives process & 2) Admission
* **Presumption of Innocence:** State’s BoP to show each element beyond a reasonable doubt *(In re Winship)*
* **Justice:** About “process” Innocent person proven guilty 🡪 Justice not served

***Powell v. AL***

**Facts:** Black men falsely accused of rape, denied right to counsel.

**Issue:** Were ∆’s denied right to counsel, & if so whether it violates 14th Amendment DP

**Rule:** Denial of counsel violates 14th Am. DP of right to assistance to counsel (in capital case)

**Note:** Must deny a fundamental right, “a critical phase of the adversarial process”

***Brown v. Miss***

**Issue:** Whether convictions, which rest solely upon confessions shown to have been extorted by PD by brutality, are consistent w/ DP req’d by 14th Amendment.

Incorporation

* **Definition:** 14th Amendment acts like a funnel that allows some of the Bill of Rights to go through to the state
* **Applies:** States through the 14 amendment DP clause **!!!**
* When state law or constitution is inconsistent w/ Fed law or constitution
* **Remedy:** State must incorporate their law to meet minimum Fed standards

Total Incorporation

* **Rule:** SupCt rejected. Opted for case-by-case incorporation
* **14th Amendment P&I:** “No states shall deprive the citizens the P&I”
* Would make all of the Bill of Rights apply?

Partial Incorporation

* **Problem:** Too much SupCt discretion
* **Doesn’t Apply:** To states
* **States not req’d to:**
* Have a unanimous verdict (2/3 ok) **!!!**
* Have a 12 person jury **!!!**
  + - Can be as small as 5, unless capital case (must be unanimous)
* Bring a felony to trial by indictment to a grand jury **!!!**

Incorporated rights

* **4th Amendment**
* **Protects:** People against unreasonable searches & seizures. *(Wolf v. CO)***!!!**
* **Touchstone:** Reasonableness **!!!**
* Exclusionary rule requires the result of a 4th Amendment violation not be used as evidence against ∆. *(Mapp v. Ohio)*
* **If search**
  + - 1) PC to issue a warrant **&**
    - 2) Warrant must describe with specificity the person to be searched or place to be seized
* **5th Amendment**
* Privilege against compulsory self-incrimination
* Prohibition against double jeopardy
* **6th Amendment**
* Right to a speedy, public trial
* Right to trial by jury *(Duncan v. LA)*
* Right to confront W’s
* Right to assistance of counsel in felony or misdemeanor cases where imprisonment possible *(Gideon v. Wainwright)*
* **8th Amendment**
* Prohibition against cruel & unusual punishment
* **Habeas Corpus**
* **Rule:** Any one deprived of rights by a state can go to a FedCt to show they’ve been deprived of their rights
* **Applies:** Virtually every state criminal conviction (90% denied)
* **Reason:** Criminal proceedings implicate Bill of Rights 🡪 Creates a Fed issue. FedCt can set aside State Ct ruling
* ***Duncan v. LA***
* **Issue:** What rights from the Bill of Rights should apply to the states?
* **Rule:** Fed right to trial by jury applies to states through 14th Amendment **!!!**
* State can’t abrogate rights that are "*fundamental to our concept of ordered liberty*" w/out DP
* ***Payton v. NY*** *-* 4th & 14th Amends prohibit warrantless entries for searches of homes, absent exigent circs, even when there’s PC
* ***Richards v. WI*** *-* Not knocking & announcing is allowable under the 4th Amendment as long as it’s reasonable under circs
* ***Warden v. Hayden -*** Warrant not req’d if exigency make search imperative. Can seize items which may relate to the crime

# The Exclusionary Rule

* **Definition:** Evidence collected or analyzed that violates ∆'s 4th, 5th, or 6th Amendment rights 🡪 Generally inadmissible
* **Remedy:** Evidence seized by the police that violates 4th Amendment (unreasonable S&S) 🡪 Inadmissible
* **Purpose:** Admissibility of evidence may turn on who made the mistake
* **Original 3 Pillars (Justifications)**
* **1) Gives meaning to 4th Amendment** (protection itself)
  + - Excludes evidence obtained in violation of the Constitution gives teeth to the 4th Amendment
    - Protection meaningless unless enforced
* **2) *Core Rationale:* Deter police misconduct “deterrence”**
  + - Forces police to follow rules
    - Illegally obtained evidence jeopardizes the prosecution's case & wastes valuable police resources
* **3) Preserve judicial integrity**
  + - Avoid unlawfully obtained evidence from illegal S&S *(Weeks)*
* **Scope:** Applies to both physical & verbal evidence
* **Applies:** Only & equally to **constitutional** violations (not just 4th Amendment)
* **Note:** Miranda violations aren’t per se constitutional violations. For a fruit of the poisonous tree analysis 🡪 Analyze 5th Amendment directly, not wholly under Miranda

Scope: Fruit of the Poisonous Tree Doctrine (No Search)

* **Definition:** Gov’t obtained evidence by violating ∆’s constitutional right
* **Rule:** Can’t use direct or indirect fruits of unlawful conduct to secure a conviction
* **Rule:** Gov’t can’t make **indirect use of such evidence** for its case EX: Leads from unlawfully obtained evidence
* **Applies:** Attaches exclusively to *individual ∆'s* constitutional rights
* **Doesn’t Apply:** ∆ can’t assert a 3P’s rights as the basis to invoke the doctrine (lacks standing)
* **Limit:** Fruits derived from a Miranda violation **!!!**
* **Pillars:** ~~Judicial integrity~~ & Police misconduct
* **Tip:** Illegality shouldn't infect otherwise healthy evidence if gov’t doesn’t benefit
* **Analysis !!!**
* What evidence is Gov’t trying to admit?
* Was there a but for connection bw evidence & violation?
* Was the evidence planted in your ∆’s constitutional dirt?
* Does independent source, inevitable discovery or attenuation apply?

**EXCEPTIONS 🡪 Evidence is Admissible**

* **Independent Source Doctrine**
* **Requirement:** Evidence from a lawful source
* **Test:** No but for connection bw rights, violation & evidence EX: But for connection 🡪 Evidence is poison fruit
* **Rule:** Independent source itself can’t be tainted by illegality
* **Nutshell:** Poison tree leads to source
* **Applies:** Obtained evidence lawfully, despite unrelated constitutional violations
  + - **Live Witness Testimony**
      * **Rule:** Live W carries a willingness to voluntarily & freely testify (even if came from poison tree)*(Cecceloni)*
      * **Effect:** Can’t prevent W from testifying
      * **Purpose:** Deter illegally acquired testimony
    - **In-Ct Identification**
      * **Rule:** ∆ can’t exclude W's in-Ct identification on grounds it was fruit of an unlawful detention
        + Attack in-Ct identification on other grounds
        + No standing 🡪 Independent source (not req’d to be lawful) !!!
        + About to get from independent source, but got through poison tree EX: Find on next floor PD will search
* **Rationale:** Officer w/ independent PC to conduct a search authorized by a warrant unnecessarily risks suppressing otherwise healthy evidence by conducting an illegal search before warrant issued. Suppression wouldn’t deter illegal gov’t conduct; only suppresses same evidence acquired by independent & legal search or seizure *(Murray v. US)*
* **Inevitable Discovery Doctrine**
* **Requirements**
  + - Gov’t would inevitably find the evidence through an independent source &
    - Gov’t already started the process (set gears in motion) !!!
* **BoP:** Gov’t. Preponderance of the evidence. Must be near certainty
* **Attenuation**
* **Definition:**Connection/link to the source of the poison becomes so attenuated (distant) that the poison dissipates
* **Rule:** Too far from the poison that it’s not functionally connected
* **Applies:** Illegal arrest followed by poison tree confession
* **Doesn’t Apply:** Miranda violation (bc no poison fruit) EX: Procedural violation *(NY v. Harris)*
* **Test**
  + - How flagrant was the constitutional violation?
      * Biggest is substantive 4th violation (lacks PC) *(Brown)* EX: Flagrant = easier to attenuate
    - Is there distance & exercise of free will bw constitutional violation & evidence? EX: Location, time, connection

***Wong Sun v. US* \*\*\* Verbal evidence & fruit of the poisonous tree: Independent Source & Attenuation \*\*\***

**Rule:** Verbal evidence which derives so immediately from an unlawful entry & unauthorized arrest is no less the ‘fruit’ of official illegality than tangible fruits of the unwarranted intrusion

***Murray v. US* \*\*\* Confirmatory search case \*\*\***

**Rule:** Independent source doctrine “applies . . . to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality.” Doesn’t trigger an exclusion to conduct a confirmatory search

Limitations (Exclusionary Rule Doesn’t Apply)

* **Limitations**
  + Good faith reliance EX: Relies on search warrant
  + Grand jury proceedings
  + Preliminary hearings
  + Revoking parole or probation
  + Impeaching direct testimony **or** answers to legitimate cross-ex questions
    - Voluntary confession that violates Miranda
    - Fruit of illegal search
  + Civil proceedings
  + Internal Agency Rules
  + State law violations

Good Faith Exception

* **Definition:** Good faith reliance on a defective search warrant doesn’t infect evidence obtained from a search executed under the authority of that warrant
* **Purpose:** Deterring police misconduct not served by excluding evidence obtained in good faith
* **Negligence**
  + **Rule:** Simple police negligence in executing a warrant can’t trigger exclusion. *(Herring v. US)*
  + **Doesn’t Apply**
    - PC in affidavit is so deficient that no reasonable officer can rely on it
    - Facially defective warrant
    - Officer who obtained warrant lied to issuing magistrate
    - Magistrate abandoned his judicial role

Harmless Error Exception

* *See "Appeals" below*

Open Fields Doctrine

* **Rule:** Open fields search doesn’t implicate 4th Amendment (bc outside curtilage not intimately connected to home) *(Hester)*
* **Open Fields:** Unoccupied or undeveloped areas of ∆’s property that’s not intimately connected to their home (outside curtilage)
* **Applies:** Knowing exposure of items on the curtilage
* ***Dunn* Factors**
  + Proximity to home
  + W/in enclosure surrounding home
  + Nature of use (for area)
  + Attempt to make private
* **Trash**
* **Rule:** No REP for garbage abandoned on curb
* **Methods of Analysis:** Knowing exposure **&** Open fields

Surveillance of Curtilage from a Public Vantage Point

* **Rule:** Mere measures to restrict some views of activity doesn’t preclude PD’s observations from a ***public vantage point*** where he has a right to be & ***which renders the activities clearly visible****. (CA v. Ciraolo)*
* **Aerial Surveillance of Curtilage** 
  + **Rule:** 4th Amendment doesn’t require a warrant for police to observe what’s visible to the ***naked eye***
  + **Requirement:** Public airspace at a normal altitude
  + **Test:** Are they flying in a lawful area?
  + EX: Marijuana hidden on curtilage by fence 🡪 No REP. Police can fly plane over (anyone can see it from above)
  + EX: Aircraft flying over open field 🡪 No search
  + EX: Covered & can’t see from plane 🡪 REP
* **Examples**
  + EX: Police step on curtilage (inside white picket fence) 🡪 Search **!!!**
  + EX: Police observe from open field outside white picket fence 🡪 No search, even if trespass
  + EX: On open field 🡪 Don’t have to worry about going on the open field
  + EX: Marijuana field a mile from π’s home 🡪 No search
  + EX: Closed shed in open field w/ no window 🡪 Search. REP
  + EX: Closed shed in open field w/ window (looking through) 🡪 No search. No REP
  + EX: Police see it on curtilage **🡪** No search

# 4th Amendment

*The right of the people to be secure in their persons, houses, papers, & effects, against unreasonable searches & seizures, shall not be violated, & no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, & particularly describing the place to be searched, & the persons or things to be seized*.

Overview

* **Rationale:** Protection against arbitrary search & seizure is essential to ordered liberty (main const’ limit on S&S)
* **Core:** Security of privacy against arbitrary intrusion by PD. Basic to a free society 🡪 Implicit in ordered liberty 🡪 Enforceable against states through DP clause *(Wolf v. CO)*
* **Touchstone of Compliance w/ 4th Amendment:** Reasonableness **!!!**
* **Restrains:** Gov’t
* **Prime directive:** Get a warrant
* **Effect**
* Search or seizure based on a warrant 🡪 Presume reasonable **!!!**
* Unreasonable search 🡪 State can defend w/ exception EX: Good faith
* EX: PC there’s drugs in the car 🡪 Warrant not req’d
* EX: Hot pursuit of suspect entering home 🡪 Warrant not req’d
* **Analysis !!!**
  + - Does ∆ have a 4th Amendment right?
      * Was there gov’t conduct?
      * Did ∆ have a REP?
    - Did PD have a valid warrant?
    - If not, did PD conduct a valid warrantless search?

1. Requirements to trigger a 4th Amendment violation

* **1) People**
* **Protects:** People w/ reasonable connection to US (not places) **!!!**
* **Trigger:** Gov’t action directed against the people 🡪 Must determine if it’s a search or seizure
* **Applies:** Illegal aliens 🡪 Protected (bc resident w/ connection to US)
* **Doesn’t Apply**
  + - Non-resident alien w/ no connection to US EX: Involuntarily in US for trial
    - Private person unless gov’t actor **!!!** EX: Neighbor breaks in & photographs pot plants
    - Property search in foreign country owned by nonresident alien only briefly on US soil (even if conducted by US agents)
* **2) Persons, Houses, Papers & Effects**
* **Rule:** Police conduct must involve "persons, houses, papers, & effects doesn’t fall w/in the scope of 4th Amendment, & not limited by 4th Amendment reasonableness req’t”
* **Persons Includes**
  + - One’s body, as a whole EX: SITLA
    - Exterior of body (includes clothing) EX: Pat-down search
    - Interior of body EX: Blood alcohol test
* **Houses Includes**
  + - Structures commonly used as a residence
    - Buildings attached to residence EX: Garage
    - Buildings not physically connected to house if used for intimate activities of home
    - Curtilage of home
    - Commercial buildings get some constitutional protection (less than home) EX: Office, store
    - **Note:** Analyze knowing exposure & plain view when to determine whether a search
* **Papers:** Personal items EX: Letter, diary, business record
* **Effects:** Residual. Less inclusive than “property EX: Cars, luggage, containers

2. Scope

* **Scope:** Reasonable Search

2. Remedy for Violation

* **Remedy:** Exclude fruits of the poisonous tree (of the violation)

Defenses for ∆ to Rebut the Presumption of Reasonableness

* **1. Magistrate wasn’t neutral & detached**
* **2. Facially defective warrant:** So nonspecific that a reasonable officer would know it fails specificity req’t
* **3. Unreasonable manner of execution**
* **Rule:** Extreme gov’t behavior (S&S) violates DP 🡪 Inadmissible. No need to apply exclusionary rule
* **Applies:** Violations that shock the conscience EX: Pump stomach of someone PD thinks swallowed drugs
* **Doesn’t Apply:** Fail to knock & announce
* **4. No PC**

***Wolf v. Colorado* \*\*\*Overruled by *Mapp v. OH*\*\*\***

**Rule:** 14th Amendment DP Clause doesn’t prohibit evidence obtained during an apparently illegal S&S in State Ct. Didn’t extend exclusionary rule to the states. Caused police incentive to conduct illegal searches.

***Mapp v. Ohio* \*\*\*Extends *Weeks* to the state. Overruled *Wolf*\*\*\***

**Facts:** PD held up fake warrant in search of gambling paraphernalia & searched bedroom incident to arrest (police can search immediate area when arresting, w/out warrant & w/out PC) 🡪 Unreasonable. PD created their own exigency

**Rule:** All evidence discovered from S&S that violates the 4th Amendment is inadmissible in state Ct. **Exclusion applies to the states through the conduit of the 14th Amendment !!!** Applies regardless of reliability (Irrelevant it was there. Relevant it was seized illegally)

Search

* **Key Case:** *Katz*
* **Rule:** Gov’t intrusion on a reasonable expectation of privacy (REP)implicates 4th Amendment **!!!**
* **Unreasonable Searches & Seizures:** Gov’t intrusion or action that violates the people's REP **!!!**
* **Touchstone of REP:** Attempts to make it private 🡪 Subjective effort to make private EX: Hide in bag
* **Applies:** When they enter the home. Going to get it
* **Doesn’t Apply:** Knowingly exposed to the public, info voluntarily exposed to a 3P
* **Requirements to apply to the 4th Amendment**
  + Reasonable
    - *Substantive Cause:* Do they have the right level of cause? (PC, reasonable suspicion, etc)
    - *Procedural:* Do they have a warrant?
      * **Rule:** Must have PC to get a warrant
      * **Probable Cause:** Must have a fair probability based on the totality of facts & circs, that a crime has or is about to occur, **or** evidence will be found where suspected (means fair probability)

**Applies**

Fair probability a crime is being committed

Blood analysis

Description of suspect

**Difficult Assessment:** Informants (Likely on bar exam)

EX: Jaywalking to get a bagel 🡪 PC

EX: Notice that store was robbed & find suspect that meets the specific description 🡪 PC

* EX: PD sees marijuana in window 🡪 No search. Knowingly exposed to the public
* EX: PD sees marijuana in window, then enters house to seize, w/out warrant 🡪 Search
* Plain view doesn’t mean they can take it
* PD must search for it to seize it 🡪 Invalid
* EX: PD sees marijuana in window, owner sees him take a pic 🡪 Warrant not req’d. Exigency O will destroy it
* EX: Lip reader watches man in public phone booth 🡪 No search. No REP of observers (only REP they won’t listen)

Sense Enhancing Technology

* **Rule:** Obtaining info re: home interior w/ sense enhancing technology, that couldn’t be obtained w/out physical intrusion 🡪 Search
* **Tip:** Focus on exact nature of thing searched or seized **!!!**
* Emanated from house 🡪 No search
* Inside house 🡪Search likely

***Kyllo v. US*** - Heat sensing technology used to reveal ∆ uses heat lamps to grow marijuana 🡪 Unreasonable search

**Prerequisites to a Search**

* **1) Gov’t intrusion or action**
* **Requirements:** Direct gov’t action, or action of a private individual that’s imputed upon gov’t
* **Doesn’t Apply:** Private citizens acting independently of gov’t authorization
* **Doesn’t Require:** Trespass **or** Examination or taking of physical property
* Interception of conversations reasonably intended to be private 🡪 May be a search & seizure
* **2) Reasonable Expectation of Privacy (REP)**
* **Requirement:** Subjective expectation of privacy (of place searched or thing seized) that society recognizes as objectively reasonable *(Katz v. US)* **!!!**
* **Totality of the Circs Factors: Justice Harlan’s 2-Prong Test (**to determine reasonableness of REP)
  + - Subjective expectation
      * **Knowing exposure Key to REP Analysis !!!**
        + **Rule:** No REP intrusion for evidence knowingly exposed to the public 🡪 No search
        + **No REP in**

Bank records

Handwriting exemplars

Numbers dialed from your phone

Header info on your email

Anything someone can walk by your house & see

Something in backyard observed from lawful flight

Garbage on sidewalk

Odor emanating from a bag EX: Dog smells bomb hidden in suitcase at airport

Odor emanating from car on public road

Walk narcotics dog around car on public road 🡪 No search. Knowingly exposed bc public rd (even if hidden)

Pen register to extract #’s dialed shows ∆ called victim *(Smith v. MD)*

* + - * + **Have REP in**

Home (most REP) EX: Surveillance to see through wall

Car (Less REP)

Locekd desk at work

Hotel room unless let maid in

Surveillance that tracks your every move EX: GPS 🡪 Search

Contents of cell phone

**False Friend Doctrine**

No legitimate expectation of privacy in info ***voluntarily turned over***to 3P

Not constitutionally significant that undercover officer secretly records conversations *(US v. White)*

* + - * + **Extent of measures to keep info, property, or activities private**

REP not tied to property rights bc no REP in open fields (even if PD trespasses)

PD intrudes on REP 🡪 Search must be reasonable

* + - Objective reasonableness
      * **Nature of thing inspected**
      * **Pervasive gov’t regulation**
        + May decrease REP society is willing to confer upon a subjective expectation of privacy

***Katz v. US* \*\*\* 2-Prong REP Analysis \*\*\***

**Rule:** 4th Amendment protection against unreasonable S&S follows people, not places

**Effect:** Allowed anything to be a search. Since *Katz*, Ct still trying to narrow. Fed E-surveillance now requires Ct order  
**Justice Harlan’s 2-Prong REP Test – Reasonable Expectation of Privacy !!!  
Definition:** Must have a subjective expectation of privacy w/ respect to place searched or thing seized that society is willing to recognize as objectively reasonable

**Aka** Did suspect knowingly exposed the thing to the public.

If so 🡪 Can’t claim objective REP  
If not a search 🡪 Don’t need a justification to look for it **!!!**

***US v. White* \*\*\* False Friend Doctrine \*\*\***

**Issue:** Whether 4th Amendment bars from evidence the testimony of gov’t agents who related certain conversations which had occurred bw ∆ & gov’t informant, & which agents overheard by monitoring radio transmitter frequency carried by Jackson & concealed on his person

**Rule:** Secret simultaneous (electronic) recording of conversations of an individual & Gov’t agents w/out a warrant 🡪 Doesn’t violate 4th Amendment  
**False Friend Doctrine:**Not objectively reasonable to assume what you say is private. Not immune from a false friend (unsure if a gov’t agent)

***Smith v. MD* \*\*\* Voluntary Exposure \*\*\***  
**Facts:** Pen register 🡪 Not a search. No REP (recorded by phone co. anyway) 🡪 No warrant req’d  
- Everything that led from the pen register is *fruit of the poisonous tree*

**REP Test:** No REP in info voluntarily exposed to a 3P

***Kyllo v. US***

**Facts:** Agents used thermo-imaging to see warm spots on house w/ marijuana (looked through wall)

**Rule:** Device used by gov’t to obtain evidence inside home, not generally used by public 🡪 Presumptively unreasonable search w/out a warrant   
- 4th Amendment protects people, not places, *except* your home (lean toward ∆)  
- **Corn:** Irrelevant whether available to public (Not available 🡪 May make it worse)  
- Surveillance to see through wall 🡪 Search  
- Surveillance to see what’s emanating from home 🡪 No search

Seizure

* **Requirement:** Must be reasonable **!!!**

Seizure of Property

* **Definition:** Meaningful interference w/ a possessory interest *(US v. Karo)*
* **Rule:** ∆ doesn’t know gov’t put something on his property 🡪 Not a seizure *(Karo)*
  + O unaware it’s planted on property 🡪 No seizure *(Karo)* EX: Beeper in drum
  + Go on curtilage to plant 🡪 Search issue. No seizure
* **3 things police can seize based on PC**
  + Contraband
  + Fruits of a Crime
  + Instrumentalities used in the commission of an offense EX: Weapon, getaway car
  + 4th) Mere evidence used to solve the crime *(new)*
    - Persons are seized, when as a result of gov’t action, they aren’t free to leave or otherwise terminate the encounter

Seizure of a Person

* **Requirements**
  + Show of authority followed by submission *(Terry v. OH)* **!!! or** EX: They break away & run 🡪 Seizure ends
  + Physical force by an officer **!!! or** EX: Grabs, holds or puts his hand on you

Probable Cause

* **Definition:** Fair probability based on totality of the circs, that a crime has or is about to occur, or that evidence will be found where suspected **!!!**
  + Not reasonable suspicion
  + Not a judicial standard/more likely than not EX: Reasonable doubt, preponderance, prima facie
  + Assessed objectively by magistrate (intuition plays a minimal role)
* **Ensures**
  + S or S based on individualized suspicion
  + S or S justified based on objective facts & circs
* **Use for:** Blood analysis, Eyewitness ID, Forensic Evidence, Confession, Admission, Suspect description
* **Easy Assessment:** First-hand observation EX: Saw jaywalking
* **Difficult Assessment:** Informants(*see below,* likely on bar exam **!!!**)
* **Applies**
  + Warrant (PC based on individualized suspicion)
  + Search, Seizure
  + Prosecutorial charging discretion

Search Warrants

* **Requirements**
* Sets out for magistrate, under oath, that info justifies a warrant &
  + Describe place to be searched or person to be seized *with particularity* **&**
  + Issued by a neutral & detached magistrate
* **Detention while applying for warrant**
  + **Rule:** Suspect may be detained *temporarily* while police officers obtain a warrant
  + **Scope:** Only as long as necessary for officers acting w/ *reasonable diligence* to obtain warrant

Informant Tips

* **Historical Test: *Aguilar-Spinelli* 2-Prong Test** 
  + 1) Are they reliable? (telling the truth)?  
     - Must give the magistrate something independent to show they’re trustworthy/evidence of veracity
    - * + Track-record as a prior informant
        + Corroborated
  + 2) How do you lay the foundation? *(aka evidence of veracity)*
    - * Inside info(**c**an’t be anonymous)
      * Predictive info
      * First person observance

Modern Test: *Gates* Totality of the Circumstances !!!

* **History:** Uses *Aguilar-Spinelli* 2-Prong Test as factors
* **Issue:** Whether the tip is so reliable that it creates a fair probability
* **Analysis**
  + - **1. Is the info truthful (reliable)?** 
      * 1) Statement under oath (rare) **or**
      * 2) Track record of accurate tips (most common) **or**
      * 3) Police corroborate most of the details
    - **2. Is it based on a sufficient foundation of knowledge?** 
      * 1) Detailed explanation of how they know about criminal activity (rare) **or**
      * 2) Subsequently corroborated by independent PD investigation (Must be predictive **&** not known by the public **!!!**)

**Balancing:** Deficiency in one prong may be offset by the weight of the other prong

* + *Weighty basis of knowledge* 🡪 Best bc it indicates a reliable & trustworthy tip
  + *Weight on the veracity prong w/ NO basis of knowledge* 🡪 Insufficient PC, but a trustworthy source’s tip+ a minimal basis of knowledge can establish PC (*Gates*)
    - EX: PD corroborate inside predictive facts 🡪 Reliable
* **Advantage** 
  + Flexible, allows magistrate to review evidence collectively w/ common-sense
  + Better serves judicial review process
* **Standard of Review**
  + Substantial deference **!!!** *(IL v. Gates)*
* Uphold unless abuse of discretion (no *de novo* review, not PC **!!!**)
* Presume reasonable
* Reward for following prime directive to get a warrant
  + - Even if PC defective 🡪 Search will be declared reasonable **!!!** (if not a rubber stamp)
    - Some weight on one prong 🡪 Valid
    - Mistake must be so substantial to overturn warrant (even if judge thinks magistrate made mistake)
    - **Purpose:** Police incentive to get warrant
    - Warrant 🡪 PC determination difficult to challenge successfully
    - No warrant 🡪 They act on their own PC determination, de novo review, easier to challenge
* ***Spinelli v. US* \*\*\*Historical Test\*\*\***
* **Facts:** Affidavit w/ insufficient details wasn’t reliable or credible enough (hearsay) to justify a warrant for a suspected gambler
* **~~Rule:~~** ~~Affidavit used to support a warrant must set forth underlying circs, which would cause a magistrate to judge informants info independently & support a finding it’s reliable & credible~~

***Illinois v Gates* \*\*\*Modern Test\*\*\***

**Rule:** Anonymous tip corroborated by PD 🡪 Totality of the circs approach determines PC instead of using the 2-pronged of “veracity/reliability” & “basis of knowledge” test *(Spinelli)*

**-** 4th Amendment only requires a “substantial basis” a search will uncover evidence

Reasonable Suspicion

* **Definition:** PD instinct corroborated by objective fact. Lower, more subjective standard than PC
* **Applies**
* Headlong flight in high crime area when PD approaches
* Terry Doctrine

# Exceptions to the Warrant Req’t

* **5 Exceptions to the Warrant Requirement**
* Exigent Circs
* SITLA
  + - Terry Sweep (Reasonable suspicion)
* ASITLA
* Auto Exception
* ***Also see***
* Plain View (exception to seizure, not PC)
* Consent (exception to both warrant & PC)
* Administrative Search
* Border Searches, Search in foreign countries
* **Tip:** Can have PC but still may need a warrant **!!!**
* **Tip:** Analyze separately **!!!**

Search incident to lawful arrest (SITLA)

* **General:** Always reasonable to search person being arrested (automatic)
* **Rule:** Upon a *lawful arrest*, arresting officer may search arrestee & area w/in his immediate control (wingspan)
* **Includes:** Area which he can get a weapon **or** destroy evidence. Moves w/ arrestee
  + Arrestee enters home 🡪 May search wingspan as arrestee moves
* **When:** Contemporaneous to the arrest (timeliness, still connected to exigency that justifies the connection)
* **Rationale/Objectives**
  + 1) Protect officer’s safety (remove weapons)
    - Automatic, *Chimmel* doesn’t want to inquire whether there’s a real danger
  + 2) Preserve evidence to prevent concealment or destruction (must be for offense ∆ arrested)
* **Requirements** 
  + **Trigger:**Lawful arrest
  + **Scope:**Area w/in immediate control

Terry Doctrine

* **Tip:** All require reasonable suspicion **!!!**
* **Terry Sweep**
* **Definition:** Cursory inspection of the spaces a person may be found
* **Scope:** May sweep area beyond arrestee’s wingspan if reasonably believes accomplice present
* **Applies:** May look in closet by front door (plain view 🡪 can seize)
* **Doesn’t Apply:** Rooms other than where arrest occurred EX: Desk drawers
* **Peas & Carrots:** Plain view
* **May extend to interior of car** *(MI v. Long)*
  + - PD must let suspect go back to car **&**
    - Reasonable suspicion weapons immediately accessible to them
* **Terry Stop**
* **Definition:** Brief investigatory search (low-level seizure)
* **Effect:** Doesn’t automatically trigger a terry frisk, but may if suspected crime usually has a weapon
* **Scope:** Duly diligent time to confirm or deny the suspicion EX: Confirmed 🡪 PC
* **Terry Frisk**
* **Definition:** Cursory protective search of the person
* **Scope:** Pat-down outer clothing to reveal any weapons (can’t move object around)
* **Pre-textual Arrest**
  + Subjective motive of arresting officer 🡪 Irrelevant
  + **Tip:** Analyze justification for the stop. Search 🡪 Analyze scope
  + No such thing as a pre-textual arrest, as a matter of law
* EX: ∆ gets a citation. PD has objectively reasonable basis that ∆ has immediate access to a weapon 🡪 Can do terry sweep of the car
  + No such thing as a search incident to lawful citation, even if arrest would have been authorized *(Knowles v. Iowa)*
* EX: What if 1/10,000 drivers is arrested for driving w/out a seatbelt. They arrest you, do a SITLA, & find dope🡪 Admissible
* EX: What if you’re arrested for an offense that doesn’t result in jailtime 🡪 Can do SITLA bc lawful arrest

* ***Chimel v. CA* \*\*\*\*What is a reasonable scope of a SITLA\*\*\*\***
* **Facts:** PD had arrest warrant, asked to look around home, π objected. PD searched claiming SITLA & used findings as evidence. State claimed *Rabinowitz* precedent: that a warrantless SITLA generally extends to area in *possession* or under *control* of arrestee  
  **Rule:** Reasonable SITLA extends to the area w/in arrestee’s immediate control
* ***US v. Robinson***
* **Facts:** 15-yr veteran of PD arrests π for driving w/out a license. SITLA & finds cigarette pack w/ heroin in it Performed a pre-textual arrest bc no PC. Searched further to find drugs. (vs. terry pat down would give plain touch conclusion it’s contraband)
* **Rule:** Subjective motive of an arresting officer irrelevant to determine reasonableness of a lawful arrest  
  **Dissent:** Must determine reasonableness based on the facts & circs of each case

Automobile Search Incident To a Lawful Arrest (ASITLA)

* **Definition:** A modified scope to SITLA based on when you arrest them
* **Rule:** PD may conduct a warrantless vehicle SITLA
* **Scope:** Can only search car, not trunk
* **Compare:** ASITLA is different than the automobile exception to the warrant req’t

Reasonable Suspicion

**Protects:** From a pre-textual search

**Requirements** *(AZ v. Gant)*

* + Genuine access to what’s in the car **or** 🡪 *Belton* applies & can search container in car
  + Reasonable belief evidence related to that crime in car (even if suspect secure)

**Tip:** Go step-by-step to determine if each step is reasonable

**General:** Automatic upon arrest

Not req’d to arrest suspect while he’s in car. Can be in car or immediately surrounding it *(Thornton)*

* + - So ASITLA is arrest while in the car or immediately exiting it

***Thorton***

***NY v. Belton* \*\*\*Extends *Chimel* to search automobile SITLA (ASITLA)\*\*\***

**Facts:** PD smelled pot emitting from the vehicle, searched found pot, conducted SITLA, found cocaine

**Rule:** Incident to arrest of driver or anyone in car 🡪 Can search the interior & containers, even if locked, & seize w/out PC

***AZ v. Gant* \*\*\* Doesn’t overrule, but restricts *Belton & Thorton*\*\*\***

**Facts:** Arrestee handcuffed in police car for driving w/ revoked license, PD finds cocaine in jacket in back of arrestee’s car

**Rule:** May search a vehicle incident to an occupants arrest if genuine access (reaching distance) **or** reasonably believe it contains evidence of arresting offense (Reasonable belief 🡪 Can seize contraband in plain view)

Automobile Exception to the Warrant Requirement

**Original Rationale:** Inherent mobility of a vehicle (*Carney* - reduced expectation of privacy

**Scope**

* + Justification for the intrusion
  + PC 🡪 Can search entire vehicle (*including trunk*) & any containers w/in it *that might contain the object of the search*
  + **Limit:** What would be allowed in a warrant
  + Scope is an important issue for the automobile exception **!!!**
  + EX: PC cocaine’s in the car 🡪 May search any place in the car, including containers that may contain cocaine.
  + EX: Searching for a person 🡪 May only search such places as would contain a person (trunk)
* **Requirement:** Probable cause **!!!**
* **Requirements to establish a conveyance**
  + Self-ambulatory at the turn of a key
  + On or approximate to the hwy
* **SITLA vs. Auto Exception**
  + *SITLA:* Automatic upon lawful arrest
  + *Auto Exception:* Not automatic. Requires probable cause **!!!**
  + **Test Tip:** Don’t worry about the arrest for the auto exception
* EX: PD unlawfully seizes driver, smells marijuana. Creates PC to search car for marijuana. Can search under the seats. If he saw a gun under the seat it would be in plain view. Whether the search was reasonable depends on whether the unlawful seizing of the person made the discovered evidence fruit of the poisonous tree.
* EX**:** PD knows you have dope in your backpack & they see you put the backpack in the trunk 🡪 Can search the trunk. Scope limits the search to the trunk where they knew you put the backpack

***Chambers v. Maroney***

**Facts:** PD stopped car matching robbery description. Seized & searched car later at PD

**Rule:** No const’l diff bw seizing & holding a car before presenting PC to a magistrate vs carrying out an immediate search w/out a warrant. Searching the car at PD is safer & no further intrusion  
*Carroll* held a warrantless search is valid when a car is stopped on the hwy & officer has PC to believe it contains evidence

***CA v. Carney***

**Facts:** Selling marijuana out of motor home for sex.

**Rule:** No warrant req’t for motor vehicle like for a permanent structure (home or building) bc lower expectation of privacy   
**Holding:** No standing to complain about whether the child who tipped the PD was seized illegally bc can’t assert 3P’s right. New justification for auto exception (until *Carney* it was inherent mobility)

***US v. Chadwick***

**Facts:** Trunk seized at Amtrak bc PC contained marijuana

**Gov’t Argument:** Trunk like the automobile is mobile & exigency exception should apply (attempts to extend automobile req’t by stating there’s no material diff bw car & trunk). Ct rejects

**Rule:** Once property can’t be accessed by an arrestee 🡪 Can’t search w/out a warrant  
**Holding:** For purposes of the warrant req’t a container is more like a home than like a vehicle. Higher expectation of privacy for a locked personal container

***CA v. Acevedo (breezed through) Bright-Line RULE Simplifies \*\*\*\****

**Rule:** 4th Amendment doesn’t require a warrant when PC exists to search a container in a vehicle.  
**Holding:**Container in car is no diff from the car in the warrant exception, even if PD knows what they’re looking for

Doctrine of Plain View (seizures)

* **Nutshell:** See from a lawful place, knows it’s contraband, & can lawfully access 🡪 Valid seizure
* **Definition:** Exception to the warrant req’t for seizure (not an exception to PC req’t)
* **Rationale:** Efficiency compromise
  + No predicate search to see or get to it, **or** lawful predicate search 🡪 Stopping to get a warrant to see it is inefficient
* **Justification:** Only a justification for a warrantless seizure (Not a justification for a search)
* ***Horton* Requirements for a Plain View Seizure**
  + **1. Observation from lawful vantage point (to observe the item)**
    - *Can’t be the result of an unreasonable predicate observation*
    - Must be in plain view
  + **2. Incriminating nature is immediately apparent**
    - *Standard:* PC
  + **3. Lawful access to the point of seizure**
* **Doesn’t Require**
  + Inadvertance (can be a characteristic)
  + EX: Looking for gun w/ warrant. If you’re searching for the gun, can read the serial #’s of suspicious stereo equipment from under a glass coffee table. Doesn’t exceed scope of the warrant.
    - * Lifting the stereo up 🡪 Likely invalid bc unlikely there’s a gun under it
* **Test Tip:** PD unsure until field test (EX: powdered sugar or cocaine). If the choice is “the seizure isn’t valid until he field tested it” 🡪 wrong!)
* **Exceptions to no-warrant entry**
  + Exigent Circs (EX: hear them rustling around to destroy evidence)
  + Consent
  + Enter home to execute search warrant & do a terry sweep

***Horton v. CA***

**Facts:** Warrant scope limited to robbery evidence, finds weapons in plain view that match robbery description & seized

**Rule:** Inadvertence isn’t a req’t to plain view seizures. Constitutional if PD had a prior justification for an intrusion when he came . . .across a piece of evidence incriminating ∆” **&** if scope of search not enlarged in the slightest

***AZ v. Hicks***

**Facts:** Bullet fired through floor, PD had a reasonable suspicion stereo equipment was stolen bc it was out-of-place. *To establish reasonable suspicion, all you need is an objective fact to support the circs*

**Rule:** PD can only invoke the plain view doctrine if PC (not reasonable suspicion)  
**Holding:** Info to establish PC from an invalid search 🡪 Evidence obtained by plain view seizure was poisonous fruit  
*Justice O’Connor:* Suggests a distinction bw:

**\***PC 🡪 Can do a search  
\*Reasonable Suspicion 🡪 Can do cursory inspection. Focus on level of intrusion

*Majority rejects!* Says a truly cursory inspection involves merely looking at what’s already exposed to view, w/out disturbing it. Motive must not be to gather evidence. *This motive is the beginning of the Terry Doctrine*

\*Suspician/ hunch 🡪 Can’t do anything

Consent

**Exception:** Consent is an exception to both warrant & PC

**Peas & carrots**

* + Plain view & consent go hand in hand
    - Must be w/in the scope of consent to lawfully access & seize contraband in plain view
  + Terry stops/searches & consent go hand in hand
* **Test Tip:** Always ask how they got in the position to get consent
* **Analysis: Whether police can rely on 3P consent !!!**
  + Would an objectively reasonable officer believe the person had authority to give consent **!!!**
  + Can prove they had authority 🡪 Valid consent
  + Can’t prove they have authority 🡪 *see test above*
  + NOT whether the person had actual authority
  + Can have a reasonable belief, but be wrong (Look at belief, not whether it was correct)

**Analysis: Was there a warrant**

* + - Yes 🡪 No consent req’t
    - No 🡪 Was there an exception? [exigent circs, etc)

**Persons who don’t have authority to consent**

* + Landlord, hotel manager, child
  + Co-tenants
    - No authority to consent to private room searches
    - Common area 🡪 ***Present*** *&* ***objecting***co-tenant prevails over 3P consent *(GA v. Randolph)*
* **Refusal to Consent**
  + **Rule:** Doesn’t give officer PC
  + **Exigent Circs Exception:**Spousal battery 🡪 Reasonable belief injury will occur 🡪 May enter
  + EX: PD asks for consent, you refuse, then says “I’m going to hold it here while I get a warrant” 🡪 Valid. Not an illegal threat

Invalid Consent

* **Challenging Consent:** Nearly impossible to conclude consent invalid (unless coercion)
* **Police Coercion** 
  + **Factors:** Age, legibility, # of cops, location, cop’s statement, duration of interaction, weapons brandished, intimidating tone
  + **Effect:** Always renders consent invalid
  + Assert a valid warrant that was really invalid (*Mapp*) 🡪 Invalid consent. It’s acquiescence to an unlawful demand

***Schneckloth v. Bustamonte* \*\*\*Test for Consent\*\*\***

**Facts:** PD lawfully stops car w/ 6 people for lights burnt out. Consentee had a right to deny consent but didn’t know it  
EX:No lawful cause to stop & got consent 🡪 Evidence is fruit of the poisonous tree

**Rule:** Whether a search was voluntary doesn’t require a person knew of his rights, but whether the totality of circs indicated they voluntarily allowed the search. PD may conduct a warrantless search if they have voluntary & intelligent consent. Don’t have to tell them they have a right to refuse (but telling them is a major factor to prove consent)  
***Voluntary:***Free will to consent not coerced***Johnson:***Waiver is applied to rights guaranteed to a criminal ∆ at trial (strict standard). Compared to a right to privacy, privacy is not a fundamental right, so one can be lawfully ignorant of it + one waived more often.

***GA v. Randolph* \*\*\*3P Consent\*\*\***

**Facts:** PD unreasonably searched house when separated, but visiting wife gave consent, husband denied

**Issue:** Whether an evidentiary seizure is lawful w/ the permission of one occupant when the other is present & expressly refuses to consent

**Rule:** A present and objecting co-tenant prevails over the grant of 3P consent **!!!*****Johnson:*** *You give up REP w/ someone you live w/. Doesn’t apply here (EX: Mom can consent when you refuse)*

***IL v. Rodriguez***

**Rule:** Warrantless searches of a premises permitted when PD has reasonable belief voluntary consent was obtained from a party who possesses common authority over the premises.

***Terry v. OH*:** PD can search for weapons w/out a warrant, even w/out PC, if reasonable belief they may be armed & dangerous.

***US v. Mendenhall***

**Rule:** Person has been “seized” w/in the meaning of the 4th Amendment if in view of all of the totality of the circs, a reasonable person would believe he wasn’t free to leave.

* **Circs that may indicate a seizure** (even where the person did not attempt to leave)
  + - 1) Threatening presence of several officers
    - 2) Display of a weapon by an officer
    - 3) Physical touching **or**
    - 4) Language or tone indicates compliance may be compelled

***US v. Drayton:*** 4th Am. doesn’t require PD to advise bus passengers of right not to cooperate & to refuse consent to searches

***CA v. Hodari D:*** Arrest occurs when physical force is applied to a person **or** when a person submits to authority

***AL v. White:*** Anonymous tip corroborated by the cops' independent investigation 🡪 Can provide reasonable suspicion

***IL v. Wardlow:*** Nervous, evasive behavior & high crime area are factors to determine reasonable suspicion for a Terry stop

***MD v. Buie*:** PD has reasonable belief a serious danger exists 🡪 May do a protective sweep

An exception to the warrant and PC req’t that only requires reasonable suspicion

Border Searches

**2 part test**

- Is it statutorily authorized?

- Is it reasonable?

**Rationale:** The sovereignty interest is high and the scope of the intrusion is low

**Balancing:** Gov’t has sovereign authority to conduct a brief S&S at an international border. Routine border searches require no individualized suspicion. A significant intrusion requires reasonable suspicion

**Includes:** Opening car, suitcase, etc

**Requirements**

- Must be at a port of entry **&**

* - Can’t be a significant level of intrusion
* Significant level of intrusion 🡪 Must have reasonable suspicion EX: Strip search
* **Fixed vs. Roving Checkpoint**
* **Fixed Checkpoint**
  + - Valid, less anxiety
    - Fixed checkpoint on the *interior*: More effective bc people careless
* **Roving Checkpoint**
  + - Invalid unless reasonable suspicion

Administrative Search

* **Think of as:** Agency inspections EX: Health inspector goes to restaurants, Fire Marshall checks capacity
* Diff than a normal evidentiary/criminal search because ideally they’ll find no violation
* **Requirement:** Agency warrant, which only requires reasonable suspicion (compelling gov’t interest, like the Terry Doctrine)
* **School Search**
* May search based upon reasonable suspicion
* Warrant inapplicable

Special Needs Doctrine

* **Diff bw checkpoint search & administrative inspection:** No individualized suspicion
* **Border Search:** The only context where no individualized suspicion is req’d
* **Why Special Needs Doctrine Searches are Special**
* Inherent public danger
* Inability of PD to protect us from that danger while complying w/ the normal req’t to establish individualized suspicion
* **General:** Nature of the threat defies individualized suspicion
* **EX: Bomb search at reliant, find drugs**
* Initially appears not valid bc no individualized suspicion
* **Exception:** Special needs exception bc PD can’t discover bomber only based on individualized suspicion
* **Answer:** Canseize & admissible bc *plain view doctrine* applies:
  + - * 1. Observation from lawful vantage point (to observe)
      * 2. Incriminating nature of the item is immediately apparent
      * 3. Lawful access to the point of seizure

**3 Part balancing test:**

1) State safety interest

2) Effectiveness \*this is the fulcrum

- Must be some evidence that it’s effective

* **Touchstone**: Whether the method is reasonable
* 3) Level of intrusion on an individual’s privacy

**If you treat “effectiveness as the fulcrum”…so now it’s just a 2-part balancing test**

* Is there a state safety interest? (Objective test of the primary purpose)
  + - Can’t satisfy if requires individualized suspicion
* Is the level of intrusion reasonable
* **Critical conditions**
* Scope is narrowly tailored to the threat
* Pre-established Formula (Must be strict guidelines so police don’t act at their discretion)
* Search conducted in public
* De minimus intrusion: Use the minimally established means to accomplish the purpose
* ???
* **Doesn’t Apply:** General crime control *(City of Indianapolis v. Edmond)*
* EX: PD checkpoint on Richmond. They pull over every 5th car & have them roll down their window, ask for name drivers license, registration, and take no longer than one minute 🡪 Valid
* What if a drug dog walks around the car and alerts on the trunk? If PD were validly searching for drunk drivers, which is a reasonable seizure, & the dog just happens to be there, & it smells drugs and alerts PD 🡪 Not a search bc the dog only smelled something emanating from the trunk. Gives PD probable cause to search the trunk.
  + - **Problem:** Scope. Can’t hold the car longer than reasonably necessary to rule out DUI
    - The doctrine always implicates plain view
      * If its in plain view 🡪 you can seize it even if unrelated to the purpose of the original stop
* **Anomaly of the special needs justification**
* PD hopes to find evidence 🡪 Evidence they find is inadmissible
* PD hopes not to find evidence 🡪 Contraband they discover while acting w/in the scope is inadmissible

***Michigan Dept of State Police v. Sitz* \*\*\* 3 Part Balancing Test for Special Needs \*\*\***

**Rule:** Checkpoint program is consistent w/ 4th Amendment bc “the balance of the State’s interest to prevent drunk driving, the extent to which this system can reasonably be said to advance that interest, & the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program.

***City of Indianapolis v. Edmond***

**Rule:** Must have individualized suspicion when they employ a checkpoint primarily for general crime investigation

* Note: for warrant 🡪 PC is based on individualized suspicion

# Remedies for 4th Amendment Violations

**Rule:** Just bc a search or seizure was unreasonable does not automatically mean the evidence is inadmissible

Standing

**Rule:** Unreasonable seizure of an automobile 🡪 Unreasonable seizure of all the occupants

* Occupants don’t have standing to assert the search of the car, but have standing to complain about seizure
* Which means evidence of the search is fruit of the poisonous tree
* Only have standing to assert your rights that have been violated
* EX: PD illegally searches neighbors garage & finds evidence against you 🡪 No standing to contest the illegal search
* **REP Analysis & Standing**
* **Rule:** Commercial visitor doesn’t have derivative standing (can’t complain about homeowners REP) *(Minn v. Carter)*
  + - No standing 🡪 Can’t invoke the exclusionary rule
* **What type of guest has standing?**
  + - Overnight guest 🡪 YES, has REP **!!! (he will ask overnight vs commercial on MC, not the middle one)**
    - Visit to borrow milk (fleeting guest) 🡪 Middle ground. Kennedy’s concurrence in Minn says no REP
    - Commercial guest 🡪 No standing **!!!**

***Rakas v. IL***

**Rule:** No vicarious assertion of another’s constitutional right. (Passengers can’t assert drivers rights & claim the evidence is inapplicable to them)

***Minnesota v. Carter* \*\*\*Derivative Standing (REP)\*\*\*\***

**Facts:** Cop looked through window & saw occupants bagging cocaine, searched home, arrested primary occupant & 2 commercial visitors

**Rule:** Commercial visitor doesn’t have deritvitive standing to complain about the REP of a home owner. Can’t invoke the exclusionary rule (bc standing is a req’t to invoke)

***US v. Leon***

**Issue:** Whether the exclusionary rule should bar the use of evidence obtained w/ a warrant, that lacks PC, in the prosecutions case-in-chief

**Rule:** Reasonable reliance upon an otherwise invalid search warrant doesn’t render evidence obtained during the search inadmissible.  
**Holding:** Underlying rationale of the warrant makes sense & won’t apply exclusionary rule. Taking the evidence away from the JURY is too high a price unless it deters police. Goal is to encourage PD to rely on the prime directive to get a warrant. Must show more than an invalid warrant: 1) knowing & reckless disregard of the affidavit 2) Non-neutral magistrate or 3) Insufficient PC

Review of the 4th amendment to *Leon*

* ***Weeks*** established the exclusion rule as an aspect of the FedCts supervisory power over a fed agent
* ***Wolf* Holding:** 4th amendment extended to the states. But said the exclusion rule doesn’t go w/ it
* ***Mapp* Holding*:*** Exclusionary rule applies to the states through the 4th amendment
  + Exclusionary rule requires suppression of evidence obtained in violation of the 4th amendment (unreasonable S&S)
  + Not an exclusive rule
  + Violation of knock & announce rule doesn’t justify exclusion of evidence bc cost to society too high
  + How you get the physical evidence has no effect on its probative value
  + No matter how flagrantly illegal, if they find an illegal coffee mug, its still a coffee mug
* ***Hudson*** says the price is too high to pay when its simply failure of knock & announce (PC present, has warrant, etc)
* ***Walder*** illegally obtained evidence may be used for impeachment
  + Exclusionary rule is a shield not a sword (cant hide behind it to perpetrate a lie)
* ***Havens:*** illegally obtained physical evidence may be used to impeach a W during cross-ex
  + But *Mapp* said if gov’t obtains evidence in viol of 4th they can’t use it in their case in chief
  + **Policy**
    - Deter police misconduct
    - Protect judicial integrity
* ***Leon* Holding:** Reasonable reliance upon an otherwise invalid search warrant doesn’tt render evidence inadmissible

Good faith exception to the exclusionary rule

**Definition:** Where PD reacts in objective good faith, even if it turns out the warrant was invalid, they can still use the evidence

**Purpose:** Encourage police to follow the prime directive & they’ll be rewarded

**Doesn’t Apply**: Reasonable officer would have known not to rely on the warrant

**When a Prosecutor can’t rely on good faith** *[bad faith exceptions to the good faith exceptions to the ExRule]*

- Warrant is the result of a dishonest or recklessly false evidence

- Non-neutral magistrate, that even a rookie cop would know he couldn’t rely on it (must be reliance in objective good faith)

- Affidavit is so facially defective, that the cop giving it to the magistrate should know

- Close call on PC 🡪 Valid

- Warrant so facially defective that a reasonable (rookie) officer wouldn’t rely on it EX: You can search Houston for drugs

**Rule:** A lie by one officer is imputed to all officers, even if they’re all unaware of it

- EX: Can’t claim you didn’t know your co-officer got the warrant wrongly

**Exceptions to the Exclusionary Rule**

- Exception for impeachment

- Exception for impeachment on cross- ex

- Exception for…

- Exception for reliance on a good faith warrant

***Herring v. US ••••* Negligent Error By PD \*\*\*\***

**Facts:** Cop made clerical error about outstanding warrant that was repealed

**Rule:** 1) Isolated negligence 2) attenuated from the search (rom the point of arrest) 🡪 Doesn’t trigger exclusionary rule

**Holding:** Diff than *Evans*, where mistake made by a clerk  
**Professor:** We may be moving from a good faith exception to a bad faith req’t. Argument is that you can’t deter negligence, but can deter bad faith (Justice Brennan would say you can deter negligence by making people more careful) Rehnquist & Roberts Ct dislikes the exclusionary rule

# Confessions

* **Voluntariness Test**
* DP test, not self-incrimination
* You can fight a voluntariness issue as a matter of law & lose, but bring it in front of the jury & win
* **2 justifications for admitting an involuntary confession**
* 1.
* 2.
* **Test:** Whether a confession is legally involuntary (coerced)
* Totality of the circs 🡪 Did gov’t conduct overbear suspects free will? **!!!**
* **Factors:** Suggested, duration, fatigue, location, isolation, # of cops, demeanor of officers, lying, manipulation, officers intent
* Not offense-specific
* Reliability is merely a concern

5 th Amendment Right Against Self Incrimination

* **Definition**- No person shall be compelled to be a W against himself
* **Doesn’t Apply:** Not co terminus with Miranda (a procedural safeguard)
* **Applies:** Any time you’re questioned by gov’t & you have a **real and substantial** fear of incrimination **in the US !!!**
* Don’t have to have both custody & interrogation (diff than Miranda)
* **Test:** Did W answer the questions? Yes 🡪 Voluntary waives 5th Amendment right

Miranda

* **Actual Coercion vs. Presumptive Coercion** (🡪 Miranda)
* Custody + Interrogation = presumed coercion
* Miranda violation isn’t a constitutional violation bc it’s only presumptive coercion

Torture and Confessions

| **Four BASES TO EXCLUDE STATEMENTS & CONFESSIONS**  **(Methods that attack the admissibility)** | |
| --- | --- |
| **Approach** | **Constitutional Basis/trigger/test**  **(did it violate…?)** |
| **1.** **Voluntariness Approach** Statements obtained by actual coercion are involuntary & inadmissible for any purpose. | *- 5th & 14th Amendment DP Clauses*  *- Gov’t conduct that overbears the suspects free will*  *- Totality of the circs* |
| **2.** **6th Amendment Right to Counsel Approach** The deliberate elicitation of a statement from ∆ (formally charged) 🡪 Inadmissible unless counsel present or police obtain a knowing & voluntary waiver. | *- 6th Amendment Right to Counsel*  *- Triggered by direct or surreptitious police questioning of a ∆   who w/out the lawyer present or a waiver*  *- Was counsel present? If not, did ∆ waive?* |
| **3.** **Miranda Rule** Statements obtained as the result of custodial interrogation are inadmissible in the prosecution case-in-chief in the absence of Miranda warnings & valid waiver. | *- 5th Amendment Privilege Against Self-Incrimination*  *- Triggered by Custody + Interrogation*  *- Did suspect make a knowing & voluntary waiver? If not,   statements violate Miranda.* |
| **4.** **Fruits of Illegal Conduct** Statements that comply with the 3 tests above may still be tainted if they are the “but for” consequences of a predicate constitutional violation – like an unreasonable search or seizure. | *- Fruit of the Poisonous Tree Doctrine*  *- Triggered by a but for link between a constitutional violation   & police obtaining the statement*  *- Is the statement a product of the prior violation? If so, can the   gov’t prove it’s sufficiently attenuated from the poison tree?* |

***Hector v. State*** *-* Ct must first decide if it’s free & voluntary or coerced

***Spano v. NY***

**Rule:** Whether ∆ “was overborne by official pressure, fatigue & sympathy falsely aroused” which caused an involuntary confession

# Miranda Custody

**Custody + interrogation triggers Miranda !!!**

***Miranda* Original Definition of Custody:** A significant deprivation of freedom (seizure)

**Protects:** Miranda is a protection around the privilege against self-incrimination (no *testimony* against oneself)

- A testimonial privilege. A Miranda violation is not a constitutional violation

- Can be forced to show a tattoo, give blood, etc bc not testimonial

**Effect:** Only effect of Miranda is inadmissibility of evidence (no fruit of poisonous tree, etc)

**Applies:** Only if there’s a question of confidence in police questioning

**Doesn’t Apply:** Free to leave, even if they’re unaware 🡪 No need for Miranda

**Reasons to Reject Misdemeanor Exception to the Miranda Req’t** *(Berkemer)*

1) Reduces confusion

2) Cops may not know what the charge is when questioning

3) Don’t open up the box for other exceptions

**Advantage for State:** Predictability/Clarity/Simplicity 🡪 More plea bargains

- Once suspect has been given a valid Miranda 🡪 Voluntariness, waiver is established

**-** Can’t keep the confession out

- When confession comes in 🡪 Hard to plead not guilty

***Berkemer Functional-Equivalence Test for Custody:*** Formal arrest or a deprivation of freedom functionally equivalent to arrest

***Mathiason***

***Berkemer v. McCarty \*\*\** Functional Equivalence Test for Custody \*\*\***

**Facts:** Stopped for a traffic violation, admits drinking & dope, does intoxilyzer test & fills out form & confesses again (after booked). Gov’t argues for a misdemeanor exception to the Miranda req’t.

**Rule:** Test for custody is a formal arrest or a deprivation of freedom functionally equivalent to arrest

**Issue #1 Should we carve out a misdemeanor exception to the Miranda req’t?**  
No. Ct creates a fictional line of where custody begins. Not based on subjective intent of PO. Based on reasonable OBJECTIVE belief of suspect in custody. Look for the point where a reasonable person would feel they’re not free to go:   
- EX: Cop finds dope in the backpack you’re carrying  
- EX: Found at the murder scene with gun in hand

***RI v. Innis***

**Facts:** Suspect given Miranda 5x, cops start talking about the missing shotgun & they’re worried a kid will get hurt, suspect offers to take them to where he hid the gun. Cops take him to he station, Mirandize him again, then go to get the gun. TrCt assumed waiver established bc he’d been notified several times. Ct rejects

**Rule:** The act of questioning alone will not satisfy the gov’ts heavy burden to prove waiver  
**Holding:** The Ct said they weren’t going to decide if it was a waiver bc the….

At the time the cops assumed a Miranda violation was a poison tree 🡪 Not true today.

*US v. Pataine*, 2006 The only evidentiary consequence of a Miranda violation is inadmissibility of the confession in the gov’ts case in chief **!!!**

EX: Undercover cop plays jailmate, gets confession 🡪 Custody bc he’s in the cell. Interrogation & no Miranda waiver *but ∆ doesn’t know he’s being interrogated.* The inherent coercion of custodial interrogation isn’t present & may be admissible, but may violate the 6th amendment right to counsel.

- Common bar exam question to draw distinction bw 5th and 6th amendment

\* start drawing the line bw suspect & ∆

- If ∆ 🡪 6th Amendment Right to Counsel (to enable to atty to be able to defend you)

- If Suspect 🡪

**Know functional equivalent for custody, know functional equivalent for interrogation, know the factors for each, know Miranda’s not implicated when suspect doesn’t know he’s being questioned by a cop. Miranda isn’t t implicated by routine booking questions. Miranda isn’t implicated by non-testimonial evidence !!!**

Waiver

* **Requirement:** Waiver must be knowingly & voluntarily given. May be express or implied
* **Applies:** Mentally diseased suspect can waive
* **Doesn’t Apply**
* **Silence:** Silence is not a waiver. It’s rarely an invocation bc no indication of knowing & voluntary waiver (doesn’t meet *Butler)*
* Can’t imply waiver from silence (but silence + xxx may be)
* Can’t imply waiver if the suspect merely asked questions
* Coercion 🡪 Involuntary waiver

***NC v. Butler* \*\*\* Beginning of dilution of *Miranda* \*\*\***

**Facts:** ∆ claims he didn’t raise his right to counsel when he didn’t sign a form but acknowledged he understood the warnings re: his rights. AppCt substituted “specific” for “explicit”

**Rule:** An express Miranda waiver isn’t req’d to admit subsequent statements. You can have an implied waiver that is knowing & voluntary (but *Miranda* said you can’t imply waiver by merely answering questions)  
**Dissent:** *Miranda* is already a prophylactic rule. Don’t create another prophylactic rule that you must expressly waive your rights. Issue is whether it was knowingly & voluntary given (\*the standard for ordinary trial rights)

Re-Initiation: A waiver invocation rule

When is re-initiation admissible?

When does re-initiation violate invocation rights?

**Professor**: Believes the cops saying “If you invoke the right to counsel, I can’t talk to you anymore” 🡪 Deceptive bc suspect may think they won’t get to the benefits of confession. (judge advises jury that confession is the 1st step to rehabilitation). The cops should instead say “If you invoke the right to counsel, I can’t talk to you anymore w/out your lawyer present”

***Edwards v. AZ* \*\*\**Edwards* unapproachability Rule\*\*\***

**Rule #1:** When ∆ invoked his right to counsel during custodial interrogation, a valid waiver of that right can’t be established by showing only that ∆ responded to further police-initiated custodial interrogation, even if ∆ was advised of his rights again.

**Rule #1:** ∆ who implicitly expresses desire to deal w/ police only through counsel is not subject to further questioning until counsel has been made available to ∆, unless ∆ initiates further “communication, exchanges, or conversations” w/ PD  
**Dissent:** Rehnquest & Powell were concerned it creates a per se rule that once a suspect invokes his right to counsel 🡪 PD can’t re-initiate/re-approach them to solicit a waiver (from any jsd, from any cop)

***Minneck \*\*\*Edwards-Minneck* Unapproachability Rule*\*\*\****

**Rule:** ∆ must unambiguously (unequivocal) request counsel to invoke the right to counsel

**Doesn’t Apply:** “I think I need a lawyer”

* **Scope:** *Edwards* unapproachability rule expires 2 weeks after released from the normal interrogation environment
* Unapproachable for 14 days
* **Applies:** Diff crime, Diff cop, diff jsd, even if unaware they invoked 🡪 Can’t interrogate
* Re-approach 🡪 Must get new waiver

Invocation of Right to Counsel vs. Right to Silence

* **Rule:** Invocation of the Right to Counsel 🡪 *Edwards-Minneck* unapproachability rule qualified by *MD v. Schatner*
* **Applies:** 14-day unapproachability rule applies
* Means your unequal, don’t want to talk to the cops w/out help
* More protective than the right
* **Invokes Right to Silence** 🡪 *Michigan v. Mosely*
* No 14-day unapproachability rule
* Doesn’t mean you’re unequal

EX: Suspect says “I don’t want to talk to you”

* **Right:** Invoking the right to silence
* **Test:** Must scrupulously honor the suspects right to control the time, place & subject matter of questioning
* **Totality Analysis:** Time elapsed, diff cop / location / crime / jsd
* More factors = more it looks like a valid approach
* Could be many factors why he doesn’t want to talk: tired, doesn’t want to talk about that crime, etc

Public Safety Exception

***NY v. Quarles* \*\*\*\* Public Safety Exception to Miranda Req’t \*\*\*\*Facts:** Suspect told PD where he hid a gun in a store before given Miranda warnings **Rule:** There’s a public safety exception to the req’t that Miranda warnings be given before a suspects answers can be admitted into evidence  
**Requirements:** Imminent danger **&** Spontaneity

- A spontaneous question motivated by an objective, imminent threat to public safety  
- Like present sense impression (hearsay)

***Oregon v. Elstad*  
Facts:** ∆ convicted of burglary, questioned w/out Miranda warnings, signed confession used to convict him. Claims 2nd confession was fruit of the poisonous tree, & even if it was, waiver was invalid **Rule:** A suspect who once responded to unwarned yet uncoercive questioning isn’t disabled from waiving his rights & confessing after he’s been given the requisite Miranda warnings.”  
**Rule:** If 1st confession isn’t the product of actual coercion, the only waiver issue is whether it was knowing & voluntary  
- Can’t invoke poisonous tree bc of Miranda Violation  
- EX of Actual Coercion: Read Miranda rights, throw against the wall a few times, then get confession

**PRIOR MIRANDA VIOLATION DOESN’T INVALIDATE SUBSEQUENT MIRANDA WAIVER**  
**Purpose:** Avoid every confession made on a routine terry stop from being inadmissible  
**2 Exceptions:** Actual coercion or deliberate bypass

***Missouri v. Seibert* \*\*\*Deliberate Bypass Problem\*\*\*  
Facts:** Mom who killed baby confessed, put mentally disabled person in the trailer to make it look like the baby was attended, then burned it down, killing the mentally disabled person. Police manual allowed PD to deliberately bypass manual in order to trick suspect

**Distinction from Elstadt:** Continuous interrogation, rather than 2 distinct interrogations

**Breyer:** Wants good faith req’t w/ BoP on gov’t to show good faith

**Kennedy:** Wants BoP on suspect to show 1st violation was in bad faith (deliberate) \*Prof thinks this will become the rule

***Dickerson v. US* \*\*\*End of Miranda Journey, not on exam\*\*\*\***

# Police Interrogation: 6th Amendment Right to Counsel (SARTC)

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

Eliciting Statements in the Absence of Counsel

* **Attaches:** Once a suspect becomes a ∆ (@ the initiation of formal adversarial process)
* **Effect:** Right to have an atty assist you in your defense. Can’t be limited to just the courtroom
* **Applies:** When DA becomes involved EX: Indicted, Bail hearing bc must be charged
* **Doesn’t Apply:** Fingerprinting

***Massiah v. US* \*\*\* The Massiah Doctrine \*\*\*Facts:** ∆ didn’t know an informant was recording when ∆ made incriminating statements. Pre-Miranda  
**See Also:** False friend doctrine, Exclusionary Rule  
**Rule:** Violates the 6th Amend. Right to counsel to deliberately illicit a statement from ∆ absent counsel

***FORMAL ADVERSARIAL…*** + DELIBERATE SOLITATION  
**Right Protected:** The ability of a lawyer to adequately defend you to enforce the 6th Amendment

***Brewer v. Williams***

**Facts:** Mentally ill murderer dumps body & runs. Atty says ∆ will turn himself in if he’s not questioned. Miranda given, ∆ invokes. Detective gives the famous Christian Burial Speech, ∆ confesses, they drive around to collect the evidence & the body (it’s Xmas, daughter deserves a burial, etc).   
**∆ argues** Miranda violation, Massiah violation, Voluntariness. ∆ also argues the body is fruit of the poisonous tree.   
**Holding:** Miranda violated bc PD reinitiated after ∆ invoked 🡪 Confession inadmissible, body admissible (not poison fruit)  
**Majority:** Evidence insufficient to establish waiver  
**See Also:** PD knowingly exploits 🡪 View from objectively reasonable officer  
**Policy**  
- Protects atty’s ability to represent (right to counsel)  
- Fundamentally impossible to assume a waiver of counsel after ∆ invoked right  
**Explanation:** *Brewer* is an application of *Massiah* bc maj said gov’t deliberately illicited a confession from ∆ violating 6th Am right to counsel bc unable to prove a valid waiver, bc under *Johnson*, can’t prove waiver of a fundamental trial right by implication **!!!**

***McNeil v. Wisconsin***

**Facts:** Invokation of the 6th Amendment right to counsel only protects you from the offense you are defending against

* EX: ∆ arraigned on robbery, also suspected of rape. Confesses to both. Robbery confession inadmissible bc ∆ & doesn’t know he’s talking to a cop. If cop is undercover, its unlikely ∆ got a Miranda waiver. Not protected by 6th amendment, he’s only protected by 5th amendment.
* **Rule:** When ∆ asks for a lawyer at an arraignment he explicitly invokes the 6th amendment right to counsel & implicitly invokes 5th amend right to counsel.
* **Invoking 6th** you aren’t unapproachable (doesn’t violate *Edwards-Minneck* Unapproachability Rule)
* To have Miranda, must know you’re being questioned by a cop
* Make a list of the diff between the 6th amend right to counsel & the Miranda right to counsel (5th)
* **6th Amendment Right to Counsel**
  + - Right to have lawyer at a critical stages of the adversarial process EX: Questioning, trial
    - Can be a poison tree
    - Asks for waiver at arraignment 🡪 Explicity invokes 6th amendment right to counsel
* **Vs. 5th Amendment Right to Counsel**
  + - Can’t be a poison tree
    - Asks for waiver at arraignment 🡪 Implicitly invokes 5th amendment right to counsel

# Bail & Other Release Mechanisms

Bail

**4 Main Points**

* 1. No right to bail
* 2. **Purpose:** To secure ∆’s return & submission to the sentence
* 3. If bail won’t achieve that goal 🡪 it’s inapplicable
* 4. If bail will achieve that goal 🡪 it’s not excessive in relation to the offense
  + - *Excessive:* Gross disproportion. It’s unconstitutional pre-trial punishment
* **Based on:** Individualized Assessment
* **8th Amendment rule against excessive bail** 
  + - One of the few Bill of Rights that’s not incorporated into the states
* Initiation of formal adversarial process triggers the 6th amendment right to counsel
  + - *Includes:* First appearance for setting bail 🡪 Right to counsel

# Right to Counsel

Eyewitness Identification Procedures

* **Focus on:** Has your lawyer been given the opportunity to defend you **!!! vs. DP which is reliability/outcome**
* **Analysis**
* 1. Does the 6th Amendment attach?
  + - Yes 🡪 **Rule:** Per se rule that you have a right to have counsel present at all critical stages of the adversarial process **!!!**

- Are you the ∆

- Must be a corporeal identification

Critical Stage

* **Definition:** Aspect of pre-trial process where not having a lawyer present would significantly derogate the right of ∆’s lawyer to defend ∆ at trial
* **Rule:** Per se rule ∆ has a right to have counsel present at all critical stages of the adversarial process **!!!**
* **Requirement:** Critical stage
* **Applies (4 critical stages) !!!**
* 1. Trial *(Powell)*
* 2. Deliberate elicitation of a statement from a ∆ prior to trial
* 3. Out of Ct corporeal identification (*Wade-Gilbert)*
* 4. Preliminary Hearing
* **Doesn’t Apply**
* Bail hearing
* Photo line-up
* **Protects:** Ability to adequately defend your client
* **Doesn’t Protect:** Not meant to ensure out of court ID is reliable
* **Theory:** Confession or out-of-court ID usually results in an automatic conviction (decisive evidence)
* **Effect:** Must have counsel **or** waiver
* No lawyer or waiver 🡪 Automatically inadmissible **!!!**
* Inadmissible out-of-Ct ID, followed by an in Court ID
  + - **BoP:** Gov’t must prove by clear & convincing evidence that the out-of-ct ID is independent from the in-court ID **!!!**
      * *Aka* it didn’t poison the in-court ID
      * Harder to prove independent source for a tainted ID than any other poisonous fruit
    - **Factors** *(same for DP below)*
      * How long did they view the suspect
      * Degree of attention
      * Accuracy of the description
      * W’s level of Certainty
      * Time bw crime & confrontation
      * **Other Considerations**
        + Prior relationship w/ ∆
        + Who’s making the ID, trained observant or layperson
* Reliability irrelevant (gov’t can’t claim it’s so reliable to overcome)
* Counsel not present at out of Ct identification proceeding 🡪 Per se inadmissible *(Gilbert)*
* Out-of-court ID w/out counsel 🡪 It’s presumptively inadmissible *(Wade)*
* More unreliable out-of-court proceeding 🡪 Harder to prove independent source
* Photo ID not a critical stage bc you don’t need to be there to re-create at trial *(Ash)*
* Can you have an out-of court corporeal ID that complies w/ the 6th Amendment but violates 14th DP ???

***US v. Wade***

**Facts:**∆ forced to participate in line-up without counsel present  
- Ct says line-up is non-testimonial, like fingerprinting, etc

***Gilbert* Holding:** If PD does a corporeal identification proceeding, w/out the defense lawyer present, could the gov’t so that it was so reliable they could still use it? No. Reliability is irrelevant (in Wade-Gilbert). Per se rule that no matter how reliable the ID is, an out-of-court corporeal ID made w/out a lawyer is inadmissible   
**Purpose:** Right for atty to defend ∆. Defense lawyer must be there to adequately cross-ex

THIS IS THE KEY TO DISTINGUiSHING THEM

**6th Amendment Applies:** Corporeal ID whether or not reliable !!!

**Vs DP:** Applies to both corporeal and non-corporeal ID but must be unreliable !!

Due Process

* **Overall:** Broader application than 6th Amendment but harder to prove
* **Touchstone/Focus on:** Outcome, reliability **!!! Compared w/ 6th Amendment**
* **Applies:** Corporeal & non-corporeal
* **BoP:** ∆’s burden to show it violates DP
* **Rule:** A tainted out of Ct ID in violation of DP almost always taints a subsequent in-Ct ID
* Out of Ct ID violates DP 🡪 Fruit of the poisonous tree
* **Requirement:** Must be inherently unreliable
* **Rule:** You can use suggestive procedures if only way to ID *(Stovall)*
* **Totality Test**
* Was it unnecessarily suggestive?
* Did suggestiveness result in irreparable risk of misidentification?
  + - Not inherently unreliable 🡪 Tell jury it’s not that reliable & to not give it much weight
    - **Factors** *(same for DP below)*
      * How long did they view the suspect
      * Degree of attention
      * Accuracy of description
      * W’s level of Certainty
      * Time bw crime & confrontation

***Stovall v. Denno***

**Facts:** Stabbed lady ID’d ∆ when she was hospitalized, bc it was unclear

**Rule:** Suggestive procedure is only feasible way to ID 🡪 Doesn’t violate DP bc feasibility factored into totality of circs

***Manson v. Brathwaite***

**Rule:** Reliability is the linchpin in determining the admissibility of ID testimony

**Vs Stovall:** In *Manson* the gov’t concedes the evidence was unnecessary  
**Holding:** Use totality of the circs  
**Factors to Consider:** Ct adopts same factors as the 6th Amendment factors

# Case Screening

Prosecutorial Discretion in Charging

* **2 Constitutional bases for challenging prosecutorial charging discretion**
* Discriminatory &
* Vindictive Prosecution

I. Selective Prosecution *(Discriminatory Prosecution)*

* **Definition:** Prosecution violates **EP**
* **BoP:** For EP Claim of Selective Prosecution. ∆ must establish prima facie evidence the charge has a:
* Discriminatory Effect **&**
* Discriminatory Purpose
* **Test**
* Are ∆’s of different race/class/gender treated differently? **&**
* No other rationale for that different treatment
* **General:** Presume prosecutors act in good faith

***US v. Armstrong***

II. Vindictive prosecution

* **Definition:** Vindictive motive violates **DP**
* **Rule:** ∆ must show the only explanation for increased penalty is punishing him for exercising his right to appeal
* **Test:** New evidence justifies the new charge?
* Yes 🡪 Not vindictive
* No 🡪 Vindictive
* **Distinguishing the results This is the key !!!**
* Only explanation is the ante was upped bc of an exercise of the right to appeal 🡪 Vindictive Prosecution
* Any other plausible explanation 🡪 Not Vindictive Prosecution (permissible)
  + - **Prosecution:** Only needs PC to justify the charge (PC🡪 Can threaten & charge)

***Blackledge v. Perry*Facts:** ∆’s charge was raised when he appeal (upped the ante to a Federal charge). ∆ claims violated his right to appeal.

**Rule:** ∆ must show that there was no other plausible explanation for the heightened charge

**Holding:** There was stronger evidence on appeal 🡪 Not vindictive prosecution

Preliminary Hearing & Right to Counsel

* **4th Critical Stage:** Preliminary hearing

***Coleman v. AL*****Facts:** AL didn’t give ∆ an atty at preliminary hearing. State said don’t use the statements at trial so no need for a lawyer

**Rule:** ∆ entitled to a right to counsel at a preliminary hearing bc it’s a “critical stage” bc rights may be lost *(Coleman v. AL)*

Grand Jury

* **Rule:** Because grand jury is independent 🡪 No constitutional obligation for prosecution to inform grand jury of exculpatory info
* Can use confession that violate Miranda
* can invoke privilege against self-incrimination in front of a grand jury (if you have a real & substantial fear)

- **Note:** But can’t invoke Miranda rights in a grand jury **!!!**

* + - **3 requirements of a valid indictment (simple) !!!**
      * Valid on its face
      * Legally composed
      * Non-biased
      * **General:** ∆ must challenge indictment prior to trial

Discovery

* **ON TEST !!! JUST REMEMBER that Favorable is the disclosure trigger & Material is the REMEDY !!!**
* **Common Scenario:** ∆ convicted & later learns there was evidence not shown prior to trial & claims unfair
* ∆ requests favorable info from gov’t & failure to disclose it violates DP if material. Violates DP 🡪 ∆ entitled to new trial or sentencing *(Brady)*
* **Rule:** Must Discloseany favorable info in the gov’ts possession
* **In a Nutshell, the Test is… !!!**
* 1. Was the info favorable? (must know whether there was a request) **!!!**
* 2. If it was favorable, does it create a reasonable probability of a different outcome? **!!!**
* **Requirements for Non-Disclosure of evidence prior to trial that violates DP**
* Evidence must be favorable **& !!!**
* Material **!!!**
* **Motive:** Irrelevant. Good faith isn’t a defense of failure to disclose

|  |  |  |  |
| --- | --- | --- | --- |
| **Request** | **Favorable (Step 1: this is the disclosure trigger) D must prove this #2 Requirement** | **Material  (Step 2: this is the remedy trigger) ∆ must prove this #2 Requirement** | **Motive** |
| THE 1st CASE  Request 🡪 *Brady* | Is it something ∆ would want to have?  *Favorable*: tends to exculpate or reduce culpability | ~~Non-disclosed evidence would have created a reasonable~~ **~~possibility~~** ~~of a different outcome~~ | Irrelevant |
| THE 2nd CASE  (No Request) *Agurs* | w/out a discovery request, the evidence not disclosed must have been clearly exculpatory.  **Reason:** Prosecutor would have explicit notice that ∆’s entitled to it  **EX: Doesn’t Apply:** Gov’t fails to disclose impeachment evidence 🡪 No obligation to disclose (bc not favorable)  **EX Applies:** Learns ∆’s innocent but doesn’t give evidence 🡪 Clearly exculpatory | ~~Reasonable~~ **~~probability~~** ~~of a different outcome~~ | Irrelevant |
| THE 3rd CASE  Request *Bagley* | Test for favorable doesn’t change (w/ request 🡪 favor)(w/out request🡪 clearly exculpatory) **!!!** | Whether there’s a request or no request, the non-disclosure **must create a reasonable probability** of a different outcome to = material. **!!!** | Irrelevant |

***Williams***

**Facts:** ∆ finds exculpatory info provided to the prosecutor wasn’t presented to the grand jury  
**Holding:** Prosecution wasn’t req’d to provide it

\*remember, can invoke privilege against self incrimination in front of a grand jury (if you have a real & substantial fear)

but can’t invoke Miranda rights in a grand jury

Reciprical Discovery

- **Rule:** Reciprical discovery of a ∆ doesn’t violate the constitution to require notice of W’s & defenses

**-** Not compelled self-incrimination, it’s voluntary disclosure

- EX’s:

**If you want to plead insanity**

- Must plead 30 days in advance **&**

- Insane at the time of the crime

**For Alibi, must give:**

- Alibi defense **&**

- Notice of alibi W’s

# Right to Assistance of Counsel

Right to Appointed Counsel

* ***En formus papyrus*** - Poor person who can’t afford a lawyer
* **Rule:** Indigent ∆’s have a fundamental right to assistance of counsel as applied through 14th amendment *(Gideon v. Wainright*, overruled *Betts)*
* **Policy:** Essential to a fair trial
* **Reasons it Overruled *Betts***

- Not part of the fundamental fairness of DP  
- SupCt already applied the fundamental right to have a lawyer in federal cts

* **Rule:** 6th & 14th Amendments require only that no indigent criminal ∆ be sentenced to imprisonment unless state afforded ∆ the right to assistance of appointed counsel in his defense *(Scott v. Il)*
* **Trigger to the *Gideon* right to counsel:** Actual Imprisonment !!!
* **Applies:** Suspended sentence (termination of probation, etc could kick you into jail)
* **Note:** Right to have counsel is dictated by end result
* ***Argengensinger:***Indigent ∆ doesn’t have a right to free counsel for a petty offense w/ less than 6 months jail. *Argensinger* didn’t have it bc not “actually confined”
* **Triggers for Right to Counsel v. Right to Trial by Jury**
* **Triggers for Right to Counsel:** Actual result (confinement)(can be misdemeanor or felony)
* **Triggers for Right to Trial by Jury:** Possible result

Right to Appointed Counsel for an Appeal

* **Rule:** Indigent π’s are entitled to assistance of counsel in a 1st appeal of right *(Douglas v. CA)* **!!!**
* **Policy:** Unequal access to app process based on wealth  
   - *Griffon* said it violated DP & EP to deny indigent ∆ right to a trial transcript
* **Appeal:** No constitutional req’t to an appeal. But all states provide

Discretionary Appeal

* **Rule:** Indigent ∆ doesn’t have right to appointed counsel on a discretionary appeal *(Ross v. Moffit)* **!!!**
* **Reasons it’s not fundamentally unfair**
* 1. Not used to defend presumption of innocence. Used to attack guilt at trial
* 2. Already provided counsel in app process & write brief
* **Test:** Is it fundamentally unfair to deny a lawyer?
* **Note:** States can’t demand fee payments to review your appeal (EX: TX will review it if you pay us $500)

Pro Se

* **Rule:** While there’s a 6th amendment right to counsel, Ct can’t force ∆ to have one *(Paretta v. CA)* **!!!**
* 6th Amendment doesn’t explicitly say one has a right to appear pro se, but it’s inherent
* **Policy:** ∆’s right   
  **Effect:** Can’t claim
* **Requirement:** To waive a fundamental trial right 🡪 Must be knowing & intelligent & voluntary (*Zepps)*
* **Knowing:** Knowing the consequence of not having a lawyer
* EX: Did anyone coerce you? No🡪 Allowed
* EX: How many types of hearsay are there? 🡪 Not allowed

Pro Se on Appeal

* **Rule:** No right of pro se representation during App process
* **Effect:** Ct can force you to have counsel during an appeal
* **Reason:** Avoid pro se appellate briefs

Standby Counsel

* **Rule:** Standby counsel can’t appear to take over ∆’s case EX: Boisterous, interrupting **!!!**
* **Advantages**
* 1. Help explain Ct procedures to ∆ EX: Can’t ask that question
* 2. Judge has a lawyer to appoint & continue trial uninterrupted if ∆ changes his mind
* **Test for Competency to Stand Trial**
* Understand nature of proceedings against you **&**
* Capable of assisting your counsel in your defense
* **Test: Competency to Plead Guilty**
* Knows consequences of waiving the right **&**
* Knowing & voluntary

Minimally Competent ∆’s

* **Rule:** It doesn’t violate 6th amendment to force a minimally competent ∆ to be forced to be represented by counsel at trial **!!!**
* **Effect:** State can impose lawyer on minimally competent ∆
* **Eliminating trial vs. Conducting trial**
  + - *Godenez:* ∆ can *eliminate* the trial by pleading guilty (not *conduct*)
    - *Godenez:* A minimally competent ∆ is competent enough to plead guilty

Ineffective Assistance of Counsel

* **Rule:** 6th Amendment right to counsel implies *effective counsel* **!!!**
* **BoP:** If ∆ can show counsel was ineffective **&** suffered prejudice 🡪 Sentence can be reversed
* Ct always presumes lawyers conduct was effective
* **Standard of Effectiveness:** Extremely low. Identical for misdemeanor & for capital offense
* **Role of 6th Amendment:** Ensure each ∆ gets the benefit of a minimally competent lawyer
* **Test:** Was lawyers functioning so bad that the trial result isn’t reliable (use reliable, not fair)
* **Requirements**
* Deficient performance: Falls below a minimal level of competence **&** EX: New lawyer standard
* Prejudice
  + - **Test for Prejudice:** But for ineffective assistance of counsel, there’s a reasonable probability of a diff outcome
      * **3-Tiered Methodology for Prejudice**
        + Gov’t interferes w/ lawyers ability to represent ∆ 🡪 Conclusive prejudice (never happens)
        + Lawyer represents ∆ w/ conflict of interest 🡪 Ineffective & presumptively prejudicial (burden-shifting)
        + All other ineffectiveness 🡪 Presumptively no prejudice (BOP on ∆)
* **Ways to Show:** Violate basic lawyer, competence communication, zealousness, etc
* *Most Common:* Zealousness (didn’t investigate enough). But Cts avoid bc it’s a tactical decision that’s hard to challenge
* **Effect:** Ineffective counsel 🡪 Must be reported to state bar
* **Ineffective Assistance of Counsel & Plea Bargains**
* **Rule:** Criminal ∆ has right to effective assistance of counsel during plea negotiations
* **Applies:** If you miss timeline for plea deal 🡪 Ineffective 🡪 New trial
* **Plead guilty** 🡪 Waive all evidentiary objections. Must say ‘the reason I didn’t move to suppress it is bc I got bad advice’

# Plea Bargaining

* **Standard of Competence for a Plea:** Same as…
* **Strongest form of guilt:** Admission of guilt in an open Ct
* **Requirements:** Voluntary, knowing & intelligent:
* Awareness of the direct consequences of the plea
* Awareness of what the gov’t offers
* Absence of misrepresentation
* *\*Henderson:* ∆ must know nature of the offense he’s pleading guilty to
* *\*Boikon:* ∆ must have notice of the constitutional rights being waived by pleading guilty…
  + - Trial by jury
    - Right to confrontation
    - Compulsory Process
    - …but doesn’t have to be on notice of collateral consequences EX: Can’t own a gun, job
      * \**Pedilla (2010)*: Immigration consequences are no longer collateral (they’re direct)
* **Applies:** Pleas ok as long as lawful action (Can’t be coerced)
* Lower charge
* Wire deal EX: Someone else benefits if you plead guilty
* Package deal EX: Unless you all plead, no one gets a deal
* Another one not offered is a naked plea (cold plea) EX: Plead guilty for no benefit

***Brady v. US***

**Facts:** § created disincentive for jury trial, ∆ confessed to avoid death penalty

**Rule:** No req’t ∆ must be permitted to disown his solemn admissions in open Ct that he’s guilty simply bc it later develops the State would have had a weaker case than ∆ thought or the max penalty has been held inapplicable in subsequent decisions.

Characteristics of a Valid Guilty Plea

***NC v. Alford***

**Rule:** ∆ may voluntarily, knowingly, & understandingly consent to the imposition of a prison sentence even if he’s unwilling or unable to admit his participation

* **Alford Plea:** Plea of guilty w/out getting the benefit of the bargain, contesting guilt *(nolo contendere)*
* No admission of guilt 🡪 Means no evidence of a finding of guilt
* **Nolo contendere Plea:**Not contesting guilt
* *\*Bordinkircher v. Hayes:* Doesn’t violate DP to threaten ∆ w/ a more serious charge if he refuses to accept a plea bargain
* Not vindictive during plea bargaining bc not punishing ∆ for asserting the right
* Not vindictive until the appellate process **!!!**

Making & Breaking Deals

* **Rule:** Plea performance is **strict performance** **!!!** Both parties are obligated to strictly comply w/ the deal terms *(Santobellow v. NY)*
* No substantial performance
* Promise imputed to every prosecutor in jsd (even if unaware) EX: Prosecutor promises not to recommend sentencing
* Agreement presumes fairness
* Substance of promise must be made known to Ct (so AppCt knows) EX: Are there any sub-rosa agreements?
* Inadvertence isn’t an excuse
* No causation element
* Judge not party to it (not req’d to do what they agree to, but usually do)

Effect

* **Rule:** Can’t withdraw your plea
* **Rule:** A guilty plea waives evidentiary objections (includes constitutional objections) *(McCann v. Richardson)*
* **Effect:** Can’t challenge evidence (Waive Appeal **!!!** ) EX: Invalid search, etc
* **2 Ways to Guilty Plea in Habeas Corpus**
* **Ineffective Assistance of Counsel**
  + - Lawyer ineffective in advice to not raise issue (obvious he should have challenged) **&**
    - Wouldn’t have pled ‘but for’ it
* **Crime itself violates DP or EP**
  + - Invalid plea if const’l defect exposed on collateral review would have prevented the charge EX: Law violates DP

# trial Process

Trial by Jury

* **Rule:** Right to trial by jury is incorporated to the states from the conduit of the 14th Amendment *(Duncan v. LA)*
* SupCt extends Fed standard of right to trial by jury to the state *(Baldwin v. NY)*
* **Purpose:** Protect against arbitrary gov’t power (prevent overzealous charges, bia judges, etc)
* **Test:** Any charge w/ potential jail time < 6 months
* **Triggers right to lawyer:** Any trial that results in confinement

Waiving the Right to Trial by Jury

* **Requirement:** *K*nowing, intelligent & voluntary **&** Gov’t consents
* **Test Tip:** Permissible to require gov’t consent to a waiver of trial by jury
* EX: ∆ not entitled to a bench trial if the gov’t objects 🡪 Constitutional. State can change.

Jury Size

* **Rule:** 6 member jury is constitutional (doesn’t violate DP)
* Capital case 🡪 Must be 12 & unanimous
* 5 is too small *(Bellow v GA)*
* Doesn’t violate DP to not require unanimous verdict (OR & LA)*(Apadoca v. Oregon)*
* Unanimity isn’t req’d but a substantial majority is (2/3+) *(Johnson v. LA)*
  + - Unanimity means guilt requires 12, not guilty requires 12

Jury Selection

* No constitutional req’t that the petit jury represent a fair cross section of the community
* **But!** Jury pool must reflect a fair cross section of the community *(Taylor v. LA*, alleged women systematically excluded*)*
  + - **Issue:** Does an exclusion of an identifiable class of citizens violate the 6th amendment 🡪 Yes
    - ***Duran* Test** *(Duran v. MI)*
      * Was the group distinctive in the community (EP groups, race, sex)
      * That group isn’t reasonably represented in the jury pool (proportion to population)
      * Underrepresentation due to systematic exclusion (de jure or de facto)

Challenges

* **2 Types of Challenges to Exclude Jurors**
* Challenge for cause
  + - **# of times you can challenge:** Unlimited
    - Affiliation alone doesn’t create bias
    - **Requirement:** Actual or Implied bias
    - **Test for Actual or Implied Bias**
      * Does the juror hold a particular belief or opinion that will prevent or substantially ***impair*** their performance?
* Preemptory Challenge
  + - **# of times you can challenge:** Depends on constitution (2 or 3)

Causal Challenges in Capital Cases

* **Causal Challenge** - Absolutely implied bias that will substantially impair impartiality
* **Test:** Test for bias is the same in a capital case (Wainwright v. Witt)
* **Effect:** Easier for gov’t to challenge death penalty opponents on the jury
  + - Just have to show their implied bias may substantially impair their ability to apply the law

Special Rules for Causal Challenges in Death Penalty Cases

* **Ct improperly grants a prosecution request to remove a juror based on an “opposition to death” argument, &   
  prosecution had a remaining peremptory challenge** 🡪∆ entitled to new sentencing hearing **!!!**
  + - *Reason:* Preemptory challenge is speculative
* **Ct improperly denies a defense causal challenge to remove a juror bc argued they’re predisposed to vote for death &  
  juror was removed w/ a defense peremptory challenge, . . .** 🡪∆ not entitled to a new sentencing **!!!**
  + - *Reason:* bc juror gone
* **In either case, the remedy for a juror improperly retained or excluded from a death penalty jury bc of views on the death penalty is limited to . . .** 🡪 A new sentencing hearing **!!!**
* Loss of a preemptory challenge 🡪 Not a violation of a constitutional right
* Can use preemptory challenge as a secret causal challenge *(Swain v. AL)*
  + - But there must be some cause
    - Race 🡪 Invalid cause. Unrelated whether they can perform as a juror
* Created presumption that a preemptory challenge directed against a minority is used for an improper purpose (race)
* *Batson* extended to women in *JEV v. AL*
* **Rule:** If you move for a preemptory challenge against a minority or a woman 🡪 Must reveal your secret cause for removing them *(Batson)*
  + - Must be a reason, but not as high as a causal challenge. Just rebut the inference that it’s based on gender/race
    - **BOP:** On party who opposes the preemptory challenge to show it’s invalid (bc they object)
      * Never shifts from the opponent of the strike
    - **Reason:** bc of history of discrimination EX: Juror is the only one who graduated from high school, has a goatee
    - **Proponent** Party making the preemptory challenge
    - **Opponent:**
* ***Batson* Analysis**
* 1. **Objection** triggers the presumption of improper use
* 2. **Evidence that’s race/gender neutral:** Require the proponent of the preemptory to challenge it
* 3. **Defense** (the opponent) must **persuade** the Ct that the basis is insufficient
  + - If you can 🡪 Challenge denied
    - Can’t 🡪 Challenge granted

# Confrontation Clause

* **Underlying Purpose *(****Olden v. KY)***:** To test the reliability of evidence offered against ∆
* **Why excluding cross-ex is a violation**
* Cross-ex is central to exposes W’s motive to fabricate
* Rule of evidence can’t be permitted to trump the constitutional protection of the 6th amendment
* **Underlying Purpose** *(per MD v. Craig):*
* **Craig Essential Elements for satisfying the right to confrontation**
* Child W must be competent to testify **&**
* Under oath **&**
* Subject to cross-ex (∆ has opportunity to participate) **&**
* Permits judge/jury to observe W
* **Rule:** Video confrontation sometimes permissible. Doesn’t violate CC to authorize virtual confrontation if... *(MD v. Craig)*
* **Applies:** Tender victims EX: Children
* **Doesn’t Apply:** Not extended beyond the child EX: Adult rape victim
* **Other rights**
* ∆ has a right to a public trial
  + - Not absolute EX: Security concerns 🡪 May not be public
* ∆ has right to be present at trial
  + - Not absolute
* Ct has right to restrain ∆ EX: Manson strapped to a chair w/ mouth taped bc preferable to excluding him
* Ct can remove ∆
  + - ∆ indicted & escapes 🡪 *Abstentia Trial:* Can try ∆ if they voluntarily absences themself
* **Goal:** Reliability, but not synonymous w/ the right *(Crawford v. WA)*
* ***Crawford’s* Principal Evil Confrontation is designed to protect:** Mode of proof. Trial by Affidavit. Use of ex parte examinations in criminal trials
* **Applies to:** W’s against the accused
* **Type of Evidence that triggers 6th A, right to confrontation:** Testimonial evidence
* **Test for Testimonial Evidence:** Would a reasonable person anticipate the statement would be used as evidence in a subsequent criminal trial
* Not testimonial 🡪 hearsay evidence (the state) decides if its admissible
  + - Doesn’t have to be in trial. Could be in deposition, previous trial
* Confront 🡪 Creates a presumption that the evidence is reliable
* **Doesn’t Apply**
* 911 tape 🡪 Not testimonial. Doesn’t trigger confrontation. Don’t have to cross-ex *(Davis v. WA)*
* Reports domestic abuse to cops after beaten *(Hammon)*
* **Difference**
  + - If police questioning to find out what’s happening 🡪 Not testimonial *(Davis v. WA)*
    - If to find out what happened (past) 🡪 testimonial *(Hammon)*
* **Forfeiture by Wrongdoing**
* **Definition:** ∆’s conduct prevents W from appearing in Ct & done to prevent that testimony 🡪 ∆ forfeits right to confrontation **!!!**
* Gov’t must show the conduct had the purpose of preventing W from testifying
* Lab reports identify type & quantity of drugs 🡪 Testimonial. ∆ has right to confront *(Menendez Diaz)* **!!!**
* Can’t use a substitute tech **!!!**
* *1. Is it testimonial evidence*
  + - No 🡪 pure hearsay
    - Yes 🡪
    - Happened/happening
    - If triggers CC 🡪 Evidence is inadmissible unless ∆ had prior opportunity to confront it under oath **!!!**
    - Must show ∆ had opportunity to cross-ex no matter how reliable the evidence is **!!!**
* *2.*

***Cruz v. NY*Facts:** Felony murder. NC tells PD FC told him he & B robbed a gas station, B shot attendant & B confirms

**Rule:** When a co-∆’s confession implicates a criminal ∆, and the co-∆ doesn’t testify at trial 🡪 Admitting the confession violates ∆’s rights under the 6th amendment CC, even when ∆’s own confession corroborates co-∆’s confession & jury instructed to disregard the co-∆’s confession to decide ∆’s guilt.  
***Bruton* problem:** When a ∆ in a joint trial confesses & implicates a a co-∆, that confession is treated as also offered against co-∆ 🡪 Implicates both.  
*Cruz* added an add’l fact- non-confessing ∆ confessed to someone else

* **Remedies**
* Motion to Sever (can avoid *Bruton* problem by not joining the trial)
* Independent confession
* Prosecution can redact (eliminate) the confession to the non confessing co-∆ EX: “Me and [deleted]…”
* **Disadvantage:** Virtual invitation for jury to fill in the blank w/ the confessing ∆
* **Workaround:** Me and “another person”
* **Requirements**
* Use right type of redaction **&** EX: X & “another person” said they did it (don’t say non-confessing co-∆’s name)
* Limiting jury instruction

Right to Compulsory Process

* **Rule:** If W is available & has relevant testimony 🡪 Compulsory process clause allows ∆ to call W
* **Purpose:** No conclusive incapacity laws (they violate compulsory process)
* **3 Primary Notices**
* Notice of Alibi
* Notice of Insanity
* Notice of W’s
* **Common Interests bw Discovery & Compulsory Process**
* No person is above the law
* Right to CP extends to ∆’s control
* **When Discovery not offend CP:** To impose upon ∆ a reciprocal notice
* **Preferable Remedy for a Discovery Violation:**
* **How CP impacts state ability to adopt rules that render certain W’s incompetent to testify:** Prejudice ??
* When only explanation for the violation is that the defense is trying to perpetrate a lie
* ∆ allowed when ineffective counsel
* Exclusion creates an inference that discovery violations are fraud

**Rule:** It doesn’t per se violate CP to exclude a W bc of a discovery violation *(US v. Burr)*

- Excluding an available remedy is extraordinary & only allowed when the only explanation is that the defense is lying

- Don’t exclude a W unless you’re sure the discovery violation was to perpetrate a fraud

***US v. Burr***

***Taylor v. Il***

Rules about ∆’s testimony

* **Rule:** Impermissible for prosecutor to draw an inference about ∆’s decision to not testify **!!!**
* **Reason:** Penalizes ∆ for asserting their 5th amendment right against self-incrimination
* **Permissible when**
* ∆ confesses but it’s incomplete \*main EX: Can point out holes in ∆’s testimony (credibility)
* Before Miranda rights are triggered (don’t go there)
* **Rule:** ∆ has a right to a no adverse inference instruction upon request (*Carter v KY)*
* Extended to sentencing hearings *(Mitchell v US)*

# Double Jeopardy

* **Rule:** Gov’t gets one attempt to convict. No multiple prosecutions
* **Historical:** Based on old CL concept of *former acquittal* or *former conviction*
* **Scope:** Can’t be placed twice in jeopardy, for the same offense, by the same sovereign
* **Same Sovereign**
* State & Fed are separate sovereigns **&** EX: Can be tried by FedCt & sentenced, then by state & sentenced
* Each state is a separate sovereign EX: Can be tried by TX, then OK
* **Trigger for Jeopardy to Attach**
* Jury Trial 🡪 When the trial jury is sworn
* Bench Trial 🡪 When the first W is called & placed under oath
* EX: Can attempt to indict over and over again 🡪 Permissible
* EX: Ask Judge to dismiss case before begins 🡪 Permissible (what about before jury meets?)
* **Jeopardy** *(Fong Foo v. US)* **!!!**
* Valid charge
* In a Ct of Valid jsd **&**
* Terminated w/ a final judgment
  + - **Final Judgment:** Verdict, mistrial, dismissal
* **Test:** Has there been judgment that leads to termination of the trial?
* Dismissal 🡪 No double jeopardy issue

Mistrial Doctrine

* **Rule:** Ct grants a dismissal or a mistrial bc of a defective pleading 🡪 Can re-try
* **Rule:** Factual insufficiency 🡪 Same as acquittal & gov’t can’t re-try
* **Rule:** Defense requests or consents to mistrial 🡪 Can’t argue double jeopardy if case tried again
* **Exception:** Record indicates defense baited into the mistrial by prosecutorial misconduct 🡪 Triggers double jeopardy
  + - **EX:** Had to request mistrial bc of prosecutors unethical conduct
* **Rule:** Prosecution requests &/or defense objects 🡪 Retrial is permitted when… **!!!**
* **Acquittal Avoidance:** Allowed jury to be impaneled then prosecution realized key W missing
* **Purpose:** Not a necessity
* **Applies:** Mistrial granted for prosecution to perfect it’s case
* **Test:** Did the prosecution ask for the mistrial to avoid an acquittal? *(Downum)* **!!!**
  + - Yes 🡪 Double jeopardy applies. Can’t re-try again
    - No 🡪 Double jeopardy doesn’t apply. Can re-try

Permissible Retrial

* **Purpose:** In the interest of justice
* **Remedy:** Up to trial judge to decide
  + - Curative Instruction **or**
    - Grant mistrial EX: Defense baits prosecution into mistrial by admitting excluded evidence
* **Applies**
* **Hung Jury:** Justice damaged by not granting mistrial bc jury might decide to just go home
* **Defective Pleading:** Will be mistrial & re-tried anyway
* **Bias or Tainted Juror:** Alternate jurors available at trial
* Bias Judge
* **Witness unavailable, sick, etc**

Impact of Reversal on Appeal

* **Any legal error that ends in reversal** 🡪 No double jeopardy. Original jeopardy erased
* **Factual Error** 🡪 Can’t re-try
* Imposes verdict of not guilty (rare) As a matter of law, evidence insufficient to support a guilty verdict
* **Implicit Acquittal Rule**
* EX: ∆ charged w/ offense A & legal error in his trial, then tried for offense B & gets lesser offense acquitted by legal error 🡪 Impliedly acquitted of Offense B. State can retry him for lessor offense but not for greater offense

Same Offense *(Blockburger)*

* **Rule:** Offense is same offense as for sentencing 🡪 Can only be punished once
* **Rule:** Offense is same offense as for trial 🡪 Can only be tried once
* **Separate Transaction Rule:** Each separate transaction (criminal impulse) is a separate offense **Not on Exam !!!**
* **Analysis**
  + - What does the § prohibit?
    - How many criminal transactions did ∆ engage in? EX: Multiple drug deals in 1 day 🡪 1 criminal transaction
* **Key:** Does each charge require proof of a different fact? EX: Joyriding, Grand theft auto 🡪 Same offense *(Brown v. OH)*
  + - Yes 🡪 Separate offenses EX: 2 Crimes, but diff mental states 🡪 Same offense
* **Felony Murder Rule**: Underlying felony is necessarily included in the felony murder charge 🡪 Can’t charge for separate offense

Collateral Estoppel

* **Rule:** Factual issue resolved conclusively in ∆’s favor, in one trial 🡪 Can’t re-litigate in a subsequent trial *(Ash v. Sweson)*
* **Key:** To benefit ∆, record must conclusively establish the **fact** he wants to prevent gov’t from re-litigating **was present at prior trial**
* **Applies:** Each victim is a separate transaction but gov’t only has one shot to make its case
* **Analysis**
* What is jeopardy?
* When does original jeopardy attaches?
* What is the same offense?

***Fong Foo v. US***

**Facts:   
Rule:** All that matters is that there was a valid charge, in front of a Ct of valid jsd, **&** trial that terminated w/ a final verdict.  
- Reason irrelevant  
**Exception:** Judge bribed (corrupt)

***Ash v. Sweson* \*\*\* Collateral Estoppel Rule \*\*\***

**Fact:** Poker party. Only dispute is identity. Judge says if at robbery, must be guilty. If not, not guilty.

# Appeals

Standard of Review for Factual Insufficiency

Historical Standards of Review

* **DP:** State must prove beyond a reasonable doubt *(In re Winship)*
* **No Evidence Standard of Review** (for factual insufficiency): Violates DP when ∆ convicted & record indicates no evidence to support all the elements in the defense
* **~~Some Evidence Test:~~** ~~So long as there’s some evidence, no matter how minimal, the conviction should be upheld~~
* **Rational Result Test**
* SupCt rejected no & some evidence tests. Reviewing Ct should
  + - 1) Review entire trial record
    - 2) Resolve all inferences in credibility in favor of gov’t **&**
    - 3) *Key:* Whether a *rational* trier of fact could have found elements were proven beyond a reasonable doubt
* **Nutshell:** Insufficient if you have some evidence. Result must be rational **!!!**
* **Identical to:** Motion for Acquittal (gov’t failed to meet burden)

Harmless Error Test

* **Definition:** Doesn’t affect outcome of the trial
* **Rule:** Not every constitutional violation results in an error *(Fulminante)*
* **Logic:** Some errors are so unimportant & insignificant that it doesn’t warrant setting conviction aside
* **Applies:** Wouldn’t have affected outcome
* **Key:** Can the error be offset by…analysis

***AZ v. Fulminante***

**Analysis**

Was the confession voluntary? No. coerced.  
Can a coerced confession be harmless? Yes…5 justices  
Was this coerced confession harmless error

* ***Fulminante* Constitutional Errors for Harmless Error Analysis**
* Per Se Harmful
* Potentially Harmless
* **Analysis**
* 1) What type of Constitutional Error?
* 2) Is it structural or trial?
  + - Structural 🡪 New trial
    - Trial Error 🡪
* **BoP:** ∆’s BoP to show there’s an error. Gov’ts BoP to show it’s harmless
* **Test:** Did the error support a reasonable probability of a harmless outcome?

|  |  |
| --- | --- |
| **Per Se Harmful** | **Potentially Harmless** |
| **Structural Errors**  - Denial of 6th Am. Right to Counsel - Bias judge  - Violation of pro se right  - Denial of right to trial by jury  - Improper BRD instruction  **Definition:** Errors that impact the structure of the process | **Trial Errors** - Bad Confession (EX: Miranda, Massiah, or DP) - Violates 4th Am that leads to admitting invalid evidence - Comment on silence  **Focus:**  Evidence that shouldn’t have been admitted |

# Habeas Corpus

* **Purpose of Collateral Attack by Writ of Habeas Corpus:** ∆ generally argues to FedCt that State Ct misapplied Fedlaw

Retroactivity Doctrine

* **Definition:** Don’t apply new rules to final convictions *(Teague v. Lane)*
* **Effect:** New rules apply retroactively to all non-final convictions (up to state SupCt)
* **General**
* It’s ok to advocate for the Ct to adopt a new rule (only in direct appeals)
* Relevant law is law on date of conviction (new rule not retroactive)
* Habeas corpus is state Ct making sure state got Fed rule correct
* **Purpose:** Prevents every inmate from appealing when new rules adopted
* **Effect:** Bars ∆ from advocating for new rules on habeas challenges
* **Reason:** Bc of incorporation, every time the SupCt adopts a new rule, they’d have too many appeals
* **New Rule:** New SupCt rule adopted after case finalized
* **Legal Analysis:** Look only at law at time of trial (don’t apply law that didn’t exist then)
* **2 Exceptions to New Rule Doctrine**
* 1. Entire class of criminal acts was unconstitutional (rare) EX: Sodomy; Adultery
* 2. Watershed Rule: Argument w/out merit (meaningless) EX: Right to counsel
  + - **Similar to:** A structural rule necessary for a fair trial
* **Rule:** No new rules on habeas corpus (bc not a direct appeal) **!!!**
* **Hypo:** Trial + conviction (free lawyer, right to go pro se). 1st App (free lawyer, discretionary), 2nd appeal in state SupCt (no right to free lawyer).

Cause & Prejudice Test

* **Procedural Default**:Haven’t followed state procedure to preserve your constitutional objection
* **Issue:** Whether state should entertain a writ of HC when ∆ defaulted
* **Effect:** Harder for ∆ to raise an issue on habeas that was procedurally defaulted
* **Historical Deliberate Bypass Test (Overruled in favor of Cause & Prejudice Test)**
* **Rule:** ∆ procedurally defaulted on a procedure at State level 🡪 Could still raise issue in Fed Writ of HC if they didn’t deliberately bypass state remedy (very favorable to ∆)
* **Deliberate Bypass:** Knowingly waive issue EX: Guilty plea
* **Effect:** Could raise issue for 1st time in FedCt EX: Miranda

Cause & Prejudice Test

* **Rule:** Must give states same deference for procedural law as for substantive state law *(Wainwright v. Sykes)*
* **Effect:** Only exception to raise issue at Fed level. Forces ∆ to raise issue at trial level
* **Requirements**
* Good cause for default **&**
* Prejudice as a result of default
* **Miscarriage of Justice Exception**
* **Rule:** Show the conviction probably resulted in the conviction of an actually innocent person
* **Test**
  + - Did error preclude admission of facts that would have proved actual innocence **or**
    - Did error permit admission of false facts that proved guilt of an actually innocent ∆

# Test tips

* He posts class objectives, which are key pts to know. Class discussion follows the order of the objective questions
* **Multiple Choice**
* 55 MC, hypos w/ compound issues a exclude gun, admit confession, deny…. 3 mins/question
* Average curve 90/110
* Most questions are compound questions
* Must know all rules. Harder than BarBri questions but easier to find wrong answer.. t/f
* Not going to be too detailed about probable cause
* **Will post 20-25 practice problems on 11/20 (assume exam will be harder)**
  + - It should be intuitive. PC in a nutshell:
      * W 🡪 Must have adequate foundation
      * If they have an adequate foundation, they have probable cause
      * If they can offer info on veracity, that makes it better
      * If all they have is veracity but nothing on foundation, it’s probably not good enough
* **Cases**
  + Write 1-2 sentence facts, issue, & rule on flashcards. No direct case questions, but good to trigger memory
  + Don’t need to remember case names
* **Consider for all rules:**
  + What triggers the right
  + What’s the scope of the right?
  + What’s the remedy for the violation?

- Remember, custody means not free to leave to a level tantamount to arrest

# RULES OUTLINE

* **Incorporation & the 14th Amendment**
* Most rules of Fed CrimProapply to the states thru the DP clause of the 14th
* SupCt rejected total incorporation and accepted case-by-case incorporation
* The only crimpro rules from the Bill of Rights that haven’t been incorporated:
  + - Grand jury requirement
    - 12 person unanimous jury requirement
    - States free to use a 2/3 verdict
      * Can have a jury verdict as small as 5 people except for a capital case (in which it must be unanimous)
* **The 4th Amendment**
* **Touchstone of the 4th Amendment:** Reasonableness
* **Protects:** 4th amendment protects the people from unreasonable search or seizure
* *People:* Somebody w/ a reasonable connection to the US
* If you’re here involuntarily to stand trial 🡪 Not a people
* **Restricts:** 4th Amendment restricts only gov’t action. State,, Fed, local
* **Doesn’t Apply:** It doesn’t apply to private actors unless the private actor is an agent of a gov’t actor
* If you have gov’t action directed against the people, then you must decide whether it’s a search or a seizure
* **SEIZURE**
* **SEIZURE of a PERSON:** Application of physical force or show of authority followed by submission
* **SEIZURE of PROPERTY:** A meaningful interference w/ a possessory interest
* If suspect doesn’t know the gov’t put something on her property 🡪 Not a seizure (*Karo*)
* If you have a seizure of a person or property it must be reasonable
* **SEARCH**
* *Katz* is the lone-star case
* A search is a gov’t intrusion into a REP
* **How to assess whether the suspect had a REP**
  + - Did the suspect manifest a subjective expectation of privacy by trying to shield the thing from the public
      * If yes 🡪 Ask whether that expectation of privacy was objectively reasonable, is it one society is willing to recognize?
    - **Key to REP analysis** Whether the suspect knowingly exposed the thing to the public. No REP in something you knowingly expose to the public **!!!**
    - **TIP** be very precise about what the gov’t is looking for and how they’re looking for
    - EX: Lip reader looking into phone booth 🡪 Reasonable
    - **No REP in:**
      * Bank records
      * Handwriting exemplars
      * Numbers dialed from your phone
      * Header info on your email
      * Anything that someone can walk by your house and see
      * Something in your backyard that can be observed from lawful flight
    - REP not tied to property rights
      * But home has the max REP
      * Automobile has a reduced expectation of privacy
      * Not based on property rights bc you have no REP in open fields, even if PD trespass to get there
    - If police intrude upon a REP it is a search and they must prove its reasonable
    - **REASONABLENESS ANALYSIS**
      * When PD conduct a search based on a warrant, and in order to obtain a warrant they must establish PC 🡪 The search is presumptively reasonable (warrant based) and D bears the burden of rebutting the presumption.
      * There are 4 ways to rebut the presumption of reasonableness:
        + 1. The magistrate was not neutral & detached
        + 2. The warrant was so nonspecific, so general, that a reasonable officer would know it fails the specificity req’t (facially defective warrant)
        + 3. The manner f execution was unreasonable.

A. If the manner of execution **shocks the conscience** 🡪 Extremely unreasonable (EX: Pummeling his stomach to make him throw up) 🡪 Suppress

B. If the manner of execution is unreasonable bc of a failure to knock & announce 🡪 Doesn’t trigger exclusion bc doesn’t shock the conscience

* + - * + 4. Attack the underlying PC
* **Probable Cause** - A fair probability based on facts and circs. It’s not a preponderance, doesn’t have to be more likely than not
  + - EX: If officer pulls 4 people over and finds drugs and nobody fesses up he has PC to arrest all of them
    - Normally PC is easy to establish:
      * Eyewitness ID
      * Forensic evidence
      * Confession
      * Admission
    - It becomes a challenge when you use an informant
      * see *IL v GATES:* Assess PC by looking at 2 prongs
        + The first prong is veracity of the informant which is normally established by a positive track record
        + The second prong is the informants basis of knowledge for the opinion of criminalist

To have a solid foundation the info must indicate that the informant is providing insider predictions that only someone with inside access to the criminal enterprise could make.

The police have to corroborate those predictions. When you corroborate 9 of those predictions, its supports the inference that the 10th prediction is….

* + - * If during the investigation the police seize something w/ PC 🡪 They don’t need the tip anymore bc they’re own observation supports the foundation
      * *Il v. Gates* says you don’t need to fully satisfy both prong. Overriding satisfaction of one prong can offset limited satisfaction of the other. AND, when the TrCt reviews the warrant, the magistrate’s determination of P is not subject to de novo review. It is given substantial deference
      * Even if the judge thinks the magistrate made a mistake, the mistake must be blatant to overturn the warrant
      * When PD get a warrant, they’re reward is a presumption of reasonableness that’s almost impossible to overcome.
* **RULES FOR EXCEPTIONS TO THE WARRANT REQ**
* **1) Exigent Circs**: An exigency is an exception to the warrant req for a SorS
  + - **Creates an Exigency:** Imminent danger of destruction **or** imminent danger to PD or others, **or** Flight of suspect
    - You can’t deliberately, improperly create your own exigency
    - *MacArthur v IL* Detention in anticipation of a warrant is always preferred to create your own exigency
* **2) SITLA:** No such thing as search incident to citation. Must be an arrest. Must be lawful (otherwise its fruit)
  + - Automatic
    - The arrest is all the justification they need
    - After you have the lawful arrest, the only issue left with SITLA is the scope.
    - The scope is…. And the area within the wingspan of his lunging distance
    - *Chimel* Can’t search entire house in pursuant of a SITLA
    - *But sometimes you can conduct a terry sweep*
    - Applies to any arrest, even if minor
    - Doesn’t matter if cop had an ulterior subjective motive
* **4) ASITLA**
  + - *AZ v Gant:* If after the arrest, the suspect has genuine access to a car, then the *Belton* rule applies & the officer has access to the containers in the car
    - If the arrested individual is secure and doesn’t have genuine access then you can only search the interior of the care based on a reasonable belief that evidence related to the arrest is in the car, even after the suspect is secure
    - *Thorton*: You don’t have to arrest a suspect while he’s in the car. He can get out of the car before you confront him.
      * So ASITLA is arrest while in the car or immediately exiting it
* **5) Automobile Exception to the Warrant Req’t**
  + - When police have PC to search an automobile or any other conveyance, plane, the inherent mobility and reduced expectation of privacy, exempt the search from the warrant req’t (no warrant req’d to search a car based on PC) so long as it’s near a hwy and could be driven
      * Would need a warrant if up on cinder blocks
    - **Scope:** Must be in the area in which it could be found
    - **Differentiating from SITLA**
      * EX: PD arrests Joe for driving w/out a license and put him in the cruiser 🡪 can’t do SITLA and search the car bc no evidence of the suspended license is in the car
        + But if they have PC to think he has drugs 🡪 Can search the car
      * Don’t assume that just bc you can’t do a SITLA means you can’t search the car. Consent & PC are the most common other reasons you can search the car
* A Miranda violation is not a poison tree, EVER*. Us v. Patone*
* **PLAIN VIEW**
* Plain view is an exception to the warrant req for a seizure
* There are 3 req’ts to a valid plain view seizure
  + - 1) Lawful vantage point to observe the item
    - 2) Incriminating nature is immediately apparent (probable cause)
    - 3) Office has lawful access to the point of seizure
    - \*If officer does an unreasonable search to obtain plain view 🡪 That search is a poison tree that taints the plain view seizure (AZ v. Hicks), even if it is a cursory search
* **Next exception: CONSENT**
* Consent must be voluntary
* We assess voluntariness based on a totality of the circs
* bc it’s an exception, the gov’t bears the burden of proving the consent was voluntary
* There is no req’t to inform the suspect of the right to refuse consent
* If police threaten a lawful course of action, (*IL v. MacArthur*, detention in anticipation of a warrant) leads to consent 🡪 OK
* If police threaten an unlawful course of action, the consent is invalid (EX: fake warrant)(EX hold you hear to get warrant w/out reason. Suspicion)
* **Scope** of consent, normally implied from the request and the item the officer is looking for
  + - EX: I think you’ve got drugs in the car, can I look?
* Consent and plain view go together like peas and carrots
* Consent may be limited or withdrawn at any time (prior to discovery of the evidence)
* A 3P can give consent over common areas
  + - A present and objecting co-tenant trumps 3P consent (*GA v Randolph*)
    - Even if it turns out that the 3P lacked actual authority, the consent based search is still reasonable if a reasonable officer would have believed the 3P had actual authority (IL v Rodriguez)

**NEXT EXCEPTION: TERRY**

- A **terry stop** is a low level seizure defined as a brief investigatory seizure

- It is justified on reasonable suspicion (RS) that crime is about to or has reasonably occurred (a crime afoot….)

- Doesn’t automatically trigger a terry frisk. It frequently will if the crime you suspect commonly has a weapon

* + - * **Scope:** The amount of time acting in due diligence to confirm or deny the suspicion
        + If confirmed it becomes PC

- A **terry frisk** is a cursory protective search.

- A terry frisk is justified only on reasonable suspicion that the suspect is armed and dangerous

* + - * **Scope:** A cursory inspection of the outer clothing of a suspect to confirm if he has a weapon

- Analyze them separately **!!!**

If you can do a terry search of a person, you can do a terry…

* \*Just bc you have PC doesn’t mean you don’t need a warrant
* **Scope:** A cursory inspection of the outer clothing of a suspect to confirm if he has a weapon
* A terry search and plain touch go together link peas and carrots
  + - **Terry Doctrine:** When doing a terry search, if you immediately know something is contraband 🡪 you may seize
    - Doesn’t have to be a weapon
    - Must be more than a hunch. EX: If you have to move it around 🡪 Exceeded the scope (AZ v HICKS)
    - That’s an unlawful search that taints the seizure
* Terry frisk has been extended to the interior of a car on 3 conditions
  + - 1) First condition. The PD must let someone back in an automobile
    - 2) There’s a weapon immediately accessible to that person
    - 3) Reasonable suspicion in the car that facilitate immediate access to the weapon.
    - (MI v Long)

MD v Bouy-🡪 Cursory sweep of the interior of a home when you’re there lawfully, like the execution of a warrant

- Must have RS someone else is in the house

- They can find her, do a SITLA of the area and get out.

- They can seize something in plain view

- EX: see closet think door, gov’t could claim reasonable mistake but prolly not gonna work

**SEIZURE OF A PERSON**

**Definition:** Show of authority followed by submission or application of physical force

- If they breaks away and runs 🡪 seizure terminates (no constructive ongoing seizure)

**SEIZURE of PROPERTY**

**Definition:** Meaningful interference with a possessory interest

- If the owner doesn’t know you put something on the property (like a beeper) its not seized

- Could be a problem if they have to go on the curtilage to put a beeper on the car (it’s a search, but not a seizure bc didn’t interfere w/ possessory interest)

- Reasonable suspicion DEF Police instinct corroborated by some objective fact that can be verified by a reviewing Ct

- Headlong flight in a high crime area in approach of police 🡪 RS

- Use of an informants tip to create RS 🡪 AL v. White (good review case) for RS just have to corroborate the predictive info. It doesn’t have to be insider info NOT INSIDER (VS PC🡪 Police must corroborate predictive insider info)

- If Dave gets a tip that an SUV is going to take certain travel 🡪 he can pull it over to make a brief investigatory

- Must be predictive

- If it’s not predictive 🡪 Not enough.

EX: Just describing a guy in public view is not enough

NEXT EXCEPTION: Special needs doctrine

- **Definition:** SND permits a low-level SorS w/ no individualized suspicion

- In order to be valid, must prove the primary purpose is to protect the public from a danger that cannot be adequately protected w/out individualized suspicion

- **Valid checkpoint EX’s:** DUI, counter-terrorism, NYC Subway bag search, Escaped violent convicts

- The primary gov’t interest is not searching for evidence of a crime

- Can’t use it to search for drugs *Indianapolis*

- If going to do a search for drugs, it must:

- Be a fixed checkpoint

- Seizure must be pre-established

- Should be public to minimize anxiety

- Normally expected to be uniformed officers **&**

- Scope of the intrusion must be narrowly limited to the nature of the threat

- If doing a valid Sor S 🡪 Any evidence that comes into plain view is admissible

- If the Ct thinks the gov’t is really looking for evidence and they find it 🡪 can’t use it

- If the Ct thinks the gov’t is really not looking… 🡪 can use it

///\* end of exceptions \*///

To have standing to claim the remedy of exclusion the defendant must establish that the gov’t violated her constitutional rights \*\*\*

\*\*\*No vicarious invocation of someone else’s constitutional rights

- Anyone who is personally search or seized has standing to complain about that search or seizure

- Passengers in a car don’t have standing in the privacy of an automobile

- The owner or the person in possession does

- When the car is seized 🡪 all occupants are seized

SOCIAL GUESTS

- Draw the line at overnight social guests

Justice Kennedy had the desire to extend it to all social guests except the ones that are fleeting

- Just bc its your property doesn’t mean you have standing to complain the way it was seized

- If you steal a bicycle, put it in your neighbors garage, and PD breaks into their garage to seize it 🡪 You don’t have standing to complain

- Just bc the gov’t wants to introduce evidence against you doesn’t mean you can complain about it

- the question is whose rights were violated to get it

- Once you have standing you can apply the exclusionary rule that was incorporated to the states *Mapp*

**- 2 Pillars of the Exclusionary Rule**

1. ~~Judicial integrity~~ &

2. Deter police misconduct

* + - Ct concerned the price of the exclusionary rule is too high bc it results in the exclusion of probative evidence
    - So they come up w/ the good faith exception *US v Leon.* Thus, judicial integrity was dropped
    - *Leon:* Only purpose of the exclusionary rule is to deter police misconduct.
      * Therefore if PD acts in good faith, the cost of the exclusion is not worth the benefit
      * so if the magistrate makes the mistake, even though there’s a 4th amend. Violation there’s no exclusion
    - When PD relies on a facially valid warrant, or data in a database, that is later determined to be invalid they’ve acted in good faith and there’s no exclusion
    - There are exceptions to the good faith exception. Can’t invoke GF exception when
      * 1. police lie or are reckless in the info presented to the magistrate
        + Imputed to all officers in the chain
      * 2. The warrant is so facially defective that no reasonable officer would rely on it
        + *Test:* Would a rookie cop rely on the warrant?
      * 3. The magistrate has compromised neutrality by becoming a participant in the investigation
* In #1-3 If police rely on a …
* *US v Herring*
  + - Up until *Herring*, the negligent error was completed by judicial clerks.
    - In *Herring,* the warrant was left in the system as a result of police negligence and the Ct said the good faith exception still applied. The GFE applies so long as it’s isolated negligence attenuated by …??? Search or seizure???
* EX: PD sees brown paper bag that he believes has a fair probability of containing drugs. He does a search & as he’s pulling out the bag, he sees a pistol. He seizes the pistol on PC that its not registered. Arrests the driver. In fact, there were doritos in the bag. At trial ∆ says the entry into the automobile was an unlawful search bc the entry was not based on PC. Officer Jones says he made a good faith mistake, was not acting in bad faith, and had PC. The pistol would be excluded as fruit of the poi… bc not isolated neg attenuated bw the mistake & the point of SorS… “But for the PC, the cop wouldn’t have seen the pistol”
* **FRUIT OF THE POISONOUS TREE DOCTRINE**
* *Wong-Sun*
* **EXCEPTIONS to the Fruit of the Poisonous Tree Doctrine**
* **1) Independent Source**
* If you can establish a **but for** connection bw evidence the prosecution wants to admit & a constitutional violation against your D 🡪 That evidence is fruit of the poisonous tree
* Don’t forget fruit & standing
  + - If no standing to complain about standing to complain about the constitutional violation 🡪 It’s an independent source
      * This really tricks people !!! The independent source doesn’t have to be lawful
* **2) Inevitable Discovery (Inevitable independent source)**
  + - Just about independent source - they were just about to get it thru an independent source & then they got it thru the poisonous tree
    - **Key:** Inevitable (look to see the gears of inevitable discovery have been put in motion)
      * EX: You’ve looked through some floors & find it on the next
      * The fruit of the poisonous tree beats you to the source
      * **Rule:** Can’t use poison tree to prevent a W from testifying
      * If a poison tree leads to a W 🡪 Ct treats that W as inevitable discovery
* **3) Attenuation**
  + - **Definition:** The link bw the poison tree and the fruit becomes so attenuated that the poison doesn’t reach the fruit
    - **Most common:** Confession that’s the product of a poison tree (illegal arrest followed by a confession)
    - **Look for:** Facts that separate the illegal arrest from the poison violation
    - **Gov’t always argues attenuation.** D says but for illegal arrest…
    - If it’s the immediate product of the illegal arrest 🡪
    - If some time passes 🡪 Good argument for attenuation
      * At that point, focus on the nature of the violation
      * An arrest w/ PC w/out a warrant when it was req’d 🡪 Easier to attenuate than an arrest w/out PC
      * Normally, a Miranda waiver at a diff location will attenuate the poison of an arrest
      * If it’s an arrest w/out PC 🡪 Release the suspect & wait for them to come back voluntarily
      * If attenuation on test 🡪 Should have illegal arrest hypo

**Q&A:** Don’t have to worry about attenuation w/ a Miranda violation bc no fruit of the poisonous tree

DP Protection of Identification

* **Applies** to both corporeal & non-corporeal ID
* **Rule:** If the suggestive procedure necessary 🡪 Doesn’t violate DP *(Stoval v. Deno)*
* **To violate DP, the D has the BOP to prove:**
  + - 1. Procedure unnecessarily suggestive &
    - 2. Suggestiveness produced irreparable risk of false ID
* **Ultimate Test to Prove no DP Violation 🡪** Reliability
  + - If gov’t can show the procedure didn’t produce an unreliable ID
* **Test Tip:** You can comply w/ 6th amendment & violate DP
  + - **Reason:** 6th protects lawyers ability to cross-ex vs. DP violated bc inherently unreliable bc unnecessarily suggestive
    - EX: Ridiculous line-up: You gave description of short guy mugged you. Line-up of short ∆ w/ Houston Rockets. Even if they do a second line-up, the first ID is fruit of the poisonous tree
    - **Factors**
      * Did D know the W?
      * Was W trained
      * Etc, (Branson factors to assess reliability

Charging Discretion

* **Rule:** Prosecutors have unlimited discretion to charge so long as the charge is supported by PC
* **2 Constitutional Limits**
* Selective Prosecution
  + - Violates EP
    - **Requirements:** Must show that the charge was based on a discriminatory motive & had a discriminatory Effect
    - **To show:** Must show similarly situated suspects of a diff race/gender were treated diff
* Vindictive Prosecution
  + - Violates DP
    - **Requirements:** Must show the only explanation for the charge is to punish the ∆ for exercising a constitutional or statutory right (vindictive motive).
      * Will only happen after ∆ appeals
      * It’s a presumption, not conclusive
      * If prosecutor can show a new fact was discovered 🡪 It ups the inference of vindictive motive
    - ***Bordenkircker:*** VP not applicable to plea bargaining bc always an explanation for upping the ante

Re-Sentencing

* **Rule:** It doesn’t violate DP to give you a new sentence so long as you appeal and are re-tried
* Pre-Trial Screening
* **Critical Stages**
  + - **1. PRELIMINARY HEARING**
      * **Purpose:** Enables you to preserve testimony
    - **Grand Jury**
      * Not a critical stage bc not adversarial (not subject to judicial control so no req’t that the prosecutor give the GJ clearly exculpatory evidence). It’s an investigation **!!!**
      * No right to counsel at a grand jury
      * Your not a D, you’re a target
      * GJ is an independent entity, it doesn’t belong to any of the 3 branches of the gov’t
      * They’re secret so that you don’t have your reputation damaged before they enter a true bill
      * Only rules that apply: Constitutional Privileges (IE priv against self incrimination)
      * An indictment by a legally impaneled GJ that’s not biased, will almost never be overturned
      * Not incorporated to the states. Not req’d by the 14th amendment
      * 2 types of immunity
        + Use

Fully satisfies privilege against self-incrimination

Can be used to force a W to testify at a GJ

* + - * + Transactional
    - **Discovery**
      * *Brady* held that it violates DP if the gov’t fails to disclose, upon request, favorable & material evidence to the defense
        + *1.* Evidence means disclosure isn’t req’d until prior to trial (not prior to plea bargaining)

bc “evidence” used

* + - * + 2. Favorable is the **disclosure** standard. It indicates what you just disclose

If written request 🡪 favorable means any evidence that would tend to held ∆ (everything that’s not privileged)

No request 🡪 Favorable means clearly exculpatory evidence. Evidence that places prosecution on notice the defense should get it.

So, if not favorable & wasn’t disclosed 🡪 No DP violation

No request almost always = ineffective lawyering

Hypo: Impeachment evidence in your file that you don’t turn over bc ∆ never requested. Denied. Never consider whether it was material bc it wasn’t clearly exculpatory

* + - * + 3. Material (Remedy)

*Material* means the favorable non-disclosed evidence would have created a reasonable probability of a diff outcome (aka reasonable doubt)

To violate DP must prove the evidence was both favorable and material

* + - * + Motive is irrelevant (good faith doesn’t matter)
        + Evidence against any gov’t evidence is imputed to the prosecutor
        + Diff rule for **destruction of evidence**

For defense to prevail on a DP violation, based on the gov’ts failure to preserve evidence, the D must show the evidence was destroyed in bad faith *(Youngblood)*

Negligent or reckless gov’t conduct will not violate DP

**Best evidence that destruction wasn’t in bad faith:** It may have helped the gov’t (AZ v Youngblood)

* + - **Joinder & Severance**
      * Join offenses when they arose out of the same transaction **or** are of a similar character to each other
      * Join offenders only when they were part of the same transaction
      * Prosecutors normally join charges or defendants for efficiency purposes
      * ∆’s can move to sever but they bare the burden of showing unfair prejudice as a result of joinder
      * Normally the prejudice from joinder can be cured through an instruction
      * **2 best severance cases are:**
        + Incompatible defenses

EX: D claims during 1 offense was insane, for the other was xxx

EX: When ∆ must show it to the Ct & wants to show testimony on one offense, but doesn’t want to proffer that testimony on another

* **Speedy Trial**
* **Key interest protected:** Accuracy
* **Analysis**
  + - 1. Length of delay
      * 1 year 🡪 Normally triggers inquiry
    - 2. Reason for delay
      * *Good Excuse:* Gov’t has no control over
      * *Bad Excuse*: One the gov’t can control
      * *If you have a delay that’s excessive & there’s no good excuse* 🡪 real issue is prejudice.
        + *Test:* As a result of the unjustified delay, evidence has been degraded
      * *Don’t work:*
        + *Oppressive incarceration ?*
        + *Anxiety*
      * Exclusive Remedy:
      * Clock starts running at:
        + Formal charge
        + Pre-trial incarceration
      * EX: Indicted, 4 months later gov’t dismisses, a year later they re-indict you 🡪 duration of that dismissal isn’t included in calculating a speedy trial
      * To prevail on a speedy trial claim 🡪 Must move to dismiss the charge before trial. Can’t do it on appeal
    - 3. Right to counsel
      * *Gideon v. Wainwright Rule:*  an indigent D has the constitutional right to be represented by counsel, at the expense of the gov’t
      * *Argensinger:* trigger is any charge that results in confinement
        + *Confinement = rght to have a free lawyer*
      * *Douglas v CA:* Right to a free lawyer is extended to your first appeal of right
      * *Griffon v.* CA: Indigent D has a right to a free transcript
      * *NC v.* Ross: No right to a free lawyer for a discretionary appeal
      * 6th amendment provides a D with a right to pro-se representation so long as a D makes a knowing, intelligent & voluntary waiver
        + Intelligent means you know the consequence of the right your giving up and you do it voluntarily w.out coercion
        + If you represent yourself 🡪 you waive any ineffective assistance of counsel claim
        + **Limits on pro se representation**

1. Ct may appoint standby counsel on issues of procedure, decorum, evidence, etc

but can’t create the appearance shes taking over the case

2. Indiana v Edmonds: State may require that a minimally competent d be represented by counsel for trial

but Godenez - a minimally competent d can plead guilty w/out assistance of counsel

* + - **Ineffective Assistance of Counsel**
      * To prove a 6th amenmendment violate
* **Plea Bargaining**
  + - Gov’t can threaten anything in its awful power as an incentive to bargain
    - There’s no problem w/ upping the ante if ∆ refuses to accept the gov’ts bargain
    - For a guilty plea to be valid 🡪 Must be knowing & voluntary
      * *Knowing:* ∆ must know general nature of the charge he’s pleading to (Ct or defense lawyer can explain)
        + Must also know the nature of the rights being given up by the plea
    - **Alford Plea:** Can plead guilty… but must be evidence on the record to proe elements of the offense
    - **Plea:** **Strict Performance**
    - A plea waives all evidentiary objections
      * Can’t gamble by pleading guilty then raise Miranda on appeal
    - Doesn’t waive jsd’l defects
      * **Plead guilty: 2 ways to challenge on Appeal:**
        + Validity of Jsd
        + Ineffective Assistance of Counsel

The advice you got from your lawyer to plead guilty was so defective that it fell below an objective standard of reasonableness

* **Right to Trial By Jury**
* Trigger: Any charge that creates a risk of 6+ months confinement
* Can’t add up minor offenses 🡪 Must be one charge of more than 6 months
* If D faces exactly 6 months 🡪 Ni right to jury
* The Fed rul & most states 🡪 Requisite # of jurors is 12 & unanimous
  + - Always req’d for a capital case
* In non capital case 🡪 Can have as low as 6 member jurors & a 2/3 verdict req’t
* It violates the right to trial by jury if the jury pool systematically excludes distinct members of the community (fair cross section req’t)
  + - Doesn’t apply to the petit jury (trial jury) as opposed to the jury pool
    - Causal challenges
      * Unlimited
      * Basis: Actual or implied bias
        + Association alone isn’t enough\* know special rules for capital juries

\*improper granting or denial of a causal challenge on a death penalty

*Batson:*  It violates EP if the only reason for a preemptory challenge is the race or gender of a juror

Restriction applies to defense and prosecution alike

In order to prevent such violations, the opposing party can request or demand that the party exercising the preemptory provide a race or gender neutral basis

Doesn’t have t be good enough for a challenge for cause

But has to be good enough to rebut the presumption of discriminatory motive

Once the neutral basis is provided, the Ct decides whether its good enough the challenge was made for improper reasons

**Tip:** If asserted neutral basis is only …

**3 hispanics, 5 caucasians, & 2 women, and they all wear a beard**

so use 3 preemptory challenges that they wear a beard 🡪 not enough to convince that its race neutral

* **Confrontation**
* Virtual confrontation doesn’t violate the constitution when there’s a compelling state interest to protect a tender victim (MD v. )
  + - Effect: Can shield W from looking at ∆
* **Two big issues**
  + - Testimonial evidence must be subject to oath & adversarial testing (cross-ex) in order to comply w/ the 6th am. Right to confrontation, no matter how reliable the evidence is *(Crawford)*
      * Testimonial evidence 🡪 Strictly a question of hearsay law
      * Confrontation has no application to non-testimonial
      * Test for Test evidence: A statement made under conditions where a reasonable person would anticipate it would be used for criminal prosecution
      * 2 Cases following *Crawford*
        + **Touchstone for test evidence**

If declarant is telling police what’s happening so they can respond to an emergency 🡪 Non-testimonial (Davis v. WA)

If telling PD what happened 🡪 Testimonial

* + - **Special Problem of Co-∆’s confessions in a Joint Trial**
      * ***Bruton* Rule:** In a joint trial, the admission of a confession against ∆1 that implicates ∆2 🡪 Violates ∆2’s confrontation right unless ∆1 testifies
      * *Cruz v NY:* Doesn’t matter whether ∆2 also confessed 🡪 still a confrontation violation
      * *Richardson:* Can cure this problem by a proper redaction & limiting instruction
        + The other way to fix it is to sever
    - **Double Jeopardy**
      * **Attaches when:**
        + **Jury trial 🡪** When jury sworn
        + **Bench trial** 🡪 When W is called
      * If jeopardy has attached & the case terminates as a result of factual findings 🡪 Final & ∆ can’t be re-tried
      * If dismiss charges before jeopardy attached 🡪 No DJ issue of bringing them again
      * If dismiss indictment before jeopardy attached 🡪 No DJ issue of bringing them again
      * If dismiss charges after jeopardy attached bc realize there’s a default in the pleading 🡪 Doesn’t erect a jeopardy bar (no DJ)
      * If grant a mistrial at request of defense 🡪 Waiver of jeopardy. Can bring case again unless defense baited into mistrial by prosecutorial misconduct
      * If prosecutor requests mistrial 🡪 Was it granted for reasons of necessity? (Hung jury, W doesn’t appear through no fault of gov’t)
      * A mistrial will erect a jeopardy bar (trigger DJ) whenever its granted to avoid an inevitable acquittal
        + **Downum Doctine:** So acquittal avoidance will erect a jeopardy bar for subsequent trial of that offense
    - **Collateral Estoppel**
      * Each criminal impulse is considered a separate offense (EX: Rob class🡪 each victim is a sep offense)
      * If tried on a separate offense & record indicates a factual issue has been unambiguously resolved in ∆’s favor 🡪 Gov’t estopped from re-litigating that issue in another trial for that victim
        + But record must show that acquittal in the first trial was a resolution of that factual issue, otherwise collateral estoppel won’t apply
    - **Blockburger not on exam !!!**