Short Outline

Sunday, May 01, 2011
10:00 AM

- History of the 4th A suggests that it was ratified to allow for individualized suspicion, not general warrants
- Incorporation doctrine says that when a right is "sufficiently fundamental" then it will be incorporated to the states. So far all rights are incorporated except a few, notably the right to a GJ in the states under the 5th.
- Retroactivity - general rule is that new constitutional rights do not apply retroactively
  - But rules that narrow gov't powers to punish DO apply retroactively. Also, watershed rules of procedure apply retroactively - the right to counsel is the only watershed right the court has ever found. Gideon.
- Under Powell v. Al, the twin goals of criminal procedure are obtaining the correct result and having a fair process.

- Search Approach

SEARCH	SEIZURE
1. Was there a search? ▪ The 4th A prohibits unreas gov't searches & seizures ▪ A search is when a person has a constitutionally protected REP: both a subjective and reasonable expectation of privacy. Katz. ▪ The 4th A only prohibits gov't searches	1. Was there a seizure? ▪ The 4th A prohibits unreas gov't searches & seizures ▪ A seizure is when a reasonable person would not feel free to leave.
1. Is there Standing to bring mtn to suppress? ▪ A person has standing to bring mtn to suppress if their 4th A rights were violated. ▪ For the search of a car: the owner or driver of a car will have standing to sue, unless passenger proves the search was inside her purse and had REP in her purse. Rakas. ▪ For seizure in a car: passenger and driver have standing to sue. Brendlin. ▪ For the search of a home: a person who is an overnight guest, or a guest with sufficient ties to the home, can have standing to sue. Minn v. Carter. Person otherwise doesn't have standing to challenge search of another's home ▪ For search of personal belongings: the person who owns them, if not contraband, has standing.	
2. Was there PC? a. Il v. Gates states that PC exists when, on totality of cir, there is fair probability that evidence of a crime will be found. b. Ag Spinelli, cred informant and source of info. 3. Was there a warrant? ▪ For a warrant to be valid, need PC. ▪ A good warrant must outline places/things to be seized w/ reasonable particularity. ▪ Was it executed well - timing, force used, detention, K&A? 4. Warrantless? ▪ Was a warrant needed? ▪ Was there PC if req'd, w/o warnt? ▪ If patdown, was there RS? ▪ If protective sweep, was there RS? ▪ Does an exception apply (15)? ▪ Is it a special needs search? 5. If exception, was there the right level of suspicion? ▪ PC for the exception? ▪ RS for the exception? ▪ If search during terry stop, was there a lawful arrest and SIA?	2. If Seizure: what kind? ▪ Consensual encounters are not seizures ▪ If arrest, need PC + warrant □ No need for warrant for arrests in public when officer witnessed crime, just need PC. Can also arrest w/o warrant for felony not witnessed directly by cops so long as have PC. ▪ If terry stop, need RS to stop and RS to patdown 3. Who was seized? ▪ Individual on the street? ▪ Car seizure? Both passenger and driver are seized. 4. Was there the proper level of suspicion? ▪ For Terry, need RS ▪ For arrest, need PC ▪ For consensual, need no suspicion 5. Did police act properly? ▪ For a consensual encounter, they can search for anything u agree to but must be w/in scope of consent ▪ If an arrest, can SIA person and grab area, passenger compartment, search evidence and weapons. ▪ For terry stop: □ Can Pat down suspect; Ask for identification; Look inside area of car that is accessible to D; Protective sweep of house □ CANT: Full search for evidence; Search of areas outside of D's access; Lengthy detention ; Involuntarily taking suspects to stationhouse - bc that converts it to an arrest

1. Should the evidence be suppressed?
    - As a rule, evidence obtained in violation of the 4th A is to be excluded. Evidence that the illegality leads to may also be excluded under the fruit of the poisonous tree doctrine.
    - However, there are exceptions
        - Independent source
        - Inevitable discovery
        - Attenuated
        - Impeachment
        - Good faith exception

- Searches and seizures generally
    - Only applies to searches in the US & territories - even if citizens are on vacay somewhere, doesn't apply.
    - Applies only to ppl, not corporations.
    - Applies only to gov't action or private action done at behest of govt - eg. Informants who govt hires
    - Interpretation -- search is presumptively unreasonable w/o a warrant, but an exception can apply.
    - Can't have warrantless search and no exception.
    - Theme - how to balance privacy interests protected by the 4th and the gov'ts need for effective law enforcement techniques

- Search and seizure
    - Was it a search? **A search is when a person has a subjective and reasonable expectation of privacy. Katz.**
        - The D must have subjectively expected privacy.
        - That expectation must have been reasonable.
        - Note: the more the gov't keeps abridging our rights, the less and less reasonable our expectations of privacy will become

NOT A SEARCH	IS A SEARCH
Open field	Curtilage
Aerial searches & surveillance	Search of home
Surveillance of home thru open window, door	Thermal imagery if tech not in public use and its directed at home
Trash searches	
Monitoring public behavior	
Beeper following obj TO the home	Beeper tracking obj IN home
Having convo w/someone	
Consensual monitoring	
Bank records	
Pen registers/phone records	
carnivore	
Dog sniffs	
Cop squishes bag in transit only minimally	Cop squishes bag in transit exploratoraly
Field testing of drugs	Urine testing
	DNA swab

    - **Open field is not a search because no REP, curtilage is a search because it's intimately tied to the home.**
        - Open field, there is no REP, so even if there's subj expectation, it's nto reasonable, so no search.
        - **Curtilage is the space surrounding the home, where we expect the intimate household activities to extend**
    - Open field vs curtilage:
        - How close to home
        - w/in an enclosure surrounding the home?
        - Nature of use of space, intimate, private?
        - Steps taken to protect area from observation from passers by
    - Note: whether police had lawful access to the place or thing is still an important factor as to whether there was REP
        - If officers sneak into curtilage to look thru ur windows, that is search and its illegal bc no right to be there. But they can sneak into your neighbors curtilage and look thru ur window -- don't have standing to challenge that.
        - It matters if police were violating the law when searching. If the law says the police can't have access, good indication that there's REP
    - **Aerial searches and surveillance are not a search per Ciarolo and Reilley.**
        - One cannot expect privacy from helicopters and airplanes who have a right to be up there. If no right to be up

there, then more likely you have REP.
    - O'Connor puts some pressure on this -- how common is the public access from above? Is the public routinely traveling at that height, via that mechanism? Would people expect ppl to be doing that?
        - If police hang glide over your home, see drugs on ur curtilage, under Ciarolo and riley that is not a search bc no REP from above. But O'Connor would argue well how common is hang gliding at that level and by the public?
- **Surveillance of a home via an open window or door is not a search because it's open to public**
    - Even if using binoculars
- **Using thermal imaging is a search if it's being used to search a home, capable of seeing intimate activities, and the technology is still new, not in general use. Kyllo .**
    - The key here was trying to protect the HOME, the most sacred and intimate place, from gov't intrusions.
    - Argue like Kyllo in that it's about the home, argue less like Kyllo because the technology is widely in use.
    - Flashlights are widely in use, but if used towards a house, they are capable of seeing intimate activities
    - Powerful telephoto lenses are also widely in use, but they are capable of seeing intimate activities esp when directed towards the home. Probably not a search but can argue that the home is very private and the point of Kyllo was that the ct was afraid of any technology being used to search intimate details of the home
    - Night vision equipment is widely in use and capable of seeing intimate activities when directed towards the home, this one seems the most invasive and capable of seeing intimate things.
    - Face recognition software, if widely in use, then perhaps not a search, even though capable of seeing intimate details
    - Retinal scanning of course is capable of seeing intimate details
- **Trash search is not a search because no REP at all in a person's trash. Greenwood.**
- **Monitoring public activities is not a search because that is open for anyone to see.**
    - If cops follow suspect around, listen on his phone conversations, that is not a search because it's public, so there is no REP.
- **Tracking devices that follow the object to a home is not a search. Knotts.**
- **Tracking devices that monitor object's location in a home is a search. Karo.**
    - But can use plain surveillance
- **Consensually monitored convo, where one person is recording the convo, is not a search because no REP in something you say to another.**
    - Having a convo with someone, not a search, no REP. consensually monitored calls illegal in CA.
- **Looking at bank records not a search because the bank has access to them. Shulz.**
- **Looking at pen registers or call logs is not a search because the phone co can access them. Smith v. MD.**
- **Using carnivore to send gov't the web addresses you visit from your computer is not a search**
    - Anything online -- chat rooms, Ims, emails, not a search because no REP for anything online
- **Dog sniffs are sui generis and are not a search, since the dogs can only smell the presence of contraband, and there is never REP in contraband. Il v. Caballes.** If a dog can smell the presence of something else, likely a search
    - Cops have to lawfully be in a place to be using the drug dogs. Can't do an illegal seizure to sniff you. Can't hold you longer on the street than you consent to.
    - Argue that 80% of dollar bills have drugs on them, and if dog alerts on them, that's unreliable and problematic.
- **If cop squishes luggage in public transit, not a search unless they squeeze and grope it in exploratory manner.**
    - Would have different outcome post- 9/11
- **Field testing of drugs is not a search so long as it only tests whether the substance is contraband or not.**
    - And if the substance spilled out, or if a private individual took the substance out from the bag/ location, then the gov't can test it for contraband per Jacobsen.
- **Urine testing is a search because you have a REP in your bodily fluids, and because urine testing reveals much more intimate info**
    - If police take a swab from your mouth for DNA testing, that IS a search. Need spec. needs exception or ct order
- **Private employer searches are not a search per the 4th A because it's private.**
- **Searches done in foreign countries and used in US prosecutions is not a search**
- You DO HAVE REP in your home, body, car, personal belongings but not when the thing to be detected is contraband.
- Note: Perhaps this is an unfair rule since some people do not have traditional homes and live in cardboard boxes, those are their "homes" but they are quite public and thus they can be searched w/o even the 4th A triggering.

- PC Requirement - *D will bring mtn to suppress because of faulty warrant; lack of PC.*
    - **Per IL v. Gates, PC is when, on the totality of the circumstances, there's a fair probability that search will result in evidence of a crime. This considers corroboration, the informant's background and knowledge, and common sense.**
        - Could police corroborate substantial portion of the info?
        - How detailed or unique is the tip?
        - Verified predictions?
        - Nature of the information?

    - **Argue yes**
        - Yes there is PC, the standard is a totality, and common sense says there is PC here. The info was fairly detailed and unique; substantial portion was corroborated; the informant has experience in tipping and is reliable. We

also know the source of the info. The info seems reliable.
    - What are the odds that the person knew that info, and that detailed info ended up being right?
    - Further, the info obtained for this PC determination did not violate the 4th A because it was not a "search."
  - **Argue no**
    - There is no PC because we know relatively nothing about the informant or the source of her knowledge, the facts corroborated are totally innocent and don't corroborate the facts, on common sense approach, the info is not reliable, and there's not a fair probability that evidence of a crime will be found.
    - The informant was not right about a lot of things, plus the information he gave was rather commonplace, he could have been guessing.
    - Also, the info was obtained in violation of the 4th A because it was done during a warrantless search

  - **The information upon which PC rests should be relatively fresh. Unless the cops are arguing for an ongoing crime, they must rely on facts that make it likely that the items/place sought to be searched will be there when the warrant issues. US v. Harris.**

  - **Under Aguilar/Spinelli, if using an informant for PC, we want to know reliability of informant and source of his knowledge. Also want to corroborate guilty parts of the informant's tips.** Now, no longer absolute standard.
    - Do we know the identity of the informant? Do we know his credibility or reliability?
    - Do we know the source of the info, and how he knows what he says?
    - How reliable is the info? Are the facts corroborated or slightly off? Can you corroborate guilty info too?

  - Nature of PC: **PC is an objective inquiry, we don't care about the officers' subjective beliefs. Whren.**
  - Not an exact science: Can arrest someone for what you think is PC of a crime, but then it turns out there wasn't PC, but there was PC for another crime, the arrest is still legit. Alford.
  - PC to search is the same as PC to arrest

  - **If there is PC that one of a number of people owns contraband, and the # is reasonable, cops have PC to arrest all of them. Pringle.**
    - Argue whether probability high enough.
    - In Pringle, Ct said 1 in 3 chance that each person owned the drugs was sufficient to arrest all 3. Here…… On one hand, ___ chance that the drugs belonged to D is quite high. And considering the age and likelihood that D owned the drugs also leans in favor of finding PC. On the other hand, pringle said 1 in 3 chance was sufficient for PC with multiple suspects, and maybe the probability here is too low.
    - If there were 10 people in the car, you would have to look at the probability with some common sense -- is it likely that all the ppl arrested owned the drugs?
    - The location of the drugs with respect to the D doesn't seem to matter -- D can be up front and the drugs in the back.
  - Can apply for group PC for search too, but mostly comes up in group PC for arrest.

- Warrant Requirement - *D will bring mtn to suppress because of faulty warrant.*
  - **Under the 4th A, a warrant must be based on PC, supported by affidavit, particularly describing the place to be searched and the persons or things to be seized. Warrant must be issued by a neutral and competent magistrate.**
    - Mag. must be competent, but cannot be prosecutor or paid per warrant issued - Its ok if they're a rubber stamp
  - The warrant must be based on PC, and the magistrate decides if there is PC or not
  - **The place to be searched must be described with reasonable particularity, but if there is a mistake, it's fine so long as the mistake was honest and reasonable. MD v. Garrison.** Mistakes are bound to happen since PC isn't an absolute standard.
  - **The things to be seized must also be described with reasonable particularity. If the warrant doesn't describe this at ALL, then the warrant invalid. Must either describe it on the warrant or incorporate the affidavit by reference that describes the items. Groh v. Ramirez.**
    - Argue whether described reasonably or not
    - Ordinarily, fruits, instrumentalities, and other evidence of a crime may be seized
    - Computers can be described particularly by describing the files to be seized - must be reasonable.
    - **If there is catch-all language in a warrant, it's not fatal. "together with fruits, instrumentalities and evidence at this time unknown" is read in context with supporting documents and read to be part of the items to be seized. Andrewsen v. MD.**
  - Scope of a search - Under a warrant, cops can search anywhere where there's PC that a search will result in evidence of a crime.
    - Argue that it was reasonable or not reasonable
  - **Anticipatory warrants are warrants where the affidavit states that the search will occur only if certain events take place. This is OK and is treated like a normal warrant so long as there is PC -- make sure there is PC because not all the events have occurred yet. US v. Grubbs.**

- Executing search warrants - *D will bring mtn to suppress for unreasonable execution of warrant*
  - **Per Fed R Crim Pro 41(e)(2)(A), a warrant is good for 10 days, and it generally must be executed during the day -- 6am**

to 10pm. Can search during night time with permission, usually with drug cases.

- **Under Mich v. Summers, cops can use reasonable force to detain people present during search, can handcuff and question. Muehler v. Mena.** In Mena, cops present for search relating to gang, and need for safety outweighed intrusion on person.
  - In Mena, held her for 2-3 hrs, handcuffed her, asked her questions about her immigrant status.
  - Argue whether it's reasonable here.
- Can only search the place where it's reasonable to find the evidence you desire.
- **Absent exigent circumstances, officers must knock and announce their presence before entering unless exigent circumstances or if K&A would be futile for fear of safety or destruction of evidence.** No per se exceptns allowed.
  - Even if K&A is violated, mtn to suppress denied.
  - Why didn't the cops K&A here? Was it unreasonable?
- **If there is a mistake in executing the warrant, its OK so long as mistake is honest and reasonable. MD v. Garrison**
  - Reasonable mistakes are based on the circumstances, officers really truly thought they were in the right place but there was some mistake.
  - There has to be some room for mistakes because PC is not an absolute standard.
- **Cops can use reasonable force while executing warrant. Battering rams and stun grenades perhaps not reasonable in some circumstances, but if the cops had a warrant, entry was authorized, the entry was reasonable. Kip Jones.**
  - On one hand, the use of bats was unreasonable
  - On the other hand, they didn't use stun grenades and battering rams, and so it's less severe than Kip Jones, thus perhaps more reasonable
- **It violates the 4th A to have media ride alongs that do not have a lawful function. Wilson v. Lane.**
  - But when the media is serving a function -- like videotaping searches to ensure compliance and reasonableness and accountability, then that doesn't violate 4th. Can't be just for fun.
  - Argue whether legit assistance or not.
- **Cops can do a sneak and peek search, where they search when you are away and they don't even have to leave you a copy of the warrant.**

- Warrant Exceptions - *D will bring mtn to suppress for unreasonable and warrantless search*
  - **SIA allows search of an arrestee's person and grab area when there is a lawful arrest. The grab area includes the person and areas immediately w/in reach of an arrestee from which he might gain possession of a weapon or destroy evidence. Chimel.**
    - There must be a lawful arrest. An arrest w/ PC needed - with or without warrant. Warrant is not needed when cops arrest in public if felony and if misdo where cop witnessed the crime.
    - Can arrest for minor crimes and still do an SIA
    - The search must be of the grab area.
      - **If arrest in home, grab area includes the person's body and everything in the room. Chimel.**
        - Recall that you always need a warrant to arrest someone in a home, unless exigent circ or consent.
      - **If arrest in or near car, can search passenger compartment of the car (under seats, glove box) and any containers therein when lawful arrest if the arrestee is unsecured and w/in reach of the car. Gant.**
      - **Can also search car if cops have reason to believe (argue RS, argue this is sth difft) that evidence of the crime of arrest is in the car. Scalia - Gant.**
        - Scalia's approach didn't mention whether applies to trunk, likely not.
        - If arrest for traffic violation, Scalia's rule prob wont work bc no other evidence likely in car.
      - If arrest on street, no warrant needed, and can do SIA of person and grab area containers or belongings
      - CA Supreme Court considers a phone just like another "container" that can be in grab area, seized, and searched.
    - Can argue post Gant, if the rationale of SIA doesn't apply, perhaps we shouldn't allow searches of really far away cabinets that the suspect wouldn't' even reach. Gant doesn't on its face limit the application of SIA in the home but it might prove persuasive.
    - Once you search something w/in grab area, find something, that may give you PC to do a full-blown search of the entire house or car including the trunk.
    - When doing SIA, can seize anything in plain sight.

  - **For protective sweeps, police can do a cursory look in other areas around the home during an arrest or other encounter so long as there is a reasonable suspicion - articulable reason - that someone might be lurking, or that there is otherwise danger at the scene.**
    - Often arises when arrest in someone's home, and do a protective sweep for other persons likely present
    - Can also apply to cursory searches of bombs or weapons.
    - This is NOT a full search. Can't open drawers.
    - Reasonable suspicion can be based on furtive behavior - start acting nervous, not looking you in the eyes, sweating, looking around. If hear voice or know that guy has a roommate.
    - If cops have reason to believe someone else might be living there or if there are more than one cars outside

  - **Hot pursuit is when cops have PC that D committed the crime, and they are pursuing/ chasing him on his tail, and there is an immediate threat and no time to get a warrant. Warden v. Hayden.**

- Can chase someone to his home, no need for a warrant.
- Can chase D to him home, arrest w/o warrant, conduct SIA, do a full blown search via hot pursuit, and do a protective sweep.
- **Absent hot pursuit, need arrest warrant to arrest in home. Payton v. NY.**
- Two days is too long to argue that you're still chasing a guy. Patyon v. NY.

○ **If cops are lawfully in a place, they can seize evidence of a crime or contraband in plain view whose contraband nature is immediately apparent. Cannot manipulate objects to see evidentiary value. Az v. Hicks.**
- The officers must be lawfully present. Hot pursuit, warrant?
- The incriminating character of the contraband must be immediately apparent.
  - Cops, if not sure, cannot manipulate objects to see if they are contraband or evidence
  - MARIJUANA in CA - D will argue marijuana in CA is legal and thus the contraband nature not immediately apparent
  - "Clumsy" cops - argue ok because accident; argue not OK because intentionally manipulating.
  - No "inadvertence" requirement - the cops can go and expect to find the contraband there, doesn't need to be accidental. Horton.

○ **Cops can also seize contraband if its contraband nature is plain to the touch and the cop has PC to believe it's contraband. Minn v. Dickerson.**
- Gov't would argue that they could lawfully seize the contraband during the patdown because the cop felt the object and it was plainly contraband to the touch, without having to manipulate it.
- Very easy to argue the cop didn't know what it was w/o manipulating it -- especially drugs.
  - Little gun - D would argue that there is no way that the cop knew the contraband's nature plainly by the touch -- he must have manipulated it and felt it exploratoringly.
- This would only really come up when cops do a patdown pursuant to a terry stop. If the cop, from the outside, feels a gun, and make out its identity immediately, then can seize it based on plain touch.

○ **Under the automobile exception, cops are permitted to search a car if they have PC to believe that there is contraband or evidence of any crime in the car. This includes the passenger compartment and the trunk, and containers therein. Carroll.**
- The rationale of the exception is that cars are inherently mobile and they have reduced expectations of privacy.
- This rule applies to motor homes, autos no longer mobile, parked cars.
  - Cops can observe a drugs for sex scheme in motor home, then do a full search of the motor home w/ PC, no warrant. Carney.
  - Even if the car is not at all mobile -- parked in yow yard, car without wheels -- this exception still applies.
    - c/a - argue since this isn't like a running car, it's completely stationary, and its easy for cops to get a warrant.
    - Can maybe argue a car in lots of pieces isn't an automobile for the purpose of this rule and it's not a car under this exception.
- **As long as there is PC that there's contraband somewhere in car, even if it's limited to a particular container only, can do search of entire car, including containers inside the car. Acevedo.**
  - c/a- Argue the rationale doesn't apply to containers -- the car is mobile, yes, but the container is not, so you can take it, get a warrant, then search.
- Includes passenger's property too, that is treated just like a container in the car.
  - Passenger will have standing to challenge search of their purse, property, but not challenge search of the car.
  - Eg. Cops stop car. They have PC that the car contains drugs bc of lots of other info. Drugs found in back seat of car. Two ppl inside. Cops also go through passenger's purse, find a gram of coke -- then they arrest both of them. Lawful search per the auto exception. Passenger will have standing to challenge the search of her purse, but not the search of the car itself.

- There are a million ways to search an automobile
  - Warrant searches
  - Automobile exception
  - Search incident to arrest
  - Inventory searches **- if you have an illegal SIA or auto search, and a subsequent inventory search, argue ER then argue inevitable discovery.**
  - Consent searches
  - Border crossings
  - Checkpoints

○ **A warrantless search of a car or a person during a routine inventory search done according to policy is lawful.** These searches are not for law enforcement purposes; they are for officer safety and for safekeeping personal property.
- Is there a policy?
  - If there is no policy, the search is unlawful w/o a warrant

- Cannot have any police discretion when deciding to search. Inventory searches are special needs searches.
- Is it routine? Do it to every car/ person that comes in?

- **No suspicion is needed for a boarder search if it's routine. Flores Montano.**
  - This is a special needs search which is not for law enforcement purposes, but rather to safeguard our nation and borders.
  - First, it must be a border. Borders are fixed ones and int'l airports and train stations
  - Next, it must be routine.
    - A search is routine if it's relatively not invasive, somewhat short in duration, search of things not persons, and happens frequently.
    - Removing a gas tank from a car is routine, Flores-Montano
      - Took 1-2 hours, took off gas tank
      - Used statistics to prove routine because drug smugglers often put drugs in gas tank.
    - Removing car door panels is routine, Hernandes.
    - Slashing a spare tire is routine is routine, Cortez-Rocha.
    - After those searches, can put back together and drive off. Doesn't impair essential functioning of the car.
    - NOT routine if it's especially long in duration, invasive, searches persons, and the searches don't happen frequently.
  - **Searching laptops per Arnold is said to be just like a container search at border, if routine, no susp**
  - Removing artificial limbs at airport?
  - If routine, no suspicion needed
  - If not routine, need RS.

- **Checkpoints are lawful seizures that require no suspicion if the primary purpose is not for law enforcement. Stiz.** This is a special needs search, not for law enforcement purposes, but for: Safety (sobriety checkpoints), search for witnesses, to search for terrorists, and to search for missing children, NO suspicion needed to stop a car.
  - Here, gov't will argue ____ is a lawful special needs search for checkpoints because the primary purpose is not law enforcement but safety, and the degree of intrusion is minimal because it's a momentary stop. Balance favors gov't
  - D will argue that the primary purpose is to search for evidence of a crime (drug checkpoints where stop car and look for evidence to prosecute that person), and that requires some suspicion. Edmond. If stop car to see if there are drugs inside, not ok, but if stop to see if the person is ON drugs, that's OK.

- **When a person consents to police search, or questioning, the search/questioning is "reasonable" so long as consent was voluntarily given and the search/questioning was within the scope of that consent. Scheckloth**
  - Consent must be voluntarily given, determined by a totality of the circumstances, looking at whether:
    - They were told of their right to refuse (though not required); time of day; location; whether in custody; show of gun; use of violence; tone of voice; held incommunicado; how invasive the search was; the age and gender of suspect; impairment, intelligence, intoxication; language barrier; number of requests; prior arrests; what part of town suspect is from.
    - The fact that the cops say, either you consent, or we will hold you for 2.5 hrs to get a warrant, does not make consent involuntary. Those are just options.
  - Was the person authorized to consent?
    - **The suspect himself can consent, and a third party can consent if authorized, with actual or apparent authority. Apparent authority exists if a cop would reasonably believe that person had authority to consent. Randolph.**
      - Usually co-occupants, spouses, sometimes child for parent (if old enough to do so).
      - Likely not reasonable for a cop to think the landlord had authority to consent on D's behalf.
    - **If the suspect is physically present, and a third party consents but the suspect is physically present and OBJECTS to the search, the wishes of the suspect must be honored. Randolph.**
      - Here, D was physically present and objected…
  - D would argue that the search was beyond the scope of the consent given
    - D said "ok sure" to whether the cops could do a "quick search" and the cops' subsequent search was outside the scope of the consent given. Cantor.
    - Argue whether the search was reasonably w/in the consent given or not
  - Note: when it comes down to it, the exact wording of the consent given is police word against D's

- **No suspicion needed to search a parolee, need only know that the person is on parole. Samson. For probationers, need RS to search their house or belongings. Knights.**
  - This is a special needs search and the gov't interest in rehabbing parolees/probationers and protect society versus their already diminished privacy rights weighs in favor of gov't search.
  - To search an ordinary citizen, need PC
  - To search a probationer, need RS
  - To search a parolee, need no suspicion at all
  - To search someone in jail, no suspicion at all

- **Administrative searches are searches conducted by a gov't arm for the purpose of health/safety inspections done under a regulatory scheme. These are lawful so long as there is a reasonable administrative scheme that provides notice and limits discretion. Camara.**
  - Can get administrative warrants but PC is not needed
  - This is a special needs search which is done for health and safety reasons, for compliance with housing code, etc. not for law enforcement purposes.
    - Again balance gov't needs versus degree of intrusion; if unduly intrusive, argue not reasonable.
  - Statutory scheme must say "x is to be inspected monthly for compliance' or 'inspections without notice", should also limit discretion of the individual inspectors. Should also have taken into acct the way the inspections are to be conducted, what the public interest is, and how it balances the intrusion.
  - An admin scheme may be lawful, and if they see contraband in plain sight, they can tell the cops and the cops can seize it.

  - **Administrative searches of businesses is lawful if the business is a closely regulated business and there is substantial gov't interest, inspections are necessary, and there is an adequate statutory scheme that provides notice and limits discretion. NY v. Burger**.
    - A closely regulated business is a business where you know you have to get a license and you will be routinely inspected bc it 's a business that could potentially harm the public. Pawn shops, tow yards, salons, gun shops, liquor stores, etc. This signals that they have diminished REP bc they're closely reg.
    - Subst gov't interest in health/safety/ protecting ppl
    - Inspections necessary to make sure they are keeping tabs on ____.
    - Notice means the scheme must say "you will be searched twice a month" or "searches w/o notice." "Search on regular basis" is not enough
    - It has to limit discretion, can't have any discretion left to the inspector.

  - Can argue that the search is beyond the scope of the admin search
  - Law enforcement officers can be doing administrative searches, on one had they're doing it for admin purposes, on the other hand, it's really an investigatory law enforce purpose.

- **Drug testing is a special needs exception to the warrant requirement because, under a balance, the gov't interest in health/safety prevails over a privacy intrusion. Skinner, Von Raab.**
  - The purpose of these searches isn't to obtain evidence of a crime, it's to ensure health and safety of ppl. Special need for rail workers to be off drugs, special need for customs officials who handle guns to be off drugs.
  - But there is no special need to ensure that politicians are drug-free

- **School officials can search a student's backpack based on RS only because children have less 4th A rights in schools. This is not to find evidence of crime, but to safeguard children. TLO.**

- **Suspicionless random drug testing in schools is constitutional as applied to students participating in extracurricular activities. Earls.** School drug testing is a special needs search, not for law enforcement purposes, but for the health and safety of children and keeping them off of drugs. This exception to the warrant requirement balances the gov't need for safety of children versus the privacy intrusion and degree of intrusiveness in the search process. Balance favors school/govt.
  - The farthest the Ct has gone with this is in Earls, permitting random drug testing to every student participating in extracurricular activities.
  - Is there a special need?
    - The drug problem isn't especially bad here.
    - c/a - drugs are bad!! Preventing drug use by school children will help prevent things like drug overdose. All drug prevention implicates safety, thus high gov't interest at preventing
  - Does it outweigh students privacy interests?
    - Per TLO we know that students have diminished privacy rights at school
  - Is the testing technique unduly intrusive?
    - In Earls, the pee test is not very intrusive - faculty is outside the closed restroom.
    - Vernonia - watched males pee from behind; for females, monitored outside the stall.
  - Balance favors the school

- For non-random drug testing, when the school pinpoints a certain student and tests, need RS.

- **For more invasive searches of children, like strip searches, need PC or RS + a really dangerous drug. Safford.**

- **If primary purpose of the drug testing is law enforcement, it's not constitutional. Ferguson.** Can't test pregnant women for drugs w/o susp and then use the results of those tests to prosecute them for doing crack while pregs.

- **Special needs searches of gov't employees are constitutional. Quon.** When the gov't wants to audit cell phone use for

economic reasons; or for safety - check all the guns in ppl's lockers for safety.
    - Ct didn't deal with the issue of whether gov't reading cell messages is search bc REP - just said we assumed.

- Special needs searches are searches done for administrative, health and safety purposes, not for law enforcement purposes. Some examples are to reduce drug use, keep drunk drivers off the streets. In these instances, there is a special gov't need balanced with diminished privacy right or minimal intrusion.
    - Inventory
    - Border searches
    - Checkpoints
    - Probation and Parole searches
    - Administrative searches
    - School searches
    - Drug testing
    - Checkpoints near airports?
    - SARS testing?
    - HIV testing?
    - Searches in subways and trains?
        - Special need vs. diminished privacy or minimal intrusion?

- **A search done under exigent circumstances with PC that the crime occurred, no warrant is needed.**
    - **For hot pursuit, the cops must be following a perp on their tail, with PC that the perp did the crime, and must be no time to get a warrant, crime must be sufficiently serious, and purpose of chasing must be to protect others or preserve evidence** (other than blood-alcohol).
    - **Under exigent circumstances, officers can enter home in order to protect life & property so long as there is PC that criminal activity was going on. Brigham City v. Stewart**.
        - If cops witness a fight break out in someone's home, they can enter. If they see drugs lying around, they can seize those too.

- **Under the community caretaking exception, if there is RS that someone is in danger or needs help, cops can enter to help or save lives.** The purpose of this warrant exception is to allow cops to help ppl, not to uncover evidence or apprehend crime.
    - Was the cop's belief reasonable? Have to be careful in applying this exception, cops can always say they help
        - Can always say, in my experience, I smelled burning flesh.
    - Look to outward signs of distress; Does the location signal that he needs aid? Danger to anyone else?

- Seizures and Arrests
    - Was it a seizure?
        - **A person is seized w/in the meaning of the 4th A when, in view of all the circumstances, a reasonable person would have believed he was not free to leave. United States v. Mendenhall**
            - Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, asking for ID and not giving it back, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.
            - Seizure is some form of physical restraint; Police chases are not seizures until they stop you and show you some physical force. Hodari.

        - **An arrest is when the cops have PC that a crime occurred, and a reasonable person would not feel free to leave, but is more that a temporary detention.** Look to factors like, show of force, length of detention, handcuffs, told you're under arrest, taken to station, fingerprinting? Temp detention can turn into an arrest.
            - **Arrests can be made for any crime including misdos, non jailable offenses, and crimes only punishable by fine. Can even be arrested for offense for which state law does not authorize arrest if committed in presence of officer. Atwater.**
            - **Arrest warrants are generally required, but not required when arrest is in public for a felony or for a misdo that the officer witnessed. Can also arrest in public w/o warrant for felony officer didn't witness.**
            - Arrests warrants are needed for arrests in a home unless exigent circumstances or consent.
            - Can use force during arrest but only if it's reasonable, consider seriousness of crime and totality.
        - Within 48 hrs of an arrest, must give you a Gerstein review. A judge has to look and see whether there was PC for the arrest w/in 48 hrs of your arrest. Ex parte process. This is a check on police discretion for arrests.

    - **Consensual encounters are not seizures. By definition, a reasonable person would feel free to leave. Consider the above factors and whether, on the whole, the person could have felt free to leave.**
        - Mendenhall was a consensual encounter because they gave her back her ID; can ask someone on the street a question and that isn't a seizure and no susp needed; cops can come onto bus and ask you question, as long as they're not blocking your way, that's not a seizure.
        - **Argue consensual**: on one hand, it wasn't a seizure because she was free to go, there was no show of force,

seems like no compelling tone of voice, she was able to just leave just like the bus case, where she could have left when the doors opened, and the cops didn't have her belongings so she could have left, just like Mendenhall.
        - **Argue seizure:** On the other hand, we know that she wanted to leave but couldn't, she was in a moving vehicle, the cops were blocking either side of her and the exits, though they didn't use force their mere presence was very intimidating, they asked her repeatedly, and in addition, this was a young girl, not educated, Af-Am, and though the standard is an objective one, it's something to consider.

    - **For Terry stops, an officer may conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion (RS) that criminal activity is afoot, and RS of danger to pat them down for weapons. Terry.**
        - If see two guys doing fishy stuff up and down the street, that is enough to stop them and ask them qs.
        - Can stop you, ask you whats up, pat your outer clothing [if feel gun, can seize it, then arrest you, then do SIA], can search your purse, backpack w/in grab area, can ask you do ID yourself, can look inside area of car w/in grab area, can do a protective sweep, can handcuff you temporarily.
        - **Can ask you to ID yourself because this is reas. related to purpose of Terry stops, to see if crime is afoot. Hiibel.**
        - Can look inside area of car that is accessible to D; can do a protective sweep of your house; can handcuff you temporarily.

    - **RS is determined by a totality of the cir, and officers can draw upon own experience, training, inferences, and deductions. Arvizu.** Unnatural and strange conduct of the drivers, location of car, common sense and experience.
        - RS puts tremendous discretion in hands of cops - racial profiling
        - RS is lesser standard than PC so it's easier to meet.
        - **An informant's tip, even w/o knowing about the informant or source of his knowledge is enough for RS so long as there is corroboration. But the tip must be reliable and sufficiently specific. Fl v. JL** . [there will b black guy at bus stop w/plaid shirt - not enough for RS] but [guy will leave apt with attache, go to motel… if partly right, RS]
        - **Can use suspect's flight as part of a totality approach to find RS to stop a person temporarily. Il v. Wardlow**
            - Consider location, whether high crime area, unprovoked flight, timing, common sense. if D flees once sees cops, just like Wardlow, enough for RS.
        - **Can use known profiles, like drug courier profiles, as part of totality approach to find RS to stop a person temporarily. Sokolow.**
            - If paid ticket in cash, no luggage, flew source city stayed 48 hrs, nervous, race can be factor. LV luggage.

    - **For wiretapping, this is a search, and cops must get a special Title III warrant to conduct. Need to go to fed. Court and say that we've tried all traditional ways to investigate, and this is a serious crime, we need to wiretap.**

- Standing
    - **The person bringing the mtn to suppress must have standing to challenge the action. As a rule, only people whose 4A rights are violated may have standing.**
        - **For standing to challenge search of a car, only owners and drivers can challenge illegal search, not passengers. Rakas.**
            - If cops search purses or containers inside car….
                - Driver of car still has standing bec that's an illegal search of things found in car, even if in purse
                - Passenger has standing to challenge search of own purse because she has REP, evn if cntrabd found
            - But if cops search car and find a gun under seat…
                - Only driver can challenge. Passenger can't argue that the gun belonged to me, I had REP in it. No REP in contraband in itself. But if it's in the purse, then you can say I had REP in my purse as such.
            - If cops search purse inside car, find drugs, and arrest all three people
                - Like Pringle, if PC that one person owns it, if probability high enough, can arrest all ppl
                - But only owner of purse and owner of car have standing to challenge, not the third guy who was charged b/c of the drugs.
                    - She can try to argue the purse belonged to her -- I bought her that purse, I always carry my stuff in there. She can also try substantively to argue the drugs weren't hers.
            - If cops search car and find documents incriminating X, X doesn't have standing to challenge that search.
        - **For standing to challenge seizure of a car, passengers and drivers have standing to challenge the seizure, and subsequent search of SELF. Brendlin.**
        - **For standing to challenge search of the home, only an owner or lessee of a home will have standing to challenge search of the home.**
            - **Commercial visitors who stay for a short while with not much relationship to the place do not have standing to challenge a search of the home. Minn v. Carter.**
            - But a guest who has some personal relation to the home, and stays for some time, and has a relationship with the owner/lessee has some REP and thus would have standing to challenge search of the home.
            - **Argue like Carter:** D only there for short period of time, only there for commercial purposes, doesn't have significant ties to the place or any REP there. He doesn't make this his own place, he doesn't sleep there, doesn't keep his stuff there. He shouldn't reap benefit of ER.
            - **Argue unlike Carter:** on the other hand, this is not commercial in nature like Carter, there was some connection to the place and the owner, though visits short, they were frequent, this establishes strong REP

for standing purposes.

- Exclusionary Rule
  - **Material obtained in violation of the constitution cannot be introduced at trial against a crim D. However, there are numerous exceptions.**
  - Can always argue like, in Hudson v. Mich, applying the ER is too costly in relation to its deterrence.
    - Then argue that if ER applies too broadly, we will make PC standard more lenient too.

  - **If evidence obtained was discovered thru an independent, lawful source, then ER doesn't apply even though there's some illegality. Murray v. US.** Gov't must prove independent by a preponderance.
    - Gov't will argue the illegality had no effect on them obtaining a warrant and having PC, none of it was tainted. We had lots of facts, we were going to get the warrant based on those facts. It was as independent as it needed to be. We were acting good because we were getting a warrant, this is desirable conduct. And on balance, the cost of excluding the evidence is too costly in light of the small illegality.
    - D would argue that the police were *influenced* to get the warrant by the illegal behavior, and ER should apply. They wouldn't have gotten the warrant had they not seen the stuff illegally. D would also argue that the illegality may not have been used directly for the warrant, but it influenced the way the officers recalled the surveillance, and the facts -- they may have had lots of facts but they didn't see how it all added up until the illegal entry. Encourages confirmatory searches to make sure their facts are correct before getting warrant.

  - **If the evidence obtained was discovered thru illegal means, but it would have been discovered inevitably thru legal means, then the ER doesn't apply. Cannot argue however, we would have gotten a warrant eventually. Nix.**
    - If there were mechs in place to find the evidence, or if other circs where ev would have been discovered

  - **Evidence obtained after an illegal search/seizure will not be excluded if the link to the illegality is too attenuated. Wong Sun; Brown v. IL**
    - This would come up when there's an illegal search or seizure (eg. Illegal arrest) that led to many statements and confessions.
    - Factors to consider are: is there a coercive atmosphere? Type of police misconduct? Spontaneity of statements? Miranda rights? where is the statement given? Intervening cirs? Flagrancy of misconduct? D's actions in returning to provide statement.
    - Gov't would argue that the evidence is sufficiently separate from the illegality. Yes, she was illegally arrested and made a statement during that time, and that should be excluded. But the subsequent statement was sufficiently separate, there were intervening circumstances, she volunteered the information to the cops. She was distant enough from the illegality, spoke to her atty,
    - D would argue it was all one act that kept going, there's still need for the deterrent, and just giving Miranda rights doesn't automatically dissipate the taint, D would also argue she felt coerced bc she felt threatened by the police and it wasn't voluntary, she still felt coerced.

  - **If police rely in good faith on a facially valid warrant, even tho it's later found to lack PC, evidence obtained as a result will not be excluded. Leon**
    - Even if there's a huge defect on the face of the warrant - the "items to be seized" just says "contraband," if the cops rely on the warrant in objective good faith, the results from the search are not excludable. Sheppard.
    - If the cops do an administrative search based on a statutory scheme that's later ruled uncons't, if cops relied on it in good faith, the evidence is not excludable.
    - If there is a clerical error from court personnel, and cops rely in good faith on it, not excludable.
    - Gov't would argue the cops relied in objective good faith, so there is no conduct to deter. There was a warrant, and that's good! The mistake was the magistrates, not the cops', and the ER isn't designed to deter magistrates' mistakes.
    - D would argue that should apply the ER to ensure that cops make sure their warrants are legit. This GF exception really swallows the ER completely -- basically gives cops NO incentive to follow the constitution.

    - **When cops rely in good faith on negligently maintained data website, ensuing search/seizure w/o warrant is not excluded. But if the data was reckless, intentional or systematically wrong, ER applies. Herring.**

  - **Further, evidence illegally obtained is still admissible for impeachment purposes.**
  - Evidence obtained illegally is admissible in other proceedings like GJ, civil proceedings, sentencing, parole / probation revocation, etc. because cost of exclusion is too high

  - At a suppression hearing, if there was a warrant, it's the D's burden to prove it was invalid -- lacked PC, was false, or items to be seized not specific, etc.
  - If there was no warrant, gov't has burden of proving an exception applies.
  - Then the judge decides on suppression motions.
  - If D wins on a mtn to suppress, gov't can appeal that pretrial mtn, no double jeopardy attaches

- Miranda Short Outline
  - Approach

Did D make a statement that prosecution wants to use against him?
4th A - was it consensual monitoring?
Was the confession voluntary under the 5th and 14th A. due process?
Was the D's will overborne?
Was Miranda properly given? -give rts correctly? Invoke or waive?
Exception apply?
Was there rt to counsel under the 6th A.?

- Prosecution will want to use ___ against D, and D will move to suppress it on the grounds that it is involuntary, violated Miranda, and violated the rt to counsel.
  - **Due process requires that a statement be voluntary in order to use it against a criminal D. If a statement is involuntary, it is inadmissible for all purposes, even impeachment, because it's inherently unreliable. Voluntariness is determined by a totality approach, considering factors to determine whether D's will was overborne. A statement is typically involuntary in the extreme cases -- where violence or credible threats of violence were used.**
    - Was there use of physical force?
    - Credible threats of force?
    - Long interrogation, deprivation of human needs?
    - Was there intense psychological pressure?
    - Deception is OK
      - D would argue that the cops deceived him when they lied and told him his accomplice confessed and pointed the finger at D. Gov't would argue that that is not sufficient coercion, deception is Ok.
    - What was the age, level of sophistication, and mental condition of the suspect?
  - Here gov't would argue that the statement was voluntary because there was no real physical force or threats of force, the interrogation wasn't unreasonably long, D was able to use the restroom, etc, there wasn't overwhelming psych pressure. Cops deceived but that's not sufficient.
  - D would argue that the interrogation was very lengthy, she was surrounded by officers and threatened by them, she wasn't able to sleep, there was intense psychological pressure.
  - On the whole, seems like this was an involuntary/voluntary statement…

- **D will argue the statement violated Miranda. Under the 5th A, the gov't generally cannot use a statement made during custodial interrogation in violation of Miranda against that criminal D.**
  - The statement must have been made during custodial interrogation. **Custodial means that a reasonable person (objective standard) would not feel free to leave while questioned.** This considers: whether D is physically free to leave; whether he was under arrest; whether use of force or show of guns; whether D initiated the contact; whether D was informed he was free to leave; the atmosphere of questioning, if oppressive; and when placed under arrest.
    - Gov't would argue this was not custodial - D drove himself there, knew he could leave, wasn't any use of violence or showing of guns, the atmosphere of questioning meant that D must have felt free to leave but didn't.
    - D would argue that this was custodial - he did not feel free to leave, he wasn't told he was free to leave, the atmosphere was very coercive, the location was very oppressive.
    - The custodial rule is objective and doesn't really consider age of a suspect, for the sake of administerability and for uniform application
    - As a rule, terry stops are not custodial unless they become more coercive and police start questioning D because they know they will prosecute him. Berkemer.
  - **Interrogation is when cops exercise express questioning or say words / actions that are reasonably likely to elicit an incriminating response from the suspect. Innis.**
    - Gov't arg this is more like Innis because it's more off hand questioning, completely casual conversation.
    - D arg, cops were doing it to elicit a response, it wasn't just made casually so its more likely interrogation
    - "You'd better confess" is words reasonably likely to elicit an incriminating response. "If I were D, I would tell us where the dough is hidden"
    - If D blurts something out, not Miranda violation because he wasn't being "Interrogated"
    - **It is not interrogation for a D to be questioned by a third party; Miranda only applies when the subject is aware that he is speaking to a law enforcement officer, because then there is police coercion. Il v. Perkins.**
      - Gov't informants, D's wife, anyone. Doesn't create "police dominated environment"
      - D would argue, even though I was questioned by an undercover informant in my jail cell, it was still very coercive because I thought he was a convicted murderer, and plus, he was asking me questions at the behest of the govt. that is quite coercive.
      - If you see an undercover informant, you talk about how Miranda not required, and then talk about how it violates the 6th A to be questioned by him, post-formal charges, w/o atty present.
  - **The gov't violated Miranda's absolute prerequisite to custodial interrogation. The gov't must advise the D of four distinct rights: the right to remain silent; that anything he says can be used against him; he has the right to have counsel present before and during interrogation; and if he can't afford counsel, one will be appointed for him.**

- These warnings must be given for any crime, even minor crimes.
- Must be given even if the D insists that he knows already.
- The officers can give the warnings in their own words so long as they get the "essence" of the four rights. There is no talismanic incantation required. Prysock, Doody
  - D would argue they weren't given properly because he didn't understand them, they weren't clear, and he can't invoke his rights if he doesn't know what they are.

- **Did D invoke or waive? Per Berghuis, D must clearly and unequivocally invoke the right to remain silent. Staying silent is not enough. Per Davis, D must clearly and unequivocally invoke the right to counsel.**
  - D would argue he invoked his right to remain silent/ counsel because [he was unequivocal about it.. He remained silent.. Etc.]
  - Gov't would argue D did not invoke his right to remain silent/ counsel because he must have used the magic words, "I wish to remain silent," or "I want my lawyer." [maybe I should have my lawyer… or if you charge me I want to talk to a public defender is not enough]
  - Then gov't would argue he waived that right.

- **Under the 5th A, waiver must be knowing, intelligent, and voluntary. It can be written, verbal, or implicit. An implicit waiver is viewed on the totality, and when the D starts speaking after he is advised of his rights. Berghuis.**
  - Gov't would argue D waived his right to remain silent/counsel by speaking, or that on the totality, D's conduct suggested that he knew his rights and voluntarily and intelligently waived them.
    - Gov't would say this is just like Berghuis, D sat silent for 2 hrs 45m and his finally answering was waiver.
  - D would argue waiver not voluntary because he didn't speak to waive his right. His conduct suggested that he wanted to exercise his right to remain silent/counsel. [D would also argue that his speaking did not at all signal he wanted to waive -- he just said he wanted to use the bathroom.]
    - D would argue well sitting silent for 5 hrs does imply invoking rt to remain silent
  - Implied waiver is like, "I will talk to you but I'm not signing any form" - Butler.
  - Gov't would argue that waiver is still voluntary even if D isn't told his atty was waiting outside. Burbine.
  - Waiver is also still voluntary if D is not advised of charges against him.

- Then the gov't would argue, even if he invoked the right at first, he then subsequently waived it.
  - **Per Mosely, once D has invoked his right to remain silent, police must "scrupulously honor" it, but it doesn't last forever. Police can come back and requestion so long as there was a sufficient break, fresh warnings, different questions, different officers, good faith.**
    - Gov't would argue that they scru honored this invocation because they had a 2 hr break, fresh Miranda warnings, difft questions just like in Mosely … thus it seems like the cops weren't trying to overcome the invocation, just that they wanted to requestion him. So the second stmt should be admissible.
    - D would argue that the break was shorter than 2hrs, the questions were basically about the same thing, they were referring back to the prior questions, they were doing this to overcome D's assertion of his rt. So the second stmt should be suppressed because violated Mosely.

  - **Per Edwards and Shatzer, once D invokes his right to counsel under the 5th A, only D can re-initiate questioning unless there is a 14-day break in custody.**
    - Gov't would argue there was a break in custody from the case D was being interrogated on because… .[out on bail, back to prison cell if D is an inmate, etc].
    - D would argue that the break wasn't sufficient because ___. [or D could argue that even though he's an inmate, it wasn't a break from the "coercion" because he lives in a prison and everything he does is controlled by law enforcement]. The point is to take a break and reboot.
    - Either side could also argue, if in their favor, that the 14 days is an arbitrary number.
  - Also, D doesn't waive his right to counsel if he meets and confers with his atty, Edwards and Shatzer rule still applies. [ie. you invoke rt to counsel, talk to your atty a few times, then the cops are like, OK now we can question you without ur atty. Nope]

- **As a result, statements made during custodial interrogation in violation of Miranda are excludable, but admissible for impeachment purposes.**
  - **However, witnesses found as a result of an unmriandized statement are still admissible. Mich v. Tucker**
  - **Physical evidence found as a result of illegally obtained un-Mirandized statement is still admissible. Patane.**
  - **A subsequent mirandized statement is still admissible if it's not a continuation of the unmirandized statement. Elstad. But exclude if it's an attempt to deliberately evade Miranda and no curative steps taken. Kennedy, Seibert.**
    - To determine if admissible under Elstad, consider: whether same person doing the subsequent questioning; the amount of time elapsed between the two confessions; whether same location; whether sufficient break; whether referring back to statements made; whether fresh Miranda warnings given; whether first violation was accidental or intentional.
    - Under Kennedy/Siebert, argue that cops had deliberate plan; Gov't would argue they didn't deliberately
    - Curative steps are like -- "we can't use your previous stmt, so we're going to tell you your rights again and

maybe you can tell us again?" OR wait a day and let the suspect talk to his lawyer.

- Gov't would argue that a Miranda exception applied.
  - **Statements obtained in violation of Miranda can still be used for impeachment purposes when the D takes the stand and lies. Harris v. US.**
    - D would argue that you shouldn't be able to admit this, and it would not provide enough deterrent. Plus it will disincentivize Ds from taking the stand and testifying!
  - **Statements obtained in violation of Miranda can still be admissible if the circumstances gave rise to a threat of immediate danger (objective standard). NY v. Quarles.** Basically, cops need not Mirandize before asking questions in an emergency.
    - Gov't would argue this was an emergency because it's like Quarles...
    - On the other hand, there was no real threat to safety and this wasn't really an emergency.
  - **Statements obtained in violation of Miranda can still be admitted if they were made in response to routine, administrative booking questions. Muniz.**
    - Gov't arg are administrative, routine questions, like DOB, age, height, etc.....
    - D would argue the __ question really is not a routine admin question, it's a loaded question.
    - Can't be "what's date of your 6th birthday" maybe "name of spouses or significant others" (contact info)

- D will argue the stmt was made in violation of the 6th A rt to counsel. **The 6th A prohibits gov't from deliberately eliciting incriminating statements from D regarding the charged offense, post formal charges, w/o counsel present. Massiah.**
  - It must be post-formal charges. If not, say 6th A not violated. rationale: once D has counsel, gov't can't go around him
  - The gov't must deliberately elicit info.
    - **The gov't deliberately elicits statements from D when they ask him questions, consensually monitor him, or have a jailhouse informant initiate conversations or ask questions. US v. Henry.** [also mention that the conversation doesn't violate the 4th A because consensual monitoring, no REP]. **If the informant is a mere listening post, however, then that doesn't violate the 6th A. Kuhlmann.**
  - Questioning is prohibited only as to the same offense.
    - **The same offense is defined in Blockburger as offenses with the same exact elements, coming out of the same activity. TX v. Cobb, Blockburger.**
      - Gov't would argue we are asking about a difft offense
      - D would argue well, you are asking about a difft crime arising from the same exact facts and you're getting a lot, if not most, of the info about my charged crime
        - Note - it still can't violate miranda. Eg. D did a burglary murder. Charged only w/ burglary. Cops can ask D about the murder so long as it doesn't violate Miranda or another rule.
  - Waiver?
  - **Gov't will argue that D waived his 6th A right to counsel. Under Montejo, a D can waive his 6th A right to counsel when he waives his 5th A right to counsel.**
    - Rationale: the 5th A takes care of rt to counsel during the most coercive time - custodial interrogations. If a person waives that right, then the 6th A would only apply when not custodial interrogation ie. not very coercive circumstances, and that's not very necessary.
    - Gov't would argue the D waived his 6th A right by waiving his Miranda rights; by having his counsel waive for him; or by having the D waive separately.
    - D would argue can't waive 6th A right just by answering questions a la Berghuis, need to be advised of my rt to counsel under 5 or 6th and then I need to expressly waive.

  - **As a result, if the statement was made in violation of the 6th A, it is excludable, but still can be used for impeachment purposes. Ventris.**

- Priv against self-incrimination in other contexts
  - **Under the 5th A. privilege against self-incrimination, a D must not be compelled to be a witness against himself by putting on testimonial evidence that is likely to be incriminating**
  - Applies at criminal and civil trials, depos, GJ, any proceeding
  - The evidence must be testimonial.
    - Something D writes/speaks; something akin to D testifying against himself - "write down what u wrote on ur demand note"
      - D would argue this was testimonial because it involves a thought process, it's something he has to speak, it's something communicative in nature.
    - Doesn't include photos; lineups; DNA; fingerprints; hair; blood test; telling D "write down 'I want your money punk'"
      - Gov't would argue this is not something we consider testimonial because he is being told what to say/ it's fingerprints, etc.
  - The testimonial statement must be compelled.
    - Cannot allow adverse inferences by fact that D exercised his right to not testify. Don't allow in crim; allow in civ
      - D would argue the govt can't compel him to be a witness against himself..... Cannot use his silence/not taking the stand against him.

        - Tough choices are not compulsion. D had a hard decision to make between the __ and making this statement, but it wasn't being forced. Eg. Admitting to prior sex offenses to be eligible for predator rehab.
        - Compulsion is subpoenaing you; threatening to hold you in contempt if you don't comply.
    - The testimonial statement must also be potentially incriminating
        - D would argue that having him ID himself raises possibility of criminal liability. [can't be civil liab]
        - Gov't argue that compelling D to ID himself is just like Hiibel and that doesn't ordinarily incriminate a person.
            - But ID can be incriminating when the only link needed to catch the D is his ID.

    - **For production of documents, the act of producing is compulsion and is potentially incriminating, but the documents themselves are not privileged. If the D is currently in possession of documents and the gov't subpoenas them, it would violate his 5th A privilege against self-incrimination because the at of production is incriminating, so the gov't would most likely give use immunity as to the production.**
        - Use immunity says that we won't use that evidence, testimony or anything derived from it against you (in production of docs, we wont use that production against you, but we can get you with other evidence). Statutory.
        - Transactional immunity is promising the person not to prosecute him at all for offenses related to the testimony.

        - If the documents are in the possession of an atty, that third person cannot assert D's privilege for him.

- Identifications
    - IDs can be inherently unreliable and suggestive, so there are two constitutional protections.
    - **6th A provides that post formal charges, need to have counsel present for lineups. Wade.**
        - **If the pretrial ID violated the 6th A b/c counsel not present, exclude per se. Gilbert.**
        - **However, a subsequent in-ct ID can still be admitted so long as it wasn't tainted by the out of ct ID. Gov't must prove by clear and convincing evidence that the in ct ID had an independent source. Wade.**
            - This considers the witness's prior opp to observe the criminal act; any discrepancy between the witness's description and actual features; any prior ID lineup of another person; failure to ID someone else before
        - Rationale is counsel will catch all the suggestive things the cops do, there to keep tabs
        - This rule only applies to trial like IDs - lineups, show ups, and thus excludes photo spreads. Kirby.
        - D would argue this was post-formal charges, I was entitled to atty present, not given counsel, thus exclude.

    - **Under DP, if an ID procedure was unnecessarily suggestive and unreliable, it violates due process.**
        - First, the ID procedure must be unnecessarily suggestive.
            - An ID method is suggestive if it basically leads the witness to pick the suspect.
                - Put the D in a lineup of 5 ppl that look completely different than he does
                - Do a show-up with one af-am person in hospital room
                - Showing just one photo is also suggestive
            - It is unnecessary if the cops had the time and opportunity to do it another way. If there were things the cops could have done to make the ID less prejudicial.
            - D would argue that it wasn't nec for the witness to make an ID at all -- and cops pressured the witness to ID someone they may not otherwise have ID'd.

        - **Second, if the procedure is unnecessarily sugg., it can still be admitted if reliable. Brathwaite.**
            - Even if the ID was unnecessarily suggestive, it's admissible so long as it's reliable.
            - Unreliable - likely to have a prejudicial effect.
                - D would argue but look, it seemed like the witness just did what the police wanted. She didn't see his face directly; she saw so many suspects that her memory must have been blurred; months elapsed between the crime and the ID.
            - Reliable - look to the witness's opp to view the suspect at time of crime; degree of attention; accuracy of detain in description; level of certainty - more certain more likely reliable; length of time from crime to ID.
                - Gov't would argue she was sure sure of the ID, she saw many ppl and picked D out of all of them; she spent 30m with the D at the time of the crime; it was sufficiently lighted so she could see his face; she faced him directly; her desription to cops was thorough. She was confident w/ her ID when she finally saw him.
        - Thus if the ID is sufficiently reliable, ADMIT.

- Prosecutorial Discretion
    - Prosecutors have a ton of discretion on who to pros. and what charges; and there are a few limits on that discretion.
        - Prosecutors must consider retribution, deterrence, rehabilitation, danger to society, cost, resources, compassion, person's life, awareness of consequences, etc.
    - A person cannot make the judge order the prosecutor to prosecute a crime; it's totally w/in pros's discretion. SOP.
    - Statutory limits are that prosecutors can only charge crimes that legislature has deemed as a crime
    - There are also administrative limits which are like internal guidelines for what to prosecute
    - Ethical limits say that the prosecutor cannot charge w/o PC.

    - Bill of Attainders says that you can't pass a law that punishes a certain group because the leg. thinks they more guilty of

conduct deserving of punishment.
  - Under the ex poste facto clause, can't have a law that punishes acts which were legal at the time they were committed. Also, can't increase punishment for a crime after it was committed and can't extend the SOL to make something criminal when it wasn't at the time.

  - **One constitutional limit is found in the EP clause. A prosecutor cannot prosecute because of race, religion, or exercise of 1st A, and to challenge this as selective/discriminatory enforcement, D must show that the government acted with discriminatory purpose and it had a discriminatory effect. To prove effect, D must show that the gov't declined to prosecute similarly situated suspects of other races. Wayte / Armstrong**
    - To prove selective enforcement, D must have shown not only that prosecution had effect on those who exercised 1st A rights, but that they had the purpose of chilling 1st A rights.
    - Fact that certain races are being prosecuted more isn't enough in itself; need ev that other races doing same crimes aren't being prosecuted.

  - **Under the DP clause, a prosecutor cannot bring severe charges tantamount to punishment for someone exercising their constitutional rights. Blackledge.**
    - Its ok to make hard bargains but not ok when D exercises a right to appeal, and because of that, prosecutor obtains another indictment charging D w/ felony version of same crime. but this is rare case.

- Grand Jury
  - **The grand jury is a panel of 23 members, their basic function is to screen cases and determine if there is PC to charge.**
  - The purpose of the GJ is to protect citizens from unjust prosecution; to make sure enough ev; to get it right
  - Only the prosecutor and the jurors are there - no judge or D or counsel
  - This is not a right incorporated to the states, instead states use prelim hearings
  - The prosecutor need not put on exculpatory evidence in the GJ, even though they have it, and they are also permitted to present hearsay evidence. Williams, Costello. This is because the function of the GJ is a screening one, not to determine guilt or innocence.

- Preliminary hearings
  - **The prelim is another screening process whereby the judge determines whether there is enough evidence to charge.**
  - No jury; can present witnesses to judge to decide if PC that the D did the crime.

- Bail
  - Under the 8th A, excessive bail shall not be set, but it doesn't mention when bail is required or not.
  - **When considering whether bail should be given, court can consider the D's flight risk and danger to the community. Salerno.**
  - In considering whether D should be given bail, courts look at:
    - Seriousness of the offense - if not serious case, not likely to flee
    - Strength of evidence
    - D's prior criminal record
    - Punishment the D faces
    - D's ties to the community
    - D's character
    - D's financial status
    - Any other relevant info re. whether D is a flight risk or poses a future risk to the community.
  - Gov't would argue D is facing a serious offense, the evidence is very powerful against him so he's likely to flee. The offense is a violent one so he's likely danger to community. He has a prior record so it seems like he may strike again.
  - D would argue not a very serious offense, so not very likely to flee; the evidence against D isn't very strong. D doesn't have much of a record so not likely to be dangerous or repeat a crime.

  - Burden on gov't to prove detention appropriate
  - **Per Salerno, pre trial detention is not punishment, it's regulatory & administrative; civil commitment.**

  - Persons who aren't held on criminal charges may also be detained.
    - Can detain: material witnesses, sexual predators, psych patients, persons subj to removal or deportation proceedings, and individuals designated as enemy combatants.
  - If conditioned grant of bail on submitting DNA samples, could violate 5th A priv. Either stay in jail until trial OR give us ur DNA. That's a tough enough bargain to be compelled.

- Discovery
  - Since there is inequitable access to evidence, there are statutory and constitutional rules governing discovery.
  - **Under the statutory discovery rules, it is a two way street. The Prosecution by statute must give over the D's statements, prior records; tangible evidence; experts reports; and reports of exams and tests. The D must turn over tangible evidence, reports and exams. Fed R. Crim Pro 16(a) & (b).**
  - Per the Jencks Act, after a witness has testified on direct, the non-calling party must move the ct to have the calling

party produce any written statements that are relevant to the testimony.

The statutory requirements under the fed rule exclude the constitutional requirement. The CA disco rule includes the witness statements and the constitutional rule.

- **Under the constitution, the prosecution has a duty to disclose evidence favorable to D that is material to guilt or punishment. Brady/ Giglio.**
  - **Undisclosed evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Bagley**, [based on Strickland].
    - Here, D would argue evidence is material, had it been admitted, it would have changed outcome of case.
    - Gov't arg, like in Brady, the evidence that was wrongfully withheld wouldn't have had an effect on the outcome because [the evidence pertains to a crime that D wasn't sentenced for] [there was already overwhelming evidence showing D's guilt so the evidence wouldn't have made a difference].
    - When D asks for a specific piece of evidence, that makes it more likely material (but not req'd)
    - Need not show the prosecution acted in bad faith in withholding the info, but helps in showing it's material
  - Defense need not request favorable evidence, the constitutional right is automatic
  - A D who was convicted and then finds out the pros withheld mat'l info brings a **Brady challenge**
    - If Brady challenge successful, D gets new trial.
- If either side fails to comply w/ disco rules, ct can give D new trial, can order inspection, can give continuance, can exclude evidence of the side that was withholding, can give jury instructions, etc.
- Arguably, per Connick case in handout, "gov't should be responsble for single act of lone prosecutor" who tried to cheat

- Plea bargaining
  - **Guilty pleas must be knowing, intelligent, and voluntary. When the D faces going to trial and possibly facing death, and instead takes a guilty plea, that does not make the plea involuntary and uncons't coercive. Brady.**
    - D would argue, I only took the plea because I had no choice, it was either plea or death.
    - Gov't arg that tough bargains aren't unconst. There is always tough choice and pros/cons of each option.
  - But plea IS unconst if: the D was threatened, there was misrepresentation as to what the deal was, D's will was overborne by coercion, or there was otherwise improper behavior during the plea process, it was probably unconstitutionally involuntary.
  - **Also, per Fed R Crim Pro 11(b), judge must explain and advise D of his rights; D must waive his rights and admit guilt. There must also be a factual basis for the plea.**
    - The judge must explain and advise D of his rights -- not to plead guilty, to a jury trial, and to be represented by counsel -- and advise D of the nature of the charges and the consequences of guilty plea.
    - Ct will then evaluate D's mental competence to ensure he's mentally competent to plead guilty
  - If the govt violates the plea, then the ct has the pwr to order specific performance or withdraw the plea. Santobello
  - If the D violates the guilty plea, the Pros can go back and charge D, the agreement is null and void (Ricketts.)
  - Guilty pleas are difficult to withdraw.

- Right to counsel during trial
  - **There is a per se right to counsel under the 6th A that is automatic. Gideon v. Wainwright.** This right is so fundamental that it is the only watershed right to applied retroactively. It is also so fundamental that it's incorporated to the states.
    - Before Gideon, the right to counsel was on a case by case basis determined by due process fairness standards. Powell, Betts.
  - **The right to counsel attaches post formal charges in criminal trials only, but only applies in felony and misdo cases with prison time; not in misdos where no jail time was given.**
    - The rt to counsel applies during post charge lineups, prelims, arraignment, interrogations, sentencing, and appeals of right. Does not apply in civil trials, habeas appeals, or parole or probation hearings.
  - If D is charged w a misdo and not given counsel, then he knows he will likely not be given jail. If he was not given counsel and then given jail time, then the D can ask for new trial and he will be given new trial with counsel. Argersinger.
  - Rt to counsel is so crucial that ct has held even enemy combatants who aren't even residents or citizens entitled to atty

- Ineffective Assistance of Counsel
  - **To prove ineffective assistance of counsel, a D must show that counsel's performance was deficient and that such deficient performance actually affected the outcome. Strickland.**
  - **First, a D must show that counsel's actions were deficient, and that counsel made mistakes, falling below reasonable professional level.** ABA standards are a guide.
    - D would argue counsel failed to file the mtn to suppress, and any reasonable atty would have known to do that. Also, he fell below the standard of professional care when he ___.
    - Gov't would argue, lawyering is not a science and his performance was all part of a trial strategy

        - In Strickland, atty didn't present at death penalty hearing because he was hoping that judge's compassion and seeing D's remorse/ taking responsibility for his actions would spare his life.
        - If there's a plausible argument for why it's part of a trial strategy, it doesn't meet this error standard.
    - **If the D were to succeed, the D must also show that the mistakes actually affected the outcome. The D must say that there is a reas probability that, but for counsel's unprofessional errors, the result would have been different.**
        - When there is overwhelming evidence against D tending to prove guilt on a charge -- like eyewitness, clearly inculpatory evidence -- this ineffective assistance of counsel argument will likely fail.
        - D would argue if this evidence were admitted, the outcome would have been different.
        - Gov't would argue there was such overwhelming evidence tending to show guilt, the evidence didn't matter.

    - Courts often skip the first step to not closely scrutinize atty lawyering, and to not discourage ppl from becoming defense counsel.
    - Very hard for Ds to win in this argument
    - Though we don't presume prejudice when the D raises some of counsel's mistakes, assistance of counsel is **per se ineffective if:**
        - **No counsel at all; state interferes with counsel; Counsel with conflict of interest; or Counsel who does nothing. (Cronic)**

    - There are different understandings of the 6th A's right to assistance of counsel. Majority of the court understands this to mean -- did we get the right outcome? Did we catch the right guy? A minority of the court understands it to mean -- did D get a fair trial? Was D's interests vigorously and conscientiously advocated? This is more of a DP standard.

- Right to self representation
    - **D in a criminal trial has a constitutional right to proceed w/o counsel when he voluntarily and intelligently elects to do so. Faretta.**
        - Though not expressly in the constitution, right to self-rep is implicit in the language of the 6th "assistance of counsel") and the history (we've always allowed it).

    - Ct will then evaluate D's mental competence to ensure he's mentally competent to represent himself -- and competence needs to be just above that required for competence to stand trial. Indiana v. Edwards

- Right to Jury trials
    - **Under the 6th A., D has a right to a jury trial depending on the possible time he faces. It depends on how serious the offense is. If charged with petty offense (crime carrying less than 6mo sentence), you are not afforded rt to jury trial.**
        - Even if you are charged with many petty offenses. The rationale is that we think you need the community's input in more serious offenses.
        - The right to jury trial is based on what time you are facing, NOT what time you already got (as per right to counsel)
        - Petty offenses could arguably be serious enough to warrant community input if --
            - Facing losing your license; have to register as sex offender; can argue, but Ct hasn't accepted them yet.
    - D can waive right to jury, so long as the gov't agrees.
    - **Purpose of the jury trial is to prevent oppression by the gov't, providing an accused w/ the right to be tried by a jury of his peers as a safeguard against the corrupt or overzealous prosecutor against the compliant, biased, or eccentric judge. Duncan.**

    - **Jury need not be 12 members; it can consist of as low as 6 members. 6 members is sufficient to get a good cross-section of the community and a full examination of the case. Williams v. FL. Cannot be lower than 6. Ballew.**
    - **Unanimity of jury not constitutionally required (Apodaca), but may need unanimity when small, 6 person jury. Burch.**

- Jury Selection
    - If D wanted to challenge the jury selection on the venire, he may do so under the 6th A. D has standing to challenge venire process even if not member of the group excluded.
    - **Violates the 6th Amendment to have discriminatory venire selection practices based on gender, ethnicity, race. Taylor v. LA.**
        - The sexes are not fungible; need to have fair chance at having both. No requirement that panel be equal men and women; just need to give it a fair shot.
        - 6th A. doesn't prohibit exclusion of ppl for good reason - can exclude convicted felons; noncitizens.

    - **If D wanted to challenge the discriminatory use of peremptory challenges, he may do so under the EP clause. Batson.**
        - First, D need not be the same race as those excluded to challenge under EP.
        - For a Batson challenge, D must prove that there is a pattern of discriminatory challenges.
            - Here, D would say, Prosecution peremptory challenges on everyone in this case who is black.
        - Once D shows this , the burden shifts to the gov't for a race-neutral reason.
            - The Pros would say that he didn't exercise the peremptory because of race, he kicked him off because he looked nervous, had trouble paying attention, I didn't like his shoes.

        - Then, the court would decide on the credibility of the explanation.
    - In CA, these are called Wheeler challenges

    - **Marshall's touching concurrence in Batson said that this EP approach is a good standard but it will not end the racial discrimination. He proposed eliminating peremptory challenges completely, because the discretion they contain is too powerful and too volatile.**

    - Batson's EP approach applies to civil cases; applies to all types of discrimination (questionable whether it applies to language discrimination - bc that's a proxy for race or ethnicity but also legitimate bc we wouldn't want a native speaker in the jury who would not listen to the translation & instead translate for himself).
    - Remedy for Batson violation is to get a new venire; or if trial already completed, get a retrial.

- Pretrial publicity
    - The press has a 1st A right to access court proceedings; but pretrial media would also influence potential jurors.
    - **Mere knowledge or exposure to pretrial publicity is not sufficient to raise presumption that D not given fair trial; must prove juror bias and inability to be fair. Skilling.**
    - During trial, in order to mitigate the problem, ct can: delay trial, voire dire, sequester, give them lectures and detailed instructions, change venue.
        - If there is prejudicial effect on juror because of pretrial publicity, enough to disqualify them during viore dire.
    - A D would argue for a new trial because the jury was prejudiced from pretrial publicity. Court will review and if successful, D can get a new trial.

- Sentencing
    - There are various types of sentences that can be imposed for crimes. Many of them are set out by the legislature. Other times it's up to the judge to decide, and there are sentencing guidelines.
    - There are constitutional limits on sentencing, such as the EP clause (if discriminatory harsher sentences on one race); ex post facto (if make sentence harsher after the fact); due process (right to be present during your sentencing); and the 8th A (C&U).
    - **Per Solem, a sentence violates the 8th A when it's disproportionate to the crime.**
        - This considers: gravity of the offense, with deference ot the legislature's choice in making crime with corresponding sentence (most important element in Harmelin); compared penalty to other crimes in same jx; and compare the penalty for the same crime in other jxs.
        - D would argue the offense is not very grave; sentence is much higher than what most ppl get for more egregious harms in this jx; and more than what other ppl get in other jxs for the same crime.
        - Gov't would argue that the crime is a very serious one; we give lots of deference to legislature's jmt in setting out sentences.
    - Majority USSC believes C&U is about proportionality; Scalia believes that the 8th A's proscription against C&U punishment is about the manner of punishment -- is it inhumane, torture? No one really follows this view.

    - **3-strikes laws are not unconstitutional. Ewing.**

- Double Jeopardy
    - **Under double jeopardy, a person cannot be subject to trial or punishment for the same offense more than once.**
    - Jeopardy attaches when the jury is sworn in for a jury trial, and when the first witness is called for a bench trial.

    - If D is convicted, they can't convict D again for the same offense; and if D is acquitted, they can't try D again for the same offense. If they punish D for an offense, they can't punish D multiple times for the same offense.
        - If there has been a JNOV by the judge, retrial is OK
        - If D's case was dismissed pretrial, then gov't can go after him again bc no jeopardy attached
        - If good faith bona fide mistrial, can prosecute again
        - If hung jury, can prosecute again
        - If D appeals his conviction and gets a new trial, that is OK because D asked for a new trial
            - Eg. Convicted, on appeal you argue that you didn't get brady evidence, if successful, get new trial
        - D can be charged for the same crime under state and fed laws, they are separate sovereigns. In CA, however, the state cannot try the D after the feds have already tried D.

        - However, civil penalties and civil commitment is NOT PUNISHMENT

    - **Same offense is determined by the Blockburger test which states that same offense means same elements.**