Criminal Procedure Outline

INTRODUCTION

- Crim pro is all about what are the limits to the government's authority to investigate & prosecute crimes? It's a balance between state power to gather info & investigate and the individual's right to be free of state intrusion.
    - Rules of crim pro are for the state to follow & these limits on the state are set by the 4th, 5th, 6th Amendments & the Due Process Clause.

- Criminal procedure bears the mark of 3 significant historical events:
    (1) Race-BoR was not designed w/ American race relations in mind, it was designed to protect political thought. In 1960's Warren court took on the question of the role of the criminal system in relationship to race. These rules are not about race on their face, they are neutral, but the facts of these cases were racially charged. SC used these cases to create rules of crim pro for everyone, so in that way, race has left its mark on all of crim pro even though the individual rules themselves say nothing about race.
    (2) Terrorism-War on terror has changed how people understand racial profiling. Fear & national security challenges have changed how the public & courts understand the balances between individual liberty & law enforcement needs.
    (3) Technology-Two issues here:
        (a) Government has new technologies available to get evidence from you so 4th Amendment is being stretched to its limit here.
        (b) The amount of information that non-governmental actors have about you. Rules of crim pro only constrain government actors, not private entities like facebook. When private entities have all that info about you, how much of the that can the government use to prosecute you.

DUE PROCESS

- 14th Amendment DPC: *Nor shall any state deprive a person of life, liberty, or property without due process of law.*

- Due Process is the **floor beneath which no state action can fall**. DP kicks in when none of the other Amendments apply. Due Process = Fundamental Fairness.

I. Four Interpretations of Due Process

(1) DP as Rule of Law *(Hurtado)*- DP is law itself & the state has the power to make law but those powers are not absolute. **Law must hear before it condemns** (law is not just b/c you can). DP is a general guarantee (rule of law) that you will be governed by law, not by capricious & arbitrary government power; they are general rules that apply to everyone in the same way, w/ hearings to decide whether you did it or not.
(2) DP as the Bill of Rights (incorporate 4th, 5th, 6th Amendments)- Anything that is in the Bill of Rights is necessary to provide due process (i.e. would incorporate grand jury

indictment requirement to the states). BoR is a species of due process, it is not something that is exclusive of DP. This is Harlan's view.
(3) DP as Guarantee of Accuracy (accurate *procedures* to prevent convictions of innocent D's)- DP requires a neutral adjudication that is free of racial bias in order to generate right outcomes.
(4) DP as Fundamental Fairness- This one essentially says the govt can't do gross things to you. Stomach pumping in *Rochin* is not fundamental fairness & violates DP b/c the state should not be doing that; but in *Darden*, prosecutor calling the D an animal & saying he should be on a leash in front of the jury did not violate fundamental fairness.

- ***Hurtado*:** D claims states must use grand jury indictment to charge felonies (not by information), just like in federal courts, or else DP is violated. Court says no, the state charging you by information instead of grand jury is not a DP violation b/c 5th Amend grand jury indictment requirement is not incorporated to apply to the states. DP just guarantees you rules of law applied to everyone in the same way & a hearing; the grand jury indictment is not part of that requirement to guarantee DP.

II. Incorporation

- Incorporation asks whether a right is so **fundamental to our principles of liberty & justice, that lie at the basis of our civil & political institutions (system of criminal justice), that we think it qualifies as DP** & should be incorporated through the 14th Amend to the states? B/c 14th Amend says the States have to provide due process, if the BoR is a type of DP then the states have to provide it. The test for incorporation looks to: (1) History & Tradition; (2) Current Practice; & (3) American customs.

- **Duncan v. Louisiana:** Black man is being tried by a white southern judge & he wants a jury in hopes of getting black jurors & less bias. Is the right to a jury trial a species of due process? Yes. Court looks to: **(1) history/tradition** (we've had jury trials forever); **(2) current practice** (almost all the states provide jury trials; & **(3) American customs** (US has always used juries), to say that this is fundamental.

- **Legal Takeaways:**
(1) Indictment for felonies only by grand jury is NOT a species of DP (not incorporated to states).

(2) Right to jury trial IS a species of DP.
  - **Exception Petty Offenses**: Certain petty offenses are **not subject to the right to a jury trial. Anything over <u>6 months</u> is a serious crime & gives you the right to a jury trial**. Right to jury trial is triggered by the **maximum potential sentence you could have gotten, NOT the sentence you actually got.**
  - *Duncan* is precedent saying anything jailable for 2 years is considered a serious crime.

III. Competence (Is the D competent to stand trial?)

- A defendant must be competent in order to stand trial or else DP is violated.

- **Definition of Competence***(Dusky)*: D must do BOTH of the following, if he can't do either one then he is incompetent:
  (1) Can the D actually understand the nature of the proceeding against him; **AND**
  (2) Can he advise and work with his lawyer.

- Specifics of the Rule:
  (a) Hearing- If you might be incompetent, you have a right to a hearing. They can't just try you. It is a violation of DP to not hear the question of whether D is competent or not. *Drope*

  (b) No waiver- Can't rely on the fact that D waived his right to a competency hearing (which would decide whether he is incompetent or not) b/c we're afraid he may be incompetent. *Pate*

  (c) Burden of Proof- If you have a competency hearing, the **burden is on the D to prove by preponderance of the evidence (more likely than not) that he is incompetent.** *Medina.*
    - Can NOT use clear & convincing standard as the burden of proof on the D to show he is incompetent b/c that violates DP. *Cooper.*

  (d) Forced Medication- Forced medication to make you competent to stand trial does not violate DP as long as the court gives reasons for doing it.
    - ***Riggins-*** substantively the forced medication itself does not violate DP it was the way the govt medicated this D specifically that violated DP b/c it gave no indication of its rationale as to why they forcibly medicated him (deprivation of liberty). They had to justify it, had they given reasons for doing it, it would have been okay.
    - ***Sell-*** lower court gave reasons for medicating D & Court said that was okay, not a violation of DP.

VI. Residual Due Process

- Residual due process refers to what is left of the DPC apart from the BoR (it is stand alone DP). Answer is not much. We've defined things that violate DP very narrowly, and that is why it is okay for the court to adopt the Patterson test to determine whether something violates stand alone DP or not (since the Patterson test is narrow & deferential & only kicks in when the right is fundamental). If we thought stand alone DP was bigger/ broader we would use the Matthews balancing test (risk of erroneous deprivation) instead

- **Use Patterson Test to Determine Whether Something Violates Stand Alone DP.** Test says a state procedure does not violate DP unless it offends some principle of justice so rooted in our traditions as to be ranked fundamental (shock the conscience). Looks at:
  (1) History; and
  (2) Fundamental Fairness-is the violation shocking to our sense of justice.

- Patterson test is: **(a)** Narrow, **(b)** Hard test to violate & **(c)** Deferential to state legislature. Only under rare circumstances will the court tell a state they can't do something (the heart of residual DP - it has very few restraints).

- ***Medina v. California*** Is shifting the BoP on the D to show that he is incompetent a violation of DP? No. Putting the preponderance BoP on D to prove incompetence does not offend a principle of justice so rooted in tradition as to be ranked fundamental b/c this has always been done in history. Doctors all disagree on whether D is competent or not & issue is which test to use to determine whether the rule (the rule being preponderance BoP on D) violates stand alone DP or not. Court uses Patterson Test & says it should be left to the states b/c they have more expertise in matters of crim pro & it has always been done that way since the common law.

  (i) Preponderance standard (more likely than not) is anything that will make the scale tip one way or the other, so D has to prove that it is more likely than not that he is incompetent. That means if there is equal chance that he is or isn't then he goes to trial. This allocation of BoP on D **will affect the outcome only in a narrow class of cases where the evidence is in equipoise** (where the evidence that he is competent is equal to the evidence that he is incompetent). **If evidence is in equipoise, the state wins b/c burden is on D to get out of equipoise (he bears the risk of error b/c he has to get out of equipoise).** DP test is narrow, deferential, & looking only at fundamentals, & the class of D's affected by this rule is narrow.

  (ii) Clear & convincing is more than a preponderance & that violates DP b/c here **D has already proven that it is more likely than not (through the definition of the preponderance standard) that he is incompetent, & it violates DP to try someone who is incompetent.** So this affects a different class of D's.

  -- 'Narrow class of cases' means: **When you look at the nature of the people in the class it is not fundamentally unfair to try them, not b/c it's a small class but b/c its a substantive conclusion that we don't have enough evidence to say they are incompetent (the risk is so small).** It is about tolerating the potential for mistake. This is a acceptable risk to take b/c DPC does not require a state to adopt something that is most favorable & least risky to the D. The Constitution does not mandate perfection & there is no guarantee for an error free prosecution.

V. Basic Framework of DP Today (bare minimum of DP that any citizen who is detained gets)

(1) Notice of the factual basis- (aka evidence) of why the government thinks you are an enemy combatant.

(2) Fair opportunity to rebut- A hearing

(3) Neutral decision maker- It does not have to be a judge, it can be a military tribunal.

(4) Counsel

• If the govt does not provide these four things they have to let the detainee go.

- ***Hamdi:*** He is not classified as a criminal so he does not get the bundle of rights through the BoR that all criminal D's get. All he is entitled to is basic due process (pure DP). Sole evidentiary support the govt has provided to the court for Hamdi's detention is a report by a govt official, it is third party hearsay. Court uses Matthews balancing test to balance the government interest in national security & detaining combatants & Hamdi's interest in not being locked up until war on terror is over. Regarding the risk of erroneous deprivation, it asks what is the risk that we are going to get the enemy combatant determination wrong---that is how it intersects with the DP inquiry). After this balancing, the court comes up with the four factors above that must be provided to the D to not violate due process. Hamdi just opens the door to more balancing in things that are not criminal, but criminal like (this will apply to hybrid proceedings like military stuff).

- Matthews Balancing Test looks at:
  (1) Government's interest
  (2) Private interest that will be affected by the govt action (i.e., the detainee's interest in not being locked up).
  (3) Risk of erroneous deprivation (we do not want too high of a risk of erroneous deprivation).

- Matthews test is used in civil, not criminal, cases b/c in criminal cases we defer to the state legislature.

SIXTH AMENDMENT (RIGHT TO COUNSEL)

I. Right to Counsel

(A) Early History & Development of RTC

- Start w/ a standard (Powell), then a broad rule (Gideon), then pull back (Scott, Argrsingr)

- ***Powell*****:** D's were young black men who were illiterate, it was a racially charged case, & they faced the death penalty. Created a special circumstances test saying effective assistance of counsel must be provided in capital cases if D's are unable to represent themselves adequately. D could not defend himself w/o a lawyer b/c he is ignorant or feeble minded or illiterate, so DP requires giving him a lawyer under these special circ's.

- ***Gideon:*** D charged w/ felony in state court asks for counsel to be appointed & state denies his request. D sentenced to 5 years in jail. Court holds 6th Amendment RTC is **fundamental & incorporates it to the states via 14th Amend DPC.** RTC is

fundamental b/c in our adversarial system the govt spends many resources on prosecuting, so getting a lawyer to defend you is a necessity not a luxury. **It's a protection against govt overreaching, anyone haled into court that is too poor to hire a lawyer cannot be assured a <u>fair trial</u> unless counsel is provided for him**.

- Rationale rests on giving D a **<u>FAIR TRIAL</u>** (a fair trial is what justifies the rule that we have to give criminal D's lawyers).
- **Rights v. Standards:** *Gideon* seems to announce a rule, that any criminal D must get a lawyer. This is not a standard b/c it is not a judgement call it's a per se rule. But court will later limit this rule w/ caveats.

- ***Argersinger:*** D charged w/ carrying concealed weapon & max sentence is 6 months. He actually got 90 days in jail & he got no lawyer. Prosecution argues he wasn't entitled to a jury trial for that sentence so he shouldn't get a lawyer either. Court says no, **RTC should not be analogized w/ right to a jury trial** b/c if you get no jury trial you still get a trial before a neutral arbitrator, but if you get no lawyer, you get nothing.
  - Legal questions involved in misdemeanors are no less complex than in felonies so you still might need a lawyer **to ensure a <u>fair trial</u>**.
  - No person may be imprisoned for any offense unless he is represented by counsel (**no lawyer=no jail**, if you didn't get a lawyer you can't go to jail)

- ***Scott:*** D convicted of theft & facing a max penalty of 1 year in jail but he actually got a fine. He would have been entitled to a jury trial b/c his potential sentence was 1 year in jail. D did not have a lawyer & that's ok b/c he didnt get actual imprisonment he got fined
  - Actual imprisonment is the line defining the constitutional right to appointment of counsel b/c **actual imprisonment is *different in kind*** from other punishments.
  - Rule says if you didn't actually go to jail, then back at your trial that already happened, you did not have the right to counsel in the first place.

- **Hypo-Practical Difference Between Argersinger & Scott:** D is facing one year & his actual sentence is a million dollar fine. Under *Scott* he is not entitled to a lawyer b/c he didn't go to jail. Under *Argersinger & Gideon*, we can argue he is entitled to counsel b/c those cases entitle D to protection against an overreaching government & a shot at a fair trial (a million dollar sentence is not a shot at a fair trial). When the consequence is so serious, it becomes really important (so incarceration is not the only serious thing, for example, you might have to register as a sex offender, be deported or fay a huge fine).***

(B) Probation & Prior Uncounseled Convictions

- **Probation:** Probation is a period of court supervision w/ certain terms that you have to comply by. If you violate the term of your probation you can be incarcerated, so it is really a conditional/suspended sentence.
  - ***Alabama v. Shelton:*** D got a 30 day suspended sentence which means they are telling you in advance, how long you will go to jail, if you violate the probation

(like a threat of incarceration). Court holds they **can NOT sentence you to probation if you did not have a lawyer.** Reasoning is that it would be unfair to the D b/c if he violates it he is going to jail & he's being jailed for the original offense that he was charged with, and he never got a lawyer for.

- ***Nichols:*** D had a prior DUI & now he gets a new drug offense. The old DUI bumped him up from a category 2 to 3 under federal sentencing guidelines & enhanced his sentence to jail. The old DUI was an uncounseled conviction, so he argues *Scott* says if it was uncounseled he can't be put in jail. Court says no, it's okay (this is different from *Shelton*) **b/c he is getting the sentence for the new drug offense**, not the old DUI. He is not being incarcerated for the DUI here.
    - But if his old DUI were improperly uncounseled (or if he had gone to jail for it), then we couldn't use it to enhance the drug offense.

- **Legal Takeaways**:
  (1) Only actual jail time (even one day) triggers the right to counsel, whereas it is the potential of jail time that triggers the right to a jury trial (i.e., even if you didn't get a jury trial, you still get a right to counsel, even in petty cases where people are incarcerated as long as you were actually incarcerated).
  (2) Can NOT sentence you to probation if you did not have a lawyer (i.e., if you want to threaten someone with incarceration you have to give them a lawyer).
  (3) Can use a prior uncounseled conviction (as long as it was properly uncounseled) **to enhance the sentence** for a new crime resulting in jail time.

(C) Waiver

- D can waive his right to counsel (i.e., prosecutor says if you plead guilty I'll give you probation & you can walk out today or else you have to wait in jail until counsel is appointed). So even if someone goes to jail & doesn't have a lawyer, as long as he waived his RTC properly, that conviction is constitutional.

- Proper waiver must be **knowing, intelligent, and voluntary.**

- Three possible scenarios:
  (1) D is denied RTC that he is entitled to or he improperly waives his RTC = Conviction/prison sentence is unconstitutional.
  (2) RTC is properly waived = Conviction/sentence is constitutional.
  (3) D had no RTC in the first place = Conviction/sentence is constitutional, no need for waiver.

(D) When Does the 6th Amendment RTC Attach

- The fact that your RTC has attached does not mean you have the right to have a lawyer with you at that moment. The right to presence of counsel is different from whether the 6th Amend has been triggered in some way. RTC attaching means the 6th Amendment is

in play & if the government wants to prosecute you, they have to give you counsel (but it doesn't mean right at that moment they have to give you a lawyer).

- Technically the 6th Amend **begins when the adversarial process begins & it ends at sentencing.** So before the start of the adversarial process, the govt is only governed by due process (you are only protected by DP); similarly, after sentencing, when the 6th Amend no longer applies, the only thing that protects you is due process. That is what we mean by residual DPC, it is what's left when nothing else is there.

- **RTC Attachment & Critical Stage RULE:**
  Part 1 Attachment: 6th Amend RTC attaches in any criminal prosecution when the adversarial process begins & ends w/ sentencing. This usually happens at an initial appearance where you learn the charges against you & your liberty is curtailed some way
  Characteristics to mark the beginning of the adversarial process are *(Rothgery)***:**
  (1) Appearance before a judicial officer (separation of powers & judicial oversight over the executive).
  (2) First learn of the charges against you (so there are actual charges against you). **But you do not necessarily have to have a prosecutor for the adversarial process to begin.**
  (3) Subject to restraints on his liberty (i.e., b/c they set bail). Bail can be a restraint on your liberty.

  - What does NOT mark start of the adversarial process (no RTC attach yet)?
    (1) Probable Cause Hearing all by itself is NOT the beginning of the adversarial process. A PC hearing is simply a judicial check on the arresting officer's determination that there was enough PC to arrest you (separation of powers). It's just about whether they should keep you locked up or not, it does not mean your case has begun, & the govt has not committed to prosecuting you yet.
    (2) Bail Hearing all by itself is NOT the beginning of the adversarial process. Being detained w/o bail is NOT a form of punishment (b/c you may not be charged w/ a crime yet), so we are not punishing you here. It's about whether we should permit the govt to keep you detained or release you on bail?*Rothgery* didnt answer the question of whether bail all by itself triggers the adversarial process.

  Part 2 Critical Stage: Once attachment occurs, the accused at least is entitled to the presence of appointed counsel (physically get to have a lawyer present) during any ***critical stage*** of the post-attachment proceedings; what makes a stage critical is what show's the need for counsel's presence.
    - The RTC attachment makes possible the existence of a critical stage (example: a lineup is a critical stage ***IF*** *it happens after the adversarial process has begun*). But a PC hearing is not a critical stage.

- ***Rothgery:*** D was arrested & had initial appearance before a magistrate, bail was set & he was committed to jail but released after posting bond. He had no lawyer. In January, he was indicted by a grand jury, rearrested & bail increased to amount he couldn't pay, so he spent 3 weeks in jail. He was finally appointed a lawyer who got his bail reduced & charges dropped b/c he was not a felon. Court holds RTC attaches at the initial appearance before a judicial officer.

(E) Lineups

- Problem w/ lineups is unreliability & the possibility of suggestion. At trial, we don't want witnesses to tell us who they saw at the lineup, we want them to tell us who they saw at the crime. But who they saw at lineup sticks w/ them & determines what they say at trial.

- Lineups are governed by different constitutional rules depending on when they happen:
  (i) Lineup happens before the adversarial process begins = only DP applies.
  (ii) Lineup happens after the adversarial process has begun = 6th Amend governs.

- **Post-attachment Lineup Rule (6th Amend)-*Gilbert* Per Se Inadmissible**:
  Gilbert holds, post-attachment, if the government has a lineup or showup & counsel is not present, that violates the 6th Amendment & that lineup or showup is inadmissible & the government can't use it at trial. **The lineup ID is per se inadmissible (Gilbert rule).**
  - BUT problem is that during trial, the witness will identify the D again in court & just not mention the lineup to the jury. The in court ID will be admissible **(independent source doctrine)** as long as there is **clear & convincing evidence that the in court ID is independent of the lineup ID** (identifying D from an independent source, not identifying him from seeing him at the lineup). Lineup ID won't taint the in court ID.

  - **If it's post-attachment, then the lineup is a critical stage.** ***Wade*** says that post-attachment, whatever happens at lineups predetermines what will happen at trial (what will be said at trial) so this is a ***critical stage*** **of the adversarial process & to guarantee a *fair trial* we must give D a lawyer at this stage.** The lineup is a critical stage ***b/c it impacts the fairness of the trial.***

- **Pre-attachment Lineup Rule (DP)-Unnecessarily Suggestive Standard:** ***(Manson)***
  Pre-attachment, since you don't have a right to counsel & only have DP, it is governed by an **unnecessarily suggestive standard** (it's a standard not a rule). Ask, **was the lineup so unnecessarily suggestive & unreliable that we think it led to an improper ID**?
  ANS: **Reliability is the linchpin** in determining the admissibility of ID testimony. Factors to consider: (1) opportunity to view criminal at time of crime, (2) witnesses degree of attention, (3) accuracy of his prior description, (4) level of certainty demonstrated at the lineup & (5) the time between the crime & lineup confrontation. It's hard standard to meet & courts rarely find a lineup unreliable.

- **Pre-Indictment Lineups *(Kirby):*** No RTC for pre-indictment lineups b/c. RTC attaches after adversary judicial proceedings begin & at this point it is still routine police investigation. Rationale for making this distinction is that once adversarial process begins the state commits itself to prosecuting you & that's when you need help. It is then that the D finds himself faced w/ the prosecutorial forces of organized society & immersed in the intricacies of substantive & procedural criminal law.

- **Photo Arrays:** No RTC for post-attachment photo array identification. **(*Ash)***: A post-attachment photo array ID in the police station is not so much like a lineup that the D gets to have a lawyer there to observe it. It would be injecting counsel into routine investigation techniques, the D isn't even there, the RTC does not extend that far.

- **Preliminary Hearing ID**: RTC applies to ID's that happen at your preliminary hearing. ***(Moore):*** D was identified by a witness during his preliminary hearing where he was being confronted w/ charges against him. Court says his RTC had already attached at this point & the uncounseled ID infringed on his constitutional right b/c the prosecution was already commenced to prosecuting him when the victim's complaint was filed in court.

- **New Case Discussed in Class**: Rule only applies when the lineup or showup is done on purpose by the police for the purposes of identification. Rule does not apply if the showup happens inadvertently (i.e., police holding a black man outside victims window, she looks out & sees him & identifies him- that's not a formal showup or lineup).

(F) When Does RTC End (i.e., Appeals)

- Once D has been sentenced, the 6th Amend no longer applies & no more 6th Amend RTC. So any right to counsel that you have on appeal flows from the DPC,not 6th Amend

- **There is no constitutional right to an appeal at all.** State & federal govts create appellate courts by statute, but they are not required to. **But, once they do, it has to conform to due process**. Can't create an appellate system only for rich people
    - ***Griffin***-can't require a transcript that people have to pay for in order to file an appeal b/c then indigent D's can't appeal & are deprived of fundamental fairness & it violates EP.

- **First Appeal as of Right:** If you lose at trial you are always entitled to a first appeal that the court must look at. Having a lawyer here can make all the difference in the world.
    - ***Douglas***-state has to pay for an appellate lawyer b/c intermediate appellate court is for error checking & if an indigent D can't get a lawyer then he is effectively barred from the appellate court, so it violates DP & EP.

- **Discretionary Appeals *(Ross):*** No RTC for discretionary appeals b/c they are very different from first appeals as of right. First appeals are for error checking, they will be the first time an appellate attorney looks at the record. Here, no more DP or EP concerns.

Plus higher appellate courts take cases for reasons of public policy, they are not for fairness or error checking.

- ***Halbert v. Michigan:*** Michigan changes the law to say that when a D pleads guilty, **instead of giving them a first appeal as of right, they are going to make their first appeal as of right discretionary.** Michigan is allowed to do this (to make it discretionary); BUT the problem is that they also stopped providing lawyers to these D's whose appeals were now discretionary. **Court holds that Michigan cannot do that; even if it is discretionary, you have to give them a lawyer.**
    - **Rationale:** Two reasons for court's rationale requiring a lawyer for this type of discretionary appeal (what makes this case more like "*Douglas* first appeal as of right" & not like the "*Ross* discretionary appeal"):
        (1) It is a merit based adjudication: Even though it is discretionary, the intermediate appellate court is still making a merit determination, so they are error checking (and that is like *Douglas*). DP concerns are at height here still b/c its the first time someone is error checking. More like *Douglas* then *Ross* b/c the function of appellate court is error checking, did they get it wrong?
        (2) Indigent D's are ill equipped to represent themselves: This is the first time anyone is checking the case to make sure it was done right, so it is hard for a layperson to do this. Whereas if this was an appeal to a supreme court then it would not be your first crack at an appeal, you would have a prior appellate brief to look at, etc.
    - **Note:** Michigan is allowed to give people different procedures depending on whether they lost at trial or they pled guilty.

II. Ineffective Assistance of Counsel

(A) Foundational Rules

- Purpose of effective assistance of counsel is to ensure a fair trial.

- ***Strickland* Two Prong Test for Ineffective Assistance of Counsel:**
    (1) Deficiency: Attorney performed in a **deficient** manner; **AND**
        • Attorney was so deficient that you were not really represented b/c he was not functioning as counsel.
        • Its **objective standard of reasonableness** under prevailing professional norms (did it fall below standard of reasonable professional competence?)
        • Give deference to counsel's strategic/tactical choices--deferential.
        • No 20/20 hindsight, evaluate it from the lawyer's shoes at that time.

    (2) Prejudice: That deficiency **prejudiced** the outcome (meaning that but for that deficiency there is a reasonable probability of a difference outcome).
        • Counsel's error was so serious as to deprive D of a <u>fair trial.</u> **A fair trial is one whose result is reliable.**

• D does not have to show counsel's behavior more likely than not (preponderance of the evidence) prejudiced him. **D must show there is a <u>reasonable probability</u> that the *outcome would have been different.***

• Prejudice is very hard to show. It depends on the case, meaning where there is a lot of overwhelming evidence of guilt & you look really really guilty, it is going to be very hard to show prejudice even if counsel was radically deficient (so you don't even get to the deficiency prong there). If you look really really guilty, it doesn't matter that your lawyer sucked.

- ***Strickland:*** D pled guilty over advice of counsel (so no guilt phase trial) & went straight to sentencing phase & got the death penalty. Attorney did not put on witnesses or show mitigating circumstances. Counsel did argue for no death penalty by saying D confessed voluntarily & was under stress. Court holds he was NOT deficient & not prejudicial.

- *Strickland* tells us that doing the following IS enough to make you efficient:
    - Speak to the mother and wife on the phone but never meet with them.
    - Did not bring any character witnesses.
    - Didn't request psychiatric exam.
    - Got the rap sheet excluded.
    - Argued that D should not get the death penalty b/c he confessed.

- *Rompilla* tells us that even if you do lots of investigative work, **if you do not look at the file that you know is going to be used then you ARE deficient.**

- ***Rompilla:*** Benchmark example for what is not enough. Attorneys failed to look into the record of D's prior convictions for mitigating circumstances in sentencing. Instead they talked to him, family members, & got him a psych evaluation. Court holds failure to look at D's old file was deficient (b/c they knew prosecution was going to use it) & prejudicial (b/c if they looked in the file they would've found this stuff under reasonable probability)

- **Ask, is something more like Strickland or Rompilla:** In *Strickland,* counsel did some things but not much & court said that is not deficient. By contrast, in *Rompilla,* lawyers hire psych experts, etc, but court says they were deficient b/c the thing they did not do (look in the file) was **unreasonable.** There was a reasonable probability that they would have found this stuff & it would have changed the jury's mind.

- **Exceptions**: There are some categories of cases that are exempted from the requirement that D show prejudice as a result of counsel's performance to win on his IAC claim (these are presumptively prejudicial):

    (1) Actual or constructive denial of counsel (*Gideon or Powell)*-meaning D never actually got a lawyer or the lawyer couldn't function under the circumstances b/c he was appointed the night before trial.

(2) Certain kinds of state interference with counsel (i.e., refusing to allow counsel to meet with D during overnight recess).
(3) Attorney had an actual conflict of interest *(Cuyler*)
(4) Lawyer failed to subject the governments case to any type of meaningful adversarial testing. (*Cronic)*. But scope of this one is very small as set out in *Bell*

- ***Bell*** says the attorney's failure to test the prosecutor's case must be **complete,** meaning not just only on certain points (so you can't just say he did not do enough). Translation = means you really need a lump of a lawyer to trigger *Cronic.*

- ***Cronic***:D's counsel quit before start of trial & young real estate lawyer was appointed to represent him. Court held there is no inference of constitutional ineffectiveness of counsel on these facts. It is okay to presume prejudice against D in certain cases where he has no counsel or where the attorney is appointed the night before start of trial; but in other cases, as long as there is adversarial testing, then there is no prejudice.
    - So *Cronic* is an exception to *Strickland* where you do not have to prove the two prongs in these subsets of cases. If you cannot get *Cronic* to apply to your case, then *Strickland* still applies & you have to show the 2 prongs.

(B) How Does "Right to a Fair Trial" Affect IAC?

- **D is entitled to a fair trial, he is not entitled to the best trial for himself.**

- **Attorney not allowing D to perjur does not deprive D of fair trial.**
  Nix: D wants to commit perjury on the stand but lawyer told him he can't & he would withdraw if D did. D does not perjur & is found guilty. D sues his lawyer for IAC. Court holds that is not IAC b/c D has no right to use false evidence so he could not have been prejudiced by the lawyer's conduct. 6th Amend guarantees you a fair trial, it does not guarantee you a right to commit perjury. Right to a fair trial was preserved here b/c **a fair trial is not necessarily the best trial for the D**, it is one that is conducted properly, ethically, according to law, etc (even if those ethical rules hurt the D). That's what court means by saying D was not prejudiced here (if D had testified differently the outcome probably would be different & that is enough to show prejudice on paper BUT that is not just what the prejudice prong is about).
    - But this might have been deficient attorney work b/c you breach attorney client confidentiality & privilege & you are prejudging the facts. It is not attorney's job to decide guilt, his job is to be an advocate. Takeaway: On a slightly harder set of facts, this could be ineffective assistance.

- **D is not entitled to a windfall.**
  Lockhart: At D's sentencing, court does double counting of aggravating circumstances & attorney doesn't object. At the time, 8th Circuit law said what the court did is double counting. Had the attorney litigated this question, he clearly would have won. D filed a habeas but in the interim Court decided another case that said 8th Circuit was wrong. So

by the time of Lockhart's habeas decision the old law has changed & court holds no IAC. D can show prejudice b/c had the attorney objected, the outcome would have been different. But court says that is not what we mean. D got a fair trial & suffered no prejudice b/c the law had changed in the meantime so D was **not entitled to a windfall.** D got a fair trial b/c law today says what happened to you is permitted. The fact that at the time the law was misunderstood was a windfall, to which 6th Amend does not entitle you. **As of today you got everything to which you are entitled as of legal process.**

- **Rule is still Strickland.**
  Williams v. Taylor: Where does this fair trial prong now fit in to the IAC inquiry? Rule used to be Strickland, but now Nix & Lockhart say as long as D got a fair trial that is all that matters. **Supreme Court says NO.** Nix & Lockhart were about foundational instances where the meaning of a fair trial is brought into question (it's some big thing that makes us say he got a fair trial anyway even if D was prejudiced). That does not happen in run of the mill cases which are just governed by Strickland.

(C) Attorney's Giving Bad Advice

- **Plea Bargains**: The standard for pleas is that **D would not have pled guilty, & would have gone to trial, but for the attorney error.**
  - Even if you can show a better attorney would have gotten you a better deal that is NOT enough to show *Hill* prejudice. So, in effect, it **is very difficult to show that a D would not have pled (b/c the disparity between punishment after going to trial or after a plea is so large)**.
  - ***Hill:*** D plead guilty b/c of erroneous information about his parole eligibility that he got from his lawyer. Court says to satisfy the prejudice requirement **D must show that there is a reasonable probability that but for counsel's errors he would not have plead guilty** and would have gone to trial. If he would have plead guilty anyway, no error.

- **Immigration Consequences *(Padilla)*:** Attorney's failure to advise D about a special consequence (that he will be deported if he pleads guilty) of pleading guilty is IAC. Deportation is a collateral consequence & usually attorneys are only responsible for advising about direct consequences but in this case the distinction is blurred b/c **deportation is like depriving you of your liberty,** so the attorney was ineffective.
  - But *Hill* still governs, so you have to ask was there prejudice (would they still have pled if they knew they were going to be deported)?

- **Miscalculated Sentence:** Court cannot deny a D an IAC claim when the attorney failed to correct a sentencing calculation mistake, under a <u>determinate guideline</u> (not discretionary), that caused an increase in jail time b/c it has 6th Amendment implications.
  • ***Glover***: Lawyer does not fix a sentence calculation mistake made by the court. Attorney's mistake is prejudicial. 6 month extra calculation error is prejudice

b/c actual imprisonment matters. None of this Nix & Scott fair trial stuff. **Glover is limited ONLY to determinate sentencing schemes.** However, we don't apply this same logic to *Hill* b/c in Hill we are asking a different question (you can't show your client would have gotten fewer months in jail) & b/c Hill court was concerned about finality of judgements.

- **Appeals *(Roe v. Flores-Ortega)*:** If the client says I want to appeal and you don't do it, you are deficient. But if you don't ever consult w/ your client, then you are deficient only if either of the following is true:
  (a) A *rational D* would want to appeal; OR
  (b) This *particular D* has demonstrated that he wanted to appeal.

- **Capital Cases *(Nixon)*:** Sometimes, strategically, because death is different, there are very strong reasons to concede guilt & just proceed to the penalty phase if the evidence against you is overwhelming. Is defense lawyer always required to get D's consent before conceding guilt (and proceeding to the penalty phase)?
  --Not necessarily. This is not per se presumed prejudice. The decision to concede guilt in a capital case is not the same as waiving basic trial rights. We ask the basic Strickland questions & ask what would D have done if they were consulted.

III. Self-Representation

(A) Self-Representation is an Affirmative Right

- D has an affirmative right to represent himself b/c of **autonomy & individual liberty**. Court will not force a lawyer upon a D and entrap him in his rights. ***Faretta***

- Tension between individual liberty & right to a fair trial b/c if you represent yourself you are not likely getting a fair trial, but court makes judgement call to go with individual liberty. There is a liberty & autonomy interest in self representation that makes it an affirmative right that D can assert against the court. He might get an unfair trial but that's okay. Two types of unfair here:
  (1) The law does not apply to everyone in the same way if this self representing D knows less than another similarly situated D with an attorney;
  (2) Forcing a lawyer on a D who does not want it makes the D think "the law contrives against him." This is a different way that the law does not work b/c we are depriving D of his personhood in some way.

- **Difference between waiver & affirmative right:** You can waive your 6th Amend RTC & ALSO affirmatively insist on it (against the court's desire to make you do otherwise). The affirmative right to represent yourself does not come from your right to waive, it comes from the individual liberty guaranteed to you by the constitution. But for example a jury trial does not work this way, you can waive your right to a jury trial but you have no affirmative right to a bench trial. If the government wants a jury trial, they will make you go through a jury trial.

- ***Faretta v. California:*** D does not want a PD & wants to represent himself. Judge tells him it's a bad idea but agrees to it. Later judge calls a hearing to test D's knowledge & decides D had not made an intelligent & knowing waiver of his RTC & had no constitutional right to conduct his own self defense. Court says no, he does have affirmative right to self represent.

- **Faretta Test:** Waiver of RTC must be knowing, intelligent & voluntary.
    - D's technical legal knowledge does not matter. D need not have any knowledge about how the law works to self represent b/c it is irrelevant to the "knowing intelligent & voluntary test." So D has a right to ignorantly plow through a trial, even if D has a valid defense & does not even know it.
    - **BUT court can appoint standby counsel, even over D's objections. D is entitled to** *(Wiggins):*
        (1) Preserve **actual control** over the case; and
        (2) Standby counsel can't **ruin the jury perception** of D's self representation.

- ***Wiggins:*** D wants to represent himself & court appoints standby counsel over his objections. Sometimes counsel gets involved and sometimes he doesn't so it turns into a chaotic mess. Court refines the big right articulated in *Faretta* by allowing appointment of standby counsel. There are other interests at stake here too, like judicial efficiency. We are not going to make courts sit through pro se trials where D doesn't know how technical things works. Standby counsel can do lots of these things as long as D preserves actual control & the jury's perception is not ruined.

(B) Appellate Issues

- ***Anders:*** An attorney who wishes to withdraw from a case after conviction on the grounds that an appeal would be wholly frivolous may request permission to do so but must file a brief referring to anything in the record that might support an appeal.
    - The Anders Brief gives indigent D's all the process they are due. The attorney writes the Anders brief that says here are the plausible issues in this case even though I think D is going to lose on this. Anders brief is the compromise between frivolous appeals & satisfying due process rights.
    - CA does not require a full Anders brief b/c Anders is just one method to ensure adequate & effective appellate review. In CA, it is enough if the attorney puts forth all facts in the case & doesn't talk about merits *(Smith)*

- ***Barnes:*** Appellate counsel does not have to raise every **non-frivolous** issue b/c appeal is different from trial. An art of appellate advocacy is to pick & choose.

- ***Martinez****:* On appeal you do not have a Faretta right to self representation b/c the RTC on appeal does not come from the 6th Amend, it is just governed by DP & EP.

- **Habeas *(Pennsylvania v. Finley):*** On habeas, there is no RTC so that means no right to effective counsel, so no right to an Anders brief. If there is no underlying RTC then all the things we build up on that also don't pertain. Conflicting views on habeas:
  (i) On habeas indigent D must either get a law library or some kind of legal service *(Bounds);*
  (ii) *But see Lewis:* On habeas, libraries or legal assistance are NOT required, the only thing that is required is some kind of access to the court. We can't bar them from the court.

(C) Can Incompetent Defendant's Represent Themselves?

- The standard for competence to stand trial (2 prong test in *Dusky*), is the same standard that is used to decide whether you are competent to waive counsel & represent yourself *(Godinez).* But that alone is not enough, you must also waive your RTC knowingly, voluntarily & intelligently. See test below.

- **The test to be able to self represent requires:**
  (a) *Dusky* Competence; AND
    (1) Can D actually understand the nature of the proceeding against him; **&**
    (2) Can he advise and work with his lawyer
  (b) Valid Waiver
    (1) Did D knowingly, voluntarily & intelligently waive his RTC.

  • Court might say you are competent to stand trial & proceed pro se, but we are not accepting your waiver b/c your waiver is not knowing & intelligent. *Indiana v. Edwards* says it is okay for the court to do that.

- ***Indiana v. Edwards****:* D was found competent to stand trial if represented by counsel, but he was not mentally competent to conduct that trial himself. In effect this gap threatens the fair trial, so it is okay for a court to insists that a D be more competent than just in the *Dusky* standard to proceed with self representation. The state was allowed to insist that he have a lawyer & forego his right to represent himself. **So it is okay to have a little *heightened standard* for self representation.**

- ***Iowa v. Tovar:*** What does it take to plead guilty without counsel? If they have been found competent, do they need any more help?
  -Answer is No. Judge tells them the same thing that they tell every other D. All judge needs to establish are these bare bones, knowing & voluntary requirements.

FOURTH AMENDMENT (SEARCH & SEIZURE)

- 4th Amendment has 2 clauses: (1) Prohibition against unreasonable searches & seizures; (2) Warrant clause- no warrant shall issue without PC.

- 4th Amendment serves to protect your privacy AND to regulate the police.

- First always ask, did the police engage in a search or a seizure (have they done anything to trigger the 4th Amendment prohibition on unreasonable searches & seizures). If a search/seizure has not happened at all, then the 4th Amendment does not apply. Police are constrained by the 4th Amend only if they are engaging in a search or seizure. No matter how hard or intrusively someone stares at you, that does not constitute a search.

- ***Mapp v. Ohio*:** 4th Amendment was already incorporated to the states (b/c it was a fundamental aspect of DP) & *Mapp* went further to incorporate the remedy of the exclusionary rule to the states as well. Reasoning is b/c the exclusionary rule is:
  (1) An essential ingredient of the 4th Amend. W/O it 4th Amend is meaningless.
  (2) Judicial Integrity- Court is supposed to be checking the other branches of govt & we expect them to uphold the constitution. When police violate, it is up to the court to say we are not going to let you get away w/ it.
  (3) Deterrence- This is the best way to make sure police don't engage in unreasonable searches & seizures.

- If govt violates your constitutional rights, there are several other types of remedies such as a 1983 civil rights suit, injunctive relief, & a criminal prosecution against the govt.

I. Searches

(A) What is a Search?

- **Current Rule for Searches: *Katz* 2 Prong REOP Test + Trespass Rule (resurrected in *Jones*)**
  This means, a search is unconstitutional if:
  (1) A person must exhibit an **actual subjective expectation of privacy**; **AND**
  (2) The expectation is one that society is prepared to recognize as **objectively reasonable.** ***KATZ***
  OR
  (3) Government commits a **physical trespass** onto D's property. ***JONES***

- ***Katz:*** Police put a bug on the outside of a public phone booth & record D's conversation & then prosecute him for being an illegal bookie. Police argue there was no trespass b/c bug was put on the outside of the booth. Court says no, this constitutes a search & they can't do it w/o a warrant. Would have been okay w/ a warrant.
  - *Katz* rejects the physical intrusion/trespass model of privacy & says **4th Amendment protects people, not places.**
  - *Katz* says the question to ask is, do you expect that what you are doing is private & is it objectively reasonable. If so, then it is a search.

- Police argue it was a reasonable search b/c they were so limited about it & had PC. Court says it does not matter, searches w/o warrants are not okay.

- ***Jones***: Police put a GPS device on the bottom of D's car w/o a warrant (actually they just had a bad warrant). Court holds this is a trespass b/c they put it on his car (his effect) & physically occupied his space, therefore it constitutes an unreasonable trespassory search.
  - *Jones* resurrects the trespass rule.
  - Court rejects the argument that D has no REOP in the bottom of his car b/c **4th Amendment rights do not rise and fall only with the *Katz* test.** We must afford D preservation of that degree of privacy that existed when 4th Amend was adopted & back in time the founders would have said putting a GPS on his car is not cool b/c it's a trespass.
  - 4th Amendment text has a close connection to property b/c it mentions privacy **"in their persons, houses, papers, and effects."**

(B) Home/ Curtilage/ Open Fields Doctrine

Chop up the world into 3 areas:

(1) Home- Expectation of privacy in your home is very high so lots of 4th Am. protection

(2) Curtilage (can have curtilage w/o fences)- Curtilage is the area surrounding the home & it receives 4th Amendment protection b/c you have a REOP in it.

- ***Dunn* 4 factor test to determine if something is curtilage:**

  (1) The proximity of the area claimed to be curtilage to the home-how close is the area to the home.

  (2) Whether the area is included within an enclosure surrounding the home

  (3) The nature of the uses to which the area is put-hot tubs and family BBQ's are family home life activities that extend into this area, but barns & such are not.

  (4) Steps taken by the resident to protect the area from observations by the people passing by-if you have no fences or barriers & anyone can see what is going on in your curtilage then you took no steps to protect that from public view

  Dunn: Barn located 50 yards from a fence surrounding D's house was considered outside the curtilage & in an open field. Court says the barn was in the open field so it is not a search (although someone rummaging through your barn feels like a search the court says it is not).
    - So a house w/ barn 50 yards away is governed by *Dunn*. But if in the barn you had a hot tub & treadmill & your kids play room, that would be different b/c of the **use that this family has made of it.**

- **It matters from which vantage point the police look into your property.** Our expectations of privacy are context specific & change based on where we live
  - ***Ciraolo***: Police inspect the backyard of a house while flying in an **airplane at 1000** feet up. Even though the yard was within the curtilage of

the home & a fence shielded it from the street, Court held that **aerial surveillance did not constitute a search**. In an age where flights are routine, its unreasonable for D to expect his marijuana plants were constitutionally protected from being observed from the air.

• ***Florida v. Riley:*** D lives in a mobile home on lots of land & has a **greenhouse 20 feet away**. Police flew over D's greenhouse at **400 feet w/ helicopter** & observed drugs growing through openings in the greenhouse roof. Greenhouse is in his curtilage & if police were just walking by they couldn't go in & look at it. **But b/c they are flying over it, that is not considered a search** b/c in todays age of comercial flight D has no REOP

- Under FAA regulations helicopters can legally fly this low, but **the fact that they could legally do it is not the ultimate question. Ultimate question is whether he had a REOP. The fact that FAA regulation authorize it is only one factor that we can argue reasonableness from.** If it were illegal D would have a much better argument that society doesn't think hcopters can fly that low b/c its illegal
- Court splits on question of these low 400 feet flyovers: Majority says it happens, O'Connor says it can happen, minority says it's unrealistic & never happens.

(3) Open Fields (anything outside the curtilage)- There is **NO reasonable expectation of privacy in your open fields**, so no 4th Amendment protection.

- If the police enter & search on your open fields that is a trespass but it is **NOT a search** so its not protected by the 4th Amend &police can just do it
- How to reconcile w/ *Jones* trespass rule?: For open fields doctrine & trespass issues, it is the open fields doctrine itself that makes those not searches (its like an **exception where the trespass rule does not apply**).

- ***Oliver v. US:*** D growing drugs in fields near his house. Police coming on his land is a trespass but it is NOT a search b/c you don't have a REOP in your open field. Individuals may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home (curtilage). Open fields do not provide the setting for those intimate activities that the 4th Amendment is intended to shelter from government interference.

(C) More Than Visual Searches (i.e. tactile searches & dog sniffs)

- **Tactile searches are more intrusive than visual searches** & are treated differently.

• ***Bond:*** Officer who boarded a bus to check immigration status touches suitcases placed overhead & feels a hard lump, he opens it & finds meth. **Court holds his manipulation of the exterior of the bag constituted a search.** This is not like an

aerial observations b/c it is tactile; a physically invasive inspection is more intrusive than purely visual inspection. **When you put your stuff on the bus you have a reasonably objective expectation of privacy**, even though you know people are going to touch your bag, you expect employees to move your bag around to make room for others but not feel it up & search its texture.

- **Dog sniffs do NOT constitute a search at all so the 4th Amendment does not apply to them** and the police can just do them. *Place & Caballes* say so.
  - ***Place**:* Airport police walk a dog around D's suitcase b/c they suspect drugs & the dog alerts to the bag. Based on that they get a warrant to search the bag. Court holds the **dog sniff is not a search** b/c it: **(1)** ***didn't require any more intrusion*** (opening the suitcase would be an intrusion) & **(2)** ***discloses only the presence or absence of contraband,*** meaning it gives you limited info about what is in there. It's nonintrusive in manner & limited in info b/c it only tells police if contraband (narcotics) are present or absent.

  - ***Caballes***: D was stopped for speeding, while one cop wrote the ticket the other took the sniff dog around the car & discovered drugs. Court holds that if his traffic stop had been prolonged beyond the time reasonably required to write a ticket, so that officers could conduct a dog sniff of his car, the seizure of the drugs would have been unconstitutional. But b/c the dog sniff took no longer than the time necessary to write the ticket, it was okay. Sniff was conducted on exterior of his car while he was lawfully stopped for a traffic violation, so any intrusion on his privacy expectations does not rise to level of a constitutional infringement.

  - **Difference from *Kyllo*:** *Kyllo* was in the home & expectation of privacy in the home are much greater. Also the thermal scanner reveals the presence or absence of heat & heat is not contraband (heat reveals intimate details about what is going on in the home like lady taking her bath), but the dog reveals the presence or absence of drugs only (which are contraband).

  - **Hypo**: LAPD can walk around Loyola garage & dog sniff all our cars b/c dog sniff is not a search so 4th Amend does not apply. Can try to argue they can't do it on 4th Amend grounds b/c we have a REOP against that kind of intrusion & it's reasonable for us to think so b/c it is a private garage, we're paying a fee for it, etc (these are factors that go to the reasonableness for expectations of privacy, but they are not dispositive).
    - To argue that they shouldn't be able to do it in our garage, you have to argue that the private garage is different from a suitcase or from being held while you are under arrest (so first have to acknowledge that it is a search then try to differentiate it).

(D) Knowingly Expose to the Public

- **What a person knowingly exposes to the public,** even in his own home, **does not get 4th Amendment protection b/c he no longer has a REOP in it after exposing it.** No intention to keep it to himself has been exhibited. I**f you put it out there you don't think its private & that means it is not a search if the government looks at it.**

- **Informants & Wires**: There is no REOP in conversations that you have with another person (b/c you knowingly expose things to them), so they are not protected by the 4th Amendment. Adding technology, like putting a wire on a snitch, adds no extra intrusion & is not protected by the 4th Amend so police can do it. Snitch can be bugged or not.
    - ***Hoffa***: D was on trial & was plotting to bribe jurors. Govt got one of his former cohorts to infiltrate D's entourage & rat him out to the govt. They then prosecute D for that. **Court holds that did not constitute a search of D b/c although he had a subjective expectation that his friend wouldn't talk, that expectation was not objectively reasonable b/c people do talk.** So no REOP means no search & government can do it. D just takes the risk if he reveals damaging information to someone who he thinks is a colleague, but is actually an informant.

    - ***US v. White*****:** Same as *Hoffa* except the informant was wearing a wire. Court holds govt can do it b/c **D never had a REOP in the first place so the wire doesn't change anything**. Plus the recorded wire provides more reliable evidence
        - **Note:** Some states say you can't bug an informant in the D's home b/c the home is the bastion of privacy.
        - **Douglas Dissent:** Electronic bugging does make a difference b/c E-surveillance is the greatest leveller of human privacy. It changes private human conversation b/c its one thing to talk to a friend & an entirely diff thing for your friend to turn into a bug & transmit your words in perpetuity
        - **Harlan Dissent:** Getting people to turn on each other by collecting electronic info is the opposite of a democracy.

- **Third Party Entrustment:** When you convey something to a third party (like the trashman) you no longer have a REOP in it and the police can look at it, it is not a search.
    - ***CA v. Greenwood:*** Police search through D's trash that was put out on curb for trash collector, they find drug paraphernalia & get a warrant to search the house. Court says this was okay, NOT a search. It would violate 4th Amend only if D manifested a subjective expectation of privacy in his garbage that society accepts as objectively reasonable. He has a subjective expectation of privacy in his trash but that is NOT objectively reasonable. It's common knowledge that trash bags left outside are accessible to animals, kids, snoops & trashman.
    - If your health care provider gives criminal info about you to the govt that info IS admissible in a criminal trial against you. Only thing you can do is sue your health provider from jail (idea of doctor patient confidentiality does not create a REOP- as long as you tell any third party the REOP is defeated).

(E) Privacy & Technology

- Monitoring your movement on public roads is okay b/c you have no REOP, but once that beeper starts to reveal information about things going on inside a house, that is not okay.

- ***Knotts:*** No search took place when police monitored a beeper attached to a drum, to track the movements of a car they knew to be carrying the drum**. *Knotts* says that when you are driving around from place A to B, on public roads, you have knowingly exposed your location to the public therefore you lack a REOP in your location** on the road, so if the government has a beeper in the chloroform can that you happen to be carrying, that is okay and is NOT a search.

- ***Karro:*** Karro says if the govt has put a beeper in your ether can, which they **inserted before the can was yours, with the consent of the prior owner, that is NOT a search & is okay.** Then the can moves around from place to place, police track its movements, & ends up in a house & police get a warrant to search that house, that is not okay. **Monitoring the beeper in the private residence, a location that is not open to visual surveillance, violates the 4th Amend once that beeper reveals info about what's going on inside the house.**
  - **Note:** If they had put the beeper on the ether after D owned it already, then it would not be okay b/c that is a trespass on an effect and that is essentially *Jones.*
  - BUT, in *Karro*, the warrant to search the house was not bad b/c we look at all the evidence in the warrant. There was enough OTHER evidence to find PC to issue the warrant for the house. Question is, would there have been enough of this other PC evidence without the bad evidence (PC independent of the constitutional violations---i.e. surveillance videotape in storage space, strong smell of ether from the specific locker, opening windows of house on a cold night). Answer is Yes. Court does not care that they needed the beeper to actually track it all the way to the second warehouse, after which they were able to smell it out (evidence that came after it was legitimately obtained so were not going to punish police for it)

  ***Karro* Takeaways**: Use *Karro* to make two different/opposite arguments:

  (1) Taint Argument: Police made a constitutional violation in order to get the other evidence, so all the other evidence that came later is tainted too and cannot be used.

  (2) Other Side: Karro says look at all the OTHER information they got independently to find PC. Karro does not say that we have to ignore all of the other info that came after the constitutional violation, all that later info was okay ("use of the beeper does not taint its later use in detecting the ether"). So excise out all the times it was beeping in a private house, but every time it was on an open road it was okay (b/c *Knotts* says it's ok).

- ***Dow Chemical:*** Surveillance of private property using **specialized technology that is not generally available to the public**, like satellites, might be constitutionally prohibited w/o a warrant. You do have a REOP since you do not know about the existence of this

super technology & regular person walking by could not use it. But, in this case it was okay (not a search) b/c the area was like an open field so 4th Amend didn't apply; however, if they used this technology on your curtilage it might likely be a search.

- ***Kyllo:*** Police stood outside D's house & used thermal heat scanner to see if large amounts of heat were emanating from his house, which would be consistent w/ lamps used to grow drugs indoors. With this scanning info they got a warrant to get in the house. Court says thermal imaging of the house without a warrant **is a search** & is NOT okay.
    - Getting any info using this technology regarding the interior of the home **that could not otherwise have been obtained without physical intrusion constitutes a <u>search</u>, at least where the technology in question is not in general public use (Dow).**
    - *Kyll*o rejects the physical intrusion model in the same way that *Katz* did (they were measuring heat, if you touched the outside of the house you would see its hotter so you have no REOP in that).
    - **Kyllo says its not about inside or outside, <u>it is about revealing details about what happened inside the home,</u> and that is a search, b/c stuff in your home is supposed to be protected**.

II. Seizures

- **Definition: A seizure is a nonconsensual restraint of liberty.** If a police officer grabs you, that is a classic seizure, but a seizure does not have to include a physical touching.

- Threshold question is always, was there a seizure at all?
    --If no seizure, no constitutional protections kick in & they can do it.
    --If you are seized then any subsequent findings of evidence are tainted.

- The legal notion of consent does NOT apply to seizures (it only applies to searches). **You can't consent to a seizure, either you are seized or you are not seized.** If you are not seized then anything you did was consensual b/c you're not seized. But once you were seized, we can't say you consented to it.

- Inquiry is: **Is the person being coerced OR is it a voluntary non-coercive encounter?**
    --If voluntary & non-coercive & the person is free to decline then it's not a seizure
    --Court puts great weight on the question of whether **"a reasonable person would feel free to decline a request."**
    --Very **fact specific** inquiry (analogize to facts of our cases).
    --It is not about the subjective belief of a particular person whether they feel free to decline or not, it is an **objective standard.**
    --Police do NOT have to inform D that he has a right to refuse the encounter.
    --There is NO seizure during flight: Flight seizure happens only if the police use physical force OR you submit to authority. See *Hodari D.*

- Use **Mendenhall Factors** to determine whether D felt free to decline or not. Factors that suggest a police citizen exchange constitutes a seizure for 4th Amend purposes includes:
  (1) Threatening presence of several officers (number of officers)
  (2) Display of a weapon by an officer
  (3) Some physical touching of the person
  (4) Use of language or tone of voice indicating that compliance with the officer's request might be compelled.

- ***Drayton:*** Police board a bus to do a search (1 cop at front, 2 in aisles). They ask Brown if they can search him, he says yes, they find drugs and arrest him. Drayton is his friend & was sitting next to him & they were both wearing baggy clothing. Police now ask Drayton if they can search him, he says yes, they find drugs duct taped to his thighs. Officers had not told people that they had a right to refuse being searched and D's now claim they didn't know they could say no. Court holds they were not seized.
  - Officers actions here were not coercive & their consent was voluntary.
  - Not about subjective belief of a particular person whether they feel free to decline, it's an objective standard.
  - Police didn't seize D's when they boarded the bus & **gave passengers no reason to believe they were required to answer questions or stay on the bus.**
  - If this encounter happened on the street it would have been constitutional, the fact that it happened on a bus does not on its own transform standard police questioning of citizens into an illegal seizure.
  - Court does not care whether people are scared of the police or not, that doesn't make it coercive. Police have to do something above & beyond actually being police like yell at you or wave weapons for us to call it coercive.
  - Hypothetically, if D had been seized at the moment of him being spoken to, that is an unconstitutional seizure. **Consequence is that any subsequent consent he may have given is tainted** (b/c they obtained the consent as a result of the illegal seizure). This is **Fruit of Poisonous Tree,** so his consent is tainted by it.

- ***Brower***: Is there a seizure when police set up a roadblock to stop a car thief & he crashes into it & dies? Court says yes, his 4th Amend right against unreasonable seizures is violated. A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful (i.e. when there is a governmental termination of freedom of movement *through means intentionally applied)*. This seizure was unreasonable b/c of nature of the roadblock itself was likely to kill him.

- ***Hodari D***: Guys are huddled around a car on the street, they see cops approaching, panic & run away. Cops chase them & as cop catches D while he's running, he throws his drugs away. At the time D dropped the drugs, had D been seized within meaning of 4th Amend (if yes then drug evidence can't be used, if no then drug evidence is legally attained & can be used). Court holds D was **not seized when he threw drugs away**.

- **RULE:** Either the police need to use **physical force on you OR the person has to submit to the show of authority in order to constitute a seizure.** Hodari Rule ONLY applies to in flight situations.

- Holding: Officers pursuit constituted a show of authority enjoining D to halt, since D did not comply he was not seized until he was attacked. So the drugs abandoned while he was running was not the fruit of a seizure & was admissible.

- If D is running & cops have no evidence & he submits to their authority, & then they see drugs fall out, that is not admissible b/c its illegal seizure (had no RS or PC to seize him).

- To make a seizure legal (i.e. to make an illegal seizure into a legal arrest), the police need PC. So all the while that he is running they can't seize him, but as soon as he throws away the drugs they now have evidence of something and can seize him legally.

- ***Brendlin* (car passenger was seized when car was stopped)**: Police stop a car w/ 2 passengers for registration issue but cop recognizes one as parole violator & arrests him. Court holds the passenger was seized too. This case suggests that when police detain a number of people in order to investigate one, all members of the group have been seized.

III. Probable Cause & Warrants

- **To lawfully search/seize you police need PC + warrant** (unless an exception applies)

(A) Five Requirements for a Valid Warrant

(1) Must be Probable Cause in it (i.e., Oath or Affirmation): PC has to actually be in the affidavit, it is not enough for a police officer to secretly know stuff & not put it in the affidavit he gives to the magistrate. Requirement is satisfied by specifying the facts giving rise to PC in a police officer's affidavit that is attached to the warrant application.

- **Oath or Affirmation:** Officer makes an oath under penalty of perjury that there is PC here for a warrant. They have to swear to the truth of the matter.
- Officer can not rehabilitate an insufficient warrant afterwards w/ testimony about things he knew at the time but did not put in the warrant affidavit. *Whitley*
- **Negligent or innocent falsehoods will not invalidate a warrant.**
- ***Franks:*** But if D can prove the affidavit contained
  (1) Perjured statements or false statements made in reckless disregard of their truth; **AND**
  (2) The rest of the affidavit's contents are not enough to establish PC; then maybe warrant will be voided & fruits of the search excluded.

(2) Approval by Magistrate: Magistrate approving it must be neutral + detached.

- Okay to have law students issuing them.
- But cop or prosecutor can NOT issue the warrant, it must be someone in the judicial branch.

(3) Particularity: Warrant must describe the place to be searched & person or things to be seized w/ particularity (can't search 75 apartments at 5000 Wilshire Blvd).

- **Entering the wrong apartment is okay if mistake is objectively reasonable.**
  - ***Maryland v. Garrison***: Police entered the wrong apartment & seized contraband before discovering their error (didn't know third floor had two apartments). D argues this was warrantless search b/c they did not have a warrant to search his apartment. Court says it was okay b/c it was **objectively reasonable for the officers to make the mistake they made**. Mere fact of a mistake does not mean search is unauthorized. The warrant is valid when it was issued by the judge b/c just saying 3rd floor apartment is particular enough; the validity of the apartment search depended on whether the officers failure to realize the ***over-breadth of the warrant*** was objectively reasonable & here it was.
  - If there were 5 or 10 doors instead of 2 it probably would not have been objectively reasonable.

- **Other fruits & instrumentalities is okay.**
  - ***Andersen***: Court held valid a warrant that listed specific documents & authorized seizure of "other fruits, instrumentalities & evidence of crime at this time unknown. Police are not precluded from seizing other items not mentioned in the warrant (i.e. plain view doctrine).

(4) Nexus: There must be a relationship between the thing sought & the place that is searched. Nexus is like a subset of PC b/c it asks if there is a connection between the thing you are looking for & place you are looking for it in.

- ***Prof's Virginia Case:*** Guy has weapons arsenal in his house & farm next door where police thought he was growing marijuana. Police got a warrant to search the house for marijuana based on a neighbor kid telling them he has marijuana in his *farm* & based on police themselves seeing cut off milk jugs in his hallway (which are consistent w/ drug growing). Court holds not enough PC to issue warrant for the *house*. Even if they found the biggest marijuana growing operation ever in his *house*, since the warrant itself was invalid for lack of nexus & PC, they could not use the fruits of that search.

(5) Execution: Police need to execute warrants in a reasonable fashion. Generally, the presumption is that the 4th Amend requires police to **knock & announce** themselves before entering premises to execute a warrant to make it reasonable.

(i) But sometimes it's okay for them to not knock or barge in 15 seconds after knocking. To justify a no knock entry police must have a **reasonable suspicion** that knocking & announcing their presence, under the circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence (i.e. exigency).

- But officers must **state what the specific exigency is then ask if it makes sense to wait X amount of time before going in.** Waiting 15-20 seconds before entering for drugs is enough b/c D can destroy drugs in 15 seconds, but waiting 15 seconds when looking for a stolen piano is not enough b/c D can't destroy a piano in 15 seconds. Crucial fact in

examining police action is not the time it takes D to reach the door, it is the particular exigency claimed.

(ii) It's okay if police damage your property while executing a warrant.

(iii) When police violate the 4th Amendment by failing to properly knock & announce their presence, the **exclusionary rule does not apply** & the evidence does not have to be suppressed. Civil remedies & other checks on police behavior are enough. (*Hudson v. Michigan*)

(iv) Sneak & peek warrants are allowed in certain circumstances where notice of the search to the D is delayed. It is reasonable not to give notice b/c it would impede the law enforcement investigation.

(v) No media ride along: Bringing a reporter (or any other third party) with you on a warrant execution is a violation of the 4th Amend if the presence of the third party is not in the aid of the execution of the warrant. *(Wilson v. Lane)*

- But if you violate this rule, the evidence will not be excluded, the D can just sue the police in civil court.

(vi) If police come to execute a warrant for your roommate they can detain you b/c it is reasonable for the police to secure the premises, including any persons, reasonably for the duration of the search.

- Police go into wrong house & find people naked in bed (house was sold in interim), court said this is okay b/c it is a reasonable mistake. As soon as they figured out they were in the wrong place they left.

(B) What is Probable Cause (PC is some quantum of evidence)?

No Evidence ---------- Reasonable Suspicion ---------- Probable Cause ---------- Warrant Court Order

- An officer simply swearing out an affidavit based on a hunch or suspicion or affirmance (about the presence of illegality) is NOT enough to legalize a search, no matter how much he thinks his hunch is right. Police belief is not evidence, evidence requires articulable facts not just belief. ***Nathanson***

- Anonymous tip from an unknown informant, on its own, is not enough for PC.

- PC TEST***(Illinois v. Gates):*** Test for PC is a fluid, common sense, **totality of the circumstances** test. There are not a lot of bright lines. It is about what **fair inferences you can draw from the evidence.** Compare to our cases.

- PC needs to be **individualized/particularized** w/ respect to the person being searched or seized. But a mere propinquity to others suspected of criminal activity is not enough to create PC.

- Informant Cases Ask the Following:
  (1) Is the informant Anonymous or Known (reliable)?
    • No presumption of reliability if informant is anonymous
  (2) Corroborated Facts?
    • Tip all by itself is not enough, need corroborating evidence (independent police investigation). Corroboration is VERY important.
  (3) Fair Inference:How good of a fair inference can we draw from this informant?

- ***Draper:*** Informant gave info to police about D's description, location, & drugs that would be in his possession (train riding, tan bag holding, fast walking guy). Officers followed his info & he turned out to be right. Everything this informant said was corroborated. Court held this was **enough to create PC** to support the arrest.

- ***Illinois v. Gates*****:** Police get an *anonymous* letter telling them the Gates are drug dealers. Letter gives details about how one drives to Florida w/ the car loads up on drugs & other flies out to FL & drives the car back. Police do independent investigation & see that one spouse made a reservation on a flight to FL & they drove back nonstop a few hours after arriving.
  • Police corroborate him flying down & joining wife & them driving onto freeway
  • Court says even w/o informants tip, the facts suggest they were involved in drug trafficking: getting there & immediately driving north on a freeway used by drug dealers (i.e. people stay longer on vacations); staying overnight in a motel for a day; FL being a well known drug stop. All this stuff was enough to create PC.
  • Also informant accurately predicted what they are specifically going to do, if he knew all this, its more likely that he knew whether they had drug ties or not.

- **Hypo:** Anonymous caller says young black male in red t-shirt is standing at corner & is a drug dealer. Cops look out & see a guy matching the description standing there. Police can't stop him b/c not enough PC, there is nothing suspicious enough in those details to corroborate & violate his privacy, you need something more. You can't draw an inference that he is a drug dealer. But if we knew this was a reliable tipster then it would make a difference b/c we would have more faith in him.

- ***Maryland v. Pringle***: Police stop speeding car in the middle of the night & ask for license. As driver opens glove compartment, police see large amount of rolled up cash. Police ask if he has drugs in the car, he says no & consents to a search. Police find 5 bags of drugs behind the back seat armrest, none of the 3 claim ownership so police arrest all of them. Can they arrest Pringle (the passenger) for just being in the car? Court says yes b/c there was **particularized PC w/ respect to Pringle** by this point. Based on the

presence of lots of cash, it is a **fair inference that all of the occupants of that car had constructive control of the drugs.**

- ***Ybarra:*** A persons mere propinquity to others suspected of criminal activity is not enough to create PC (just b/c you are around other people committing crimes doesn't mean its enough to believe you committed it Loyola shuttle example). Pringle is not like Ybarra b/c a **car is different from a public bar. It's fair to draw the inference that you are engaged in a common enterprise by getting into someones car**.

- If police believe there is PC that a crime has been committed they can either get a warrant or arrest someone & hope that an exception to the warrant requirement applies. Then they end up at trial with a district court judge, who is going to evaluate whether there was PC. What happens when the trial is over & case gets appealed, what does COA do?

  (a) If They Had a Warrant: COA is going to be very deferential to the magistrate's probable cause findings when issuing a warrant (abuse of discretion), b/c we want to incentivize police to get a warrant beforehand.

  (b) If They Had no Warrant: Standard of review for district judges when considering it after the fact (when there was no warrant) is a de novo review standard (meaning looking at it anew). BUT if the district judge found **historical facts** we review for clear error (meaning we have to compare the facts in the record to the facts that are in the district courts ruling & make sure there are no large discrepancies-it doesn't matter if they get it wrong between being a 2 or 4 door car, but if it is some very large factual discrepancy then we look at it) **AND** we must give due weight to **inferences** (we are going to give due weight to inferences of local law enforcement: when local law enforcement says two door oldsmobiles are vehicles of choice for drug dealers b/c of these loose panels, and this is a valid inference we draw in their favor). COA must look at both of these things (facts and inferences) when it undertakes the de novo review of the case.

  • **Takeaway:** Where police lack a warrant then it is a de novo review of application of law to facts to determine PC.

  • ***Ornelas:*** Cop saw an old Oldsmobile in a parking lot & knew that the car is popular w/ drug sellers (with CA license plates). They notice a panel inside the car is loose. Cops dismantle the interior panel of the car & find drugs

IV. Exceptions to the Warrant Requirement

- These 5 are all exceptions to the warrant requirement, where police only need PC.

(1) Exigent Circumstances

(i) Aid: Police can make a warrantless entry if they believe person is in need of immediate aid (i.e. looking for other victims after a crime, getting help, etc), **but the search must be strictly circumscribed by the exigencies which justify its initiation**. This exception is tied to the length & nature of the exigency, the warrantless search must end roughly when the exigency ends. **Must be REASONABLE.**

- **There is no murder scene investigation exception.**
- ***Mincey v. Arizona:*** Undercover drug bust goes wrong, people start shooting & die. Police go in to secure the house & look for other victims w/o a warrant. That is okay w/o a warrant b/c it's an exigency to save life or limb & is reasonable. Then investigators arrive & search the house for 4 days w/o a warrant, that is not okay b/c the exigency was already over & the warrant requirement kicked back in.
- ***Flippo:*** Crime scene at cabin in woods w/ dead people. Police arrive at scene & initially they can do that b/c of the exigency. But after the area was closed off, police come back to investigate & find a briefcase. Briefcase must be suppressed b/c at that point the exigency was over & they needed a warrant.

(ii) Hot pursuit & fleeing suspects: Law says police do not have to stop at the door & let a fleeing suspect get away (don't have to delay in the course of an investigation if to do so would endanger their lives or lives of others).

- Ask, is it a type of hot pursuit that would justify a warrantless entry? How hot & how pursuitey was it? Are the facts like *Warden?*
- ***Warden v. Hayden***: Robber stole money from cab company office, cabbie followed him home & gave police his address. Police arrived at his house, searched & found weapons w/o a warrant. Court held it was valid b/c police don't have to delay in course of investigating if it would endanger their lives & speed was essential here to secure the fact that there were no other weapons or suspects in the house.

(iii) Destruction of Evidence: Where the **police did not create the exigency by engaging in or threatening to engage in conduct that violates the 4th Amendment,** warrantless entry to prevent the destruction of evidence is reasonable & allowed. This is an **objective** standard, the **officer's subjective motivation does NOT matter.**

- ***Schmerber:*** Exigency is destruction of evidence b/c drunk driver in custody refuses to submit to a blood test so his blood alcohol level is dissipating w/ time. Court holds police don't have to get a warrant to take his blood b/c evidence is being destroyed as he stands there. Police can do it as long as they are reasonable.

- ***Kentucky v. King*** (police created exigency): Police believe guy has drugs, they follow him into a building & lose him. There are 2 doors & they don't know which apartment he went into. They smell burnt marijuana from the left side apartment so they knock on that door & announce "police" then they hear people moving inside which led them to believe drug evidence was about to be destroyed. So they entered w/o a warrant & claimed exigency. Court holds it was valid b/c police conduct before the exigency was

reasonable. As long as police don't create the exigency by threatening to violate the 4th Amendment it's okay. **Takeaways**:

(1) Police had authority to knock on the door, had authority to announce "police police"; but they did NOT have authority to say "we're going to break the door & come in if you don't open" or "we are going to enter if you like it or not" b/c that is a threat to violate the 4th Amendment.

• **Timeline**: Police knock on door & hear stuff moving inside the house. **At that moment an exigency is created b/c they think evidence is being destroyed**. Then they announce, we are coming in. That is OKAY b/c at that point the exigency had arisen already & they did not need any more authority to enter, they could have busted the door down. But if they had knocked & said "police we are coming in" simultaneously, then they would not have authority to enter without a warrant b/c there was no exigency created yet.

(2) Smell of burning marijuana is NOT enough to create an exigency & permit the violation of the sanctity of the home.

(3) If police had knocked & the occupants responded immediately & said no you can't come in, then there is no exigency created & police cant go in

• *King* is different from ***Banks***, where police busted door down after hearing **no reaction** for 20 seconds b/c police had a warrant. In *King,* they had no warrant & they heard shuffling noises from inside (which created the exigency). Banks is an "exigency you don't need to wait for them to open the door in executing your warrant" case.

• If police have no warrant & knock on door & **don't hear anything** for a few seconds, can they come in under exigency exception?

ANS: We don't know. Law currently seems to say no they can't go in. 20 seconds is enough to execute your no knock warrant, but it is not enough to create another type of exigency.

- ***Elkins***: Officers found drugs in a building they had gone into without a warrant & said exigent circumstances justified the entry b/c they had seen drugs through a hole, aroused suspicion b/c they detained a suspect outside & saw someone else go into the building after seeing his buddy was detained. Court agreed there was exigency of evidence destruction & although part of the exigency was police created, as long as police refrain from unreasonably tipping off suspects, they may use normal investigative measures in the vicinity of a suspected crime w/o forfeiting their ability to perform a warrantless search.

(iv) Serious v. Minor Offenses: Important factor to be considered when determining whether any exigency exists is the **gravity of the underlying offense for which the arrest is being made.**

- ***Welsh v. Wisconsin:*** Witness sees erratic car, car stops D gets out & walks home. Police arrive at D's door, go into his house & arrest him in bed for drunk driving,

all without a warrant. Court holds warrantless arrest in his house was not okay b/c they went in his **house** & it was a **minor offense.**

- Invading the sanctity of the home is usually unreasonable, and if it's for a minor offense, then even more so.
- If the police had encountered D on the street, before he got home, they could have arrested him w/o a warrant.

- ***Stuart***: Police have no suspicion of a crime & have no PC, they just get a call about a loud party so they go to the house & see through a screen door that a kid punched an adult & they enter the house. D argues they entered w/o a warrant & the reason they entered is just to make arrests, not to break it up. Court says the officer's subjective intent does not matter, as long as it was objectively reasonable for them to think serious injury was happening they are allowed to enter.
  - **An action is reasonable** under the 4th Amendment, regardless of the individual officer's state of mind **so long as the circumstances viewed objectively justify the action.**
  - **Is there objective evidence to think that serious injury or threat of serous injury** is going on? **If just a <u>minor</u> injury, police can NOT go in.**
    - Getting punched is serious; getting slapped is probably minor.
    - Threat of **ongoing violence** is also enough (in *Stuart* police were faced with ongoing injury/violence in the house, but in *Welsh* there was no more ongoing injury b/c DD was in bed & off streets).

(2) Plain View Doctrine (PVD)

- Plain view is a doctrine about **warrantless seizures NOT searches** (searches are "knowingly expose to public" not plain view).

- In order to lawfully seize, police must have PC + a warrant; if they do not have a warrant, but do have PC then they can seize something that is in plain view.
  - Reasonable suspicion is NOT enough to invoke PVD.

- Plain view doctrine is a **3 prong test:** For plain view doctrine to kick in:
  (1) Police must lawfully be where they are, to be able to see the object
  (2) Incriminating character must be immediately apparent (PC)
  (3) Officer must also have a lawful right of access to the object itself (meaning they are not violating any other interest to take it--i.e., he can't just walk into my house to take something b/c he saw it through the window).

- Inadvertence is NOT a necessary condition of PVD (it does not have to be inadvertent).

- ***Arizona v. Hicks*:** Shooting in apartment, bullet goes through one floor to another. Police enter legally to search for weapons & shooter. Officer notices expensive stereo in cheap apartment, gets suspicious & moves the stereo to see the serial number. Ends up being stolen. Court holds he can't move it, it's the MOVING OF THE OBJECT that the officer was not

allowed to do. If the serial number were on the face & he just saw it without touching it, then it would be okay b/c that's not a search or seizure.

- Moving the stereo is an invasion of D's possessory interest, it is a search. However, had he not needed to move the stereo in order to see the serial number, then **(if the incriminating nature was immediately apparent)** he would have PC to believe it was evidence of a crime and b/c they have PC, plain view doctrine permits a warrantless seizure of the stereo. So it's the extra searching that the officer did that makes this violate the 4th Amend.
- PVD didn't govern whether they could move the radio or not, PVD comes later. PVD just says if you have PC & could go get a warrant, we are not going to make you; it does not go to the question of whether it is a search or they could engage in the search in the first place.
- When you move someone's stuff around you need authority.
- If bad apartment had more than 1 expensive item, then that might be enough for PC (PC that a crime has been committed so police allowed to seize it under PVD)

- ***Horton v. California:*** Police have a warrant to search D's house for stolen coins only. They hope to find guns too but search for guns is not authorized by the warrant. They enter the house, see guns in plain view & seize them. Court holds it is valid, we don't care what officer's subjective belief is & it does not have to be inadvertent. It's okay if police think they are going to find guns but never had a warrant for guns & do end up finding guns.
  - Items seized were discovered during a lawful search authorized by a valid warrant, their incriminating character was immediately apparent, had probable cause both to get the warrant & to believe the weapons were the ones used in the crime. The search was authorized by the warrant & the seizure was authorized by the plain view doctrine.

- ***Coolidge:*** Police walk by D's house & see his car in the driveway, they can see the car but they had to trespass on his property to get to the car, that flunks the test (prong 3).

- **Hypo:** If police officer sees drug transaction happening through a window into a house he can enter the house if what he saw gives him probable cause & exigent circumstances OR if he has a warrant, but not otherwise. PVD does not come into play there. PVD does come into play where, assuming, the officer was behaving legally when he saw the evidence in question & assuming that he is legally in place where he can gain physical control over the evidence & he has PC, he can seize it? But short of PC, even the most cursory search to confirm his suspicion is invalid.

(3) Car Searches

- ***Carroll:*** creates the car search exception to the warrant requirement by saying a car is like a moving exigency, it can be moved while police are waiting for a warrant.
  - Police had PC to believe bootlegging was going on so they stopped the car & slashed the seats w/o a warrant. Court says it's okay.

- ***Chadwick:*** Police had PC to think locked footlocker had drugs. They waited until guy w/ locker disembarked train & put locker in his trunk before they arrested him & searched both locker & trunk. Court holds car search exception does NOT apply to this footlocker. **Ignore *chadwick* as it related to cars & only use it to say that independent containers need warrants.** Police should have maintained custody of the locker & waited for a warrant (note: police can SEIZE the container & wait for a warrant). **Rationale**:

  (1) Car search exception is based on the **inherent mobility** of a car, luggage has nothing to do w/ that.

  (2) There is a **diminished expectation of privacy in a car** (b/c it is so heavily regulated by the state under traffic code) & that is not the case with luggage b/c it is a personal effect.

- **RULES**

  (1) If police have PC of crime **regarding the whole car**, then they can search the car & any containers in the car without a warrant, even if they are locked. ***(Ross)***

  (2) If police **only have PC regarding the container in the car**, then they can ONLY search/seize the container without a warrant, they can NOT search/seize the rest of the car without a warrant. ***(Acevedo)***

  • BUT, can try to argue that we draw **inferences that give rise to PC for the rest of the car** based on seeing a container of drugs in the trunk, once we make that extra step then *Ross* governs.

  (3) Car search exception applies to mobile homes b/c they are mobile & have lesser expectations of privacy b/c they double as mobile vehicles. ***(California v. Carney)***

  (4) Once police have PC to search the **whole car,** they can search every container in the car, even the ones that belong to other people. This is a bright line rule, once the police authority is triggered it is automatic to every container. ***(Wyoming v. Houghton)***

  (5) These cases do not give police authority to search PEOPLE in the cars. For example, the police cannot search the female passenger in *Houghton* under *Ross* authority, *Ross* only allows them to search her purse. To search her, they first have to arrest her & *Pringle* is the case that gives them authority to do that.

- If you are walking down the street holding a container & the police have PC to think there is something in it, they can NOT search it without a warrant unless an exception applies. But as soon as you put that container in the car, then the police can search it.

- When applying the rules you have to compare the fact pattern to facts of our cases & argue something is more like *Ross* & gives rise to PC for whole car, or like *Acevedo* where PC was only for container.

- ***Ross:*** Guy is dealing drugs out of the trunk of his maroon chevy Malibu. The nature of the evidence that the police had was PC of crime for the ***<u>whole car</u>*** **b/c he was using his car like an office to deal drugs out of, it was his business.** If you have PC for the whole car, you can search the whole car & any containers in the car (they can look in your locked briefcase or your computer too).

- ***Acevedo:*** Drugs are being sent through fedex & police are monitoring it all. D goes into recipients apartment & emerges w/ a brown paper bag, he puts the bag in the trunk of his car & drives off. Police stop him, open the trunk & the bag and find drugs. Police did not have a warrant. Here police only had PC for the bag so they could only search/seize the bag, not the whole car.
    - But we argue that you can draw inferences that give rise to PC for the rest of the car based on seeing a bag of drugs in the trunk (anyone who has large amount of drugs in a bag is also likely to be dealing from the rest of the car too). Once we make that extra inferential step then *Ross* governs & you can search the whole car, it is no longer *Acevedo* governing.

- ***Wyoming v. Houghton:*** Driver is pulled over for speeding & exposed to the public is a syringe in his shirt pocket. He says he uses it to take drugs. Now police have PC to search the whole car including all containers under *Ross*. Police ask female passenger to step out & search her purse that was in the back seat. Court holds they were allowed to search her purse even though they had no PC to suspect her or her container of anything.
    - **Passengers also possess a reduced expectation of privacy in property they transport in cars**.

- **Notes About People in Cars**

  (1) ***DiRe*** held that PC to search a car did not justify a body search of a passenger. Searching a passengers clothing is not included in a lawful car search (i.e. if jacket is on the seat they can search the jacket pocket but if you are wearing the jacket they can't search it).

  (2) *Ross* by itself does not authorize searches of people, it says you can search the purse but not her. But *Pringle* gives a different type of authority to say you have PC to arrest everyone in the car b/c it's common enterprise. So the girl in *Houghton* can't be searched under *Ross* but she can be arrested under *Pringle* & once she is arrested she can be searched.

  (3) Unlike for the bar patrons in ***Ybarra*** (where PC for the bar did not permit searches of patrons), for car passengers it is a fair inference that any or all of them are engaged in the enterprise together therefore there is PC to arrest all of them (i.e. Pringle). So when you are a bar patron you are not like the purse in *Houghton* b/c you need your own individualized PC determination.

(4) Arrests

- ***Watson*** creates the arrest exception to the warrant requirement & says it's kind of like an exigency b/c you need to arrest & grab them b/c they might get away.
    - Note this creates a hierarchy b/c if your'e walking down the street w/ a container they need a warrant to search your container but no warrant to arrest you.

- **All that it takes to arrest you is for one police officer to have PC.**
    (i) It does not matter how big or small the crime is, as long as police have PC to determine a crime has been committed (even something as small as a seatbelt violation), they can arrest you. It is a bright line rule. ***(Atwater v. Lago Vista)***

    (ii) Subjective intent of the police does not matter. As long as there was PC for the violation at issue it does not matter what the police were actually motivated by (i.e. it's okay if they are doing racial profiling). (***Whren v. US)***

        - **Exception:** An arrest can be deemed unreasonable if the seizure/arrest is **conducted in an extraordinary or unusual manner that is harmful to D's privacy interests or physical interests.** Just being frightening & scary is NOT enough b/c that is what happens in a regular arrest, it has to be something more (what happened in *Atwater* was not extraordinary).

- **Rule: D arrested without a warrant** & held in custody must receive, **within 48 hours**, a judicial determination of whether his arrest met the probable cause standard *(Mclaughlin)*
    (i) But 48 hours is not always going to be okay. For example, if they are keeping you that long just to teach you a lesson or to acquire more evidence about you that is NOT okay b/c it is not reasonable.
    (ii) Anything longer than 48 hours, ever, is **presumptively unreasonable** & is an illegal seizure, so anything after the 48 hours is **tainted b/c it is fruit of the poisonous tree.**

- **To arrest you inside your HOUSE the police need an arrest warrant, not a search warrant.** But once you walk outside the house they no longer need the arrest warrant, the protection is for the home not for you.
    - If they have an arrest warrant, they can arrest you in your house but not search the rest of your house. (See *Chimel +Buie* for more details).

- If police have an arrest warrant for you and you are staying in someone else's house, then they need a **SEARCH warrant to get into that other person's house**. They can NOT come into that other persons house with just an arrest warrant for you.
    - ***Steagald:*** Officers had arrest warrant for Lyons & heard he was at his friend Steagald's house. They go to Steagald's house & search it & find drugs but no Lyons. Court holds arrest warrant did not justify the search of the home of someone other than the arrestee. It is the protection of that third parties 4th Amendment privacy interest that matters here.

- ***Atwater v. Lago Vista:*** Police arrest woman in car for not wearing a seatbelt & not buckling up kids. She is arrested for a non-jailable criminal offense, a seatbelt violation (it is a misdemeanor under Texas law &Texas law says it is arrestable). Court holds it is a reasonable seizure under the 4th Amendment b/c the police have PC to believe the offense has been committed. **It doesn't matter if it is a big or little crime, we just need to give police the bright line authority to arrest people as soon as there is PC to believe a crime has been committed**.

- ***VA v. Moore*:** In Virginia, you can't arrest people for seatbelt violations. But the police do arrest someone for this & find drugs (and that is illegal under Virginia law), does that offend the 4th Amend reasonableness inquiry?

  --Court says no, the 4th Amend doesn't turn on what the states think is or isn't illegal. The 4th Amend only turns on PC. The arrest might be illegal under Virginia law but it is not illegal under the 4th Amend, for the 4th Amendment it is only PC that matters.

  --Even when officers violate a state law requiring them to issue a summons instead of arresting, this provides no basis for concluding that the 4th Amendment has similarly been violated.

(5) Searches Incident to Arrest

- Once police arrest you, they can search you. A search incident to arrest is justified by the fact of arrest itself (not the same justification as in the *Ross & Acevedo* car cases) that is why the scope of the search is narrower, it is constrained by that rationale. Rationale:

  (1) Threat to officer safety; and

  (2) Destruction of evidence.

(a) Search of Home & Person Incident to Arrest

Bright Line Rules:

(1) *Robinson* says if police arrest you they **can search in your pockets and look inside all containers on your person** (including a pack of cigarettes or your cell phone). It does not matter if they're likely to find evidence of crime of arrest in your pocket or not, they can just do it.

(2) *Chimel* says if they arrest you they can **only search in the area immediately within your grabbable control (your wingspan) b/c of the weapons & evidence rationale. They can't search the whole rest of your house or your trunk.**

- **AND *Buie*** also authorizes them to do an automatic protective sweep. That means that police (even without PC or reasonable suspicion) **can look in the closets & other spaces immediately adjoining the place of arrest** (i.e. they can look inside the closets in the room in which you are arrested), from which an attack could be launched.
  - But to look in **additional areas** not immediately adjoining the scene (the other rooms in the house), police must have at least **Reasonable**

Suspicion (don't need PC) that the area harbors an individual posing a danger to officer safety. But it has to be circumscribed by the exigency so they can't look inside the jewelry drawer for this.

- ***US v. Robinson***: Police stop D for driving on suspended license, arrest him, & search his person (valid to do the search w/o a warrant b/c this is the search incident to arrest exception). They look inside a crumpled cigarette carton which had drugs in it. The likelihood that they would have found weapons or evidence of the offense of arrest (revoked license) in a cigarette carton is very small but court does not care, they say it is okay to search, even though there was no possibility of finding weapons or evidence in this container. This is a bright line rule for police, if they **arrest you they can search in your pockets & all containers on you** (note *Chimel* says if they arrest you they can search your grabbable area and no more).

- ***Chimel v. California:*** Officers arrive at his house w/ an arrest warrant (for robbery) but not a search warrant. They give him the arrest warrant & ask if they can search the rest of the house. D says no. Officers search the whole house anyway & justify it as a search incident to arrest. Court holds they were NOT allowed to search the whole rest of the house. They can only search the area immediately within his control b/c police are entitled to protect themselves (officer safety) & protect any evidence that can be destroyed right there. There is ample justification for a search of his person & the area within his immediate control, but there is no justification for searching any room other than the one where the arrest occurs. Search is circumscribed by this rationale.
    - **Dissent** says police should have been able to search the rest of the house on a different rationale, that being, when there is PC to search & it's impracticable for some reason to go get a search warrant then a warrantless search may be reasonable. This is saying the arrest itself creates an exigent circumstance to validate a warrantless search b/c his cohorts will destroy evidence in the time it takes to get a warrant.

- ***Buie***: Officers can conduct a protective sweep through a house when executing an arrest warrant. Officers may as a precautionary matter & without PC or RS, look in the closets & other spaces immediately adjoining the place of arrest, from which an attack could be launched. But to look in additional areas not immediately adjoining the scene, there must be RS that the area harbors a dangerous individual posing a threat to police. But you can only look in areas a person might be found, so no jewelry drawers.

(b) Search of Car Incident to Arrest (Belton was about car occupant & Gant is *recent* occupant)

Rule: ***Gant*** authorizes police to search a vehicle incident to a ***recent occupant's*** arrest only IF (recent occupant means it's okay if he has just gotten out of the car already):

(1) Arrestee is unsecured & within reaching distance of the passenger compartment at the time of the search; <u>OR</u>

(2) It is reasonable to believe that evidence of the <u>offense of arrest</u> is in the *passenger compartment* of the car (and any containers in the passenger compartment). Passenger compartment means front & back seat.

(3)** IF we can also say we have PC to find evidence of arrest in the whole car then we also have a ***Ross*** argument that we can also get into the trunk.

- **Note:** Search incident to ***citation*** is NOT allowed under this doctrine (only arrest).

- ***Arizona v. Gant:*** D was arrested for driving w/ a suspended license. He was handcuffed & locked in the back of a police car while officers searched the rest of his car & found drugs in the pocket of his jacket on the seat. Court holds that b/c D could not have accessed his car to retrieve weapons or evidence at the time of the search, the search incident to arrest exception to the warrant requirement does not apply and does not justify the warrantless search in this case. Officer can search the vehicle incident to arrest only if D is unsecured & within reaching distance of the passenger compartment (i.e. can grab a weapon or destroy evidence) OR if police think there is evidence of crime of arrest in the car. Here there was no evidence of the crime of a suspended license in the car so police couldn't search the car.

- **Hypo:** Imagine fact pattern in *Wyoming v. Houghton*. D was driving & stopped for speeding. Police see syringe in his pocket & he admits it's for drugs. They tell him to get out of the car & arrest him for drugs. Two lines of argument as to what police can do next

  (1) Search incident to arrest under Gant b/c they have RS to believe there is more evidence of the offense of arrest (drug possession) in the car. So they can look in the passenger compartment but not in the trunk. This approach is laundered through *Chimel* and that is why it has restraints on it like not allowing you to look in the trunk (whereas *Ross* would let you get into the trunk). PLUS *Gant* just says reasonable belief but *Ross* requires PC, so to get into the trunk you need *Ross* probable cause.

  (2) Ross and Acevedo Car Search Doctrine: They can search the entire car b/c they have PC to believe there is evidence of drugs in the rest of the car (including looking in trunk). They had *Ross* PC to search the whole car including the trunk.

(c) Inventory Searches Incident to Arrest

- Police can inventory the contents of your car, and any evidence they find while doing that is admissible, as long as they inventory it according to their standard procedures of inventorying everyone.

  (i) Key question is whether they **have rules & regulations and are they actually followed** (so we are still not really asking about subjective intent of officers, we care about programmatic intent). What they can't do is search your car and call it an inventory. If you have evidence that police never inventory anyone & they just inventory your stuff, then you have a valid argument that it should not be admitted

  (ii) Rationale for allowing inventories is to protect your property & insure themselves against claims of loss.

- ***Colorado v. Bertine***: D is arrested for DUI & before tow truck arrived to impound his car the police inventoried the contents of the car. Court held this inventory search permissible b/c it protects the owner's property while it is in police custody & insures against claims of loss.

- **O'Connor's Overview of what police can they do when they arrest you:** Arrestee is subject to a full search of her person & confiscation of her possessions (Robinson); if arrestee is an occupant of a car then the entire passenger compartment of the car including packages therein is subject to search as well (Belton). Arrestee may be detained for up to 48 hours without having a magistrate determine whether there was PC for the arrest (McLaughlin). Once period of custody is over the, fact of the arrest is a permanent part of the public record.

V. Reasonableness

- This section is all about what police can do without PC (and without a warrant), when they only have reasonableness (i.e. reasonable suspicion) to rely on.

- If someone is detained by police, must first ask, how much evidence did the police have?
  (i) If no evidence, police can't search/seize you. All they can do is engage in voluntary interaction but they can't make you do anything.
  (ii) If RS they can do a brief investigative detention only (stop & frisk).
    - Rationale is officer safety so they can only look for weapons during a frisk. If in the course of this lesser search/seizure, it ripens into PC, then they can arrest you. But if during the investigative detention no more evidence materializes the police must let you go

  (iii) If PC, they can arrest you & search you.

(A) Terry Stops (stop & frisk)

- A terry stop is a brief investigative detention, justified by RS. It is still governed by the 4th Amendment. It includes a stop (the seizure) and a frisk (the search), **but police must have RS for the stop <u>AND</u> also RS for the frisk, so it is a two part analysis.**
  (a) Stop: RS that a crime is happening or about to happen.
  (b) Frisk: RS that person is armed & dangerous.
    • The scope of the frisk is limited by its officer safety justification, so the police can only use the frisk to look for weapons, not other evidence.

- In determining whether the seizure & search were *unreasonable* we ask:
  (1) Whether the officer's actions were justified at its inception (was there enough evidence to justify it, did they have PC or only RS); **and**
  (2) Was the search/seizure reasonably related in scope to the circumstances which justified the interference in the first place (meaning was it really a terry stop or was it an arrest? Look at nature of the seizure, how long it lasted, handcuffed or not? Facts don't tell you if it's a terry stop or arrest, you have to argue which it is)

- **What Police Can & Can't Do During a Terry Stop (very fact specific):**
  (1) The reason police are allowed to do this is b/c it is reasonable.

  (2) You can't frisk a person if you have no authority to stop them in the first place.

  (3) *Terry* only allows police to look for weapons on outer layers of clothing, they **can't look inside containers during a *Terry* frisk.** Can frisk pockets but can't go into pockets.
    • But, if in the course of a frisk the police find something they think is a weapon that might create PC, and at that point PVD kicks in, and they can seize it under PVD (b/c now they have PC). But if they don't think it's a weapon, they can't squeeze or manipulate it more to figure out what it really is b/c Terry is for officer safety. ***Minnesota v. Dickerson***

(4) Terry stops can be used for cars too, as long as there is RS that driver is committing a crime. **BUT Terry does NOT allow you to search the trunk of a car**.

• To frisk the ***passenger compartment*** of the car itself, police need **RS to believe that a suspect is dangerous & may gain immediate control of <u>weapons</u>** (not evidence). But even if they can frisk the passenger compartment (including the glove compartment), they still can't search inside the trunk. ***Michigan v. Long***

(5) Label Does Not Matter: If a Terry stop really looks like an arrest (& police had no PC), they can't just label it a Terry stop & do it. That's an illegal seizure. ***Dunaway***

• For example, if the stop takes way too much time, that seems like an arrest.

(6) It is a **reasonableness under the circumstances test** (so it's not about the number of minutes the stop lasted, it's about number of minutes + specific circumstances). ***Sharpe***

•Example: *Sharpe* says 20 minutes okay; but *Place* says 90 minutes is too long.

(7) Once a stop is lawfully made, police can order a D + Passengers to get out of the car without any reason or justification (officer safety). ***Mimms & Wilson***

(8) Once ***passengers*** in a car are lawfully detained, police can frisk passengers too as long as they have RS about the passenger (i.e., saw a bulge in passengers pocket, it's not enough to say passenger just looked shady). ***Arizona v. Johnson***

Cases

- ***Terry***: D's walked up & down street 12 times & looked in store window. Third guy shows up & talks to them & looks in window too. Police get suspicious, but not enough for PC. Police follow them & ask for names, they grab D, pat him down & feel a gun in his coat pocket (cops never go under their outer layer of clothing). Court holds it was reasonable & officer was allowed to pat for weapons to preserve his own safety. Officer needs RS for the stop (a crime was about to happen b/c they were casing) & the frisk (he's dangerous b/c robbers usually have weapons).
  - **Note:** If we have RS that Martha Stewart is doing securities fraud & we stop her for that, there is no automatic RS to justify a frisk b/c securities fraud is not a violent crime where the people committing it carry guns so it would not be fair to draw that inference.
  - To justify the intrusion, police must have **specific & articulable facts** which taken together w/ **rational inferences from those facts,** reasonably warrant the intrusion.

- ***Dunaway v. NY****:* D taken into custody w/o PC for murder. Police keep saying he is not under arrest but he would not have been free to leave if he tried. Court holds his detention was indistinguishable from a traditional arrest so police needed PC. Mere fact that he wasn't booked & told he was arrested didn't mater. And the fact that he was held for murder also didn't matter, we don't care how heinous the crime is.

- ***Florida v. Royer****:* D's physical appearance fits a drug courier profile when he is observed in the airport, but that does not create PC to arrest him. Upon request, but without oral consent he showed police his ticket (court says that part is consensual). Name on his ticket & ID don't match, he gets nervous. Without returning his ticket or ID, police ask D "mind coming with us?" They kept him in a room for 15 minutes & he gives them the key to his luggage. Court held that the drugs recovered in the search should be suppressed b/c at the **time he gave them the key to**

his luggage in that detention room, the detention had already escalated from the type of stop authorized by *Terry* into a more serious intrusion than is allowed on mere RS.

(i) Fact that your ID & ticket don't match is NOT enough for PC, but it IS enough for RS.
(ii) The fact that you seem nervous on it's own is NOT enough to create PC.

- ***US v. Place****:* D in airport refused to consent to a suitcase search so officers made him wait 90 minutes for drug sniffing dogs to arrive. Police had RS but not PC for suitcase. Court held the 90 minute retention of the suitcase w/o PC violated 4th Amendment. Seizure was illegitimate b/c they exceed the authority they had based on the evidence they had at the time (RS allowed them a short Terry stop not a 90 minute detention). It was only after the arrival of the dog when they got PC. So this logistical demand of the dog being at a different location is not enough to make the whole seizure reasonable.

- ***US v. Sharpe*****:** Police officer & DEA agent in separate vehicles stop two cars driving in tandem (Pontiac & a truck) b/c they suspect cars have contraband. DEA agent stays w/ pontiac driver while officer chases after truck guy. After detecting smell of marijuana from the truck they search it & recover drugs. 20 minutes elapsed from the time the truck driver was stopped & the search. D says 20 minutes is a long time for a traffic stop. Court says no, there are no rigid time restrictions on Terry stops. It's a reasonableness under the circumstances test & here your buddy took off & we had to chase him so it was reasonable for us to make you wait 20 minutes.

- ***Mimms****:* D was lawfully stopped for driving w/o license plate & officer ordered him out of the car. As he got out officer saw bulge in his pocket. So b/c he got out & cop saw bulge, cop now has RS to frisk him, but while he was sitting in car there was no RS. Court holds it's okay for officer to order him out of car for no reason b/c of officer safety. Plus, it was this officer's custom to order everyone out as a precautionary measure, that's a valid justification & the intrusion on the driver is de minimis.
    - ***Wilson*** extends this to passengers. Once a stop is properly made police can require passengers to exit car as well b/c interest in officer safety is so high.

- ***Arizona v. Johnson****:* Officers stop car w/ suspended registration & start to question the person in the back seat b/c he kept looking behind him, was carrying a police scanner & was wearing gang related clothing. Officer wanted to ask him more questions about gangs so she ordered him out of the car, patted him down, & found a gun on him. Court upheld the search saying that when a driver or passenger is lawfully detained in a traffic stop police may pat them down when they have RS that the person is armed & dangerous regardless of whether they believe the vehicle's occupant is involved in criminal activity. So passenger was legally stopped here b/c of the driver, & officer had RS to frisk passenger himself so she could (even though there was no RS to stop the passenger himself).

- ***Michigan v. Long****:* Officers see erratic driving & car crashes into ditch, when they get there the D is standing outside. They ask him for license & registration, D is slow to respond & can't find it & looks like under the influence. D starts walking toward the car & officers see a hunting knife in the car so they stop him & pat him down & find nothing. Officer then shines a light in the car to look for other weapons, he notices something portruding from the armrest, lifts it up, & finds drugs. Court held it was a permissible Terry search to search the passenger compartment as long as officers have RS to believe suspect is dangerous & may gain immediate control of weapons. There's no flat line rule that they can search the car, they need to articulate why he's armed/dangerous
    - If they had just looked in the car by shining the flashlight & saw nothing (no knife), then they would have no reason to frisk the car b/c there is no articulable suspicion of him being armed &dangerous. Once they see the knife in the car, it creates RS to frisk the rest of the passenger compartment (but not the trunk) b/c that shows he might be armed & dangerous. But again it's a limited frisk for weapons only. If they find drugs while doing this, then they can seize it b/c PVD kicks in.

- ***Minnesota v. Dickerson****:* Here the officer concluded that what he felt wasn't a weapon & he then squeezed & manipulated it to figure out what it was & that manipulation gave him PC to think its drugs. Court said that activity exceeded the scope of the legitimate frisk for weapons so the seizure was illegal. Police can't do the extra intrusion of squeezing (just like they can't turn the stereo around to see the serial number) **that they don't think is a <u>weapon</u>**, during a Terry frisk, to create the PC necessary for a lawful seizure under PVD.

(B) What is Reasonable Suspicion (how much evidence is RS)?

- RS is some evidence that is more than a hunch but not enough to create PC. Look to the cases as benchmarks for what is & isn't enough to create RS (standard is *Terry*).

- ***Terry:*** Walking up & down a street 12 times creates RS (but not PC) to think you are casing the joint. Anything less than Terry evidence is worrisome for police, anything more than Terry evidence means police are good to go.

- ***Royer:*** Fact that your ID & ticket don't match is NOT enough for PC, but IS enough for RS. **Note:** The fact that you seem nervous on it's own is NOT enough to create PC, but it is a pertinent factor in determining RS.

- ***Sharpe:*** Smell of marijuana coming out of your car is enough for PC & RS.

- ***Wardlaw***: Unprovoked flight from police in a high crime neighborhood IS enough to create RS. (But we can't draw any inferences when someone merely refuses to talk to u)

- ***Florida v. JL:*** Anonymous tip on it's own is NOT enough for RS (or PC)--so not enough for a Terry stop.

- ***Alabama v. White:*** Anonymous tip that is corroborated IS enough for RS.

- ***Arvizu:*** Post 911, yes there is RS to stop a minivan driving slowly.

- ***Whren:*** Subjective motivations of police don't matter, as long as there is RS or PC for ANY crime, that is enough.

Cases

- ***Alabama v. White****:* Tip says she is going to get in her car & get on a freeway. There is nothing suspicious about getting in a car & driving on the freeway. The facts are similar to *Gates,* but this is a little less suspicious than *Gates* b/c there was no flying state to state, it was just her getting in a car. Court said it was a **close case** but the police were authorized b/c their tip said a woman would leave a certain apartment holding a brown case & go to a specific hotel using this route. Police then observed & corroborated the details so it showed that the tipster had correctly predicted the women's movements.

  (i) This is enough for RS but not enough for PC.

  (ii) B/c the court said it was a close case, if you ever have evidence that is less than *Alabama v. White* then you say this fact patters has even less & if *White* was a close case, then this case has nothing.

- ***Florida v. JL***: Anonymous tipster says black man in plaid shirt waiting at bus stop is carrying a gun. Police go & see a black man in a plaid shirt, they stop & frisk him & find gun.They had no reason to suspect him other than this anonymous tip. Court holds this was an illegal seizure b/c there was no indicia of reliability in the tip (so no RS). Officers did not base their suspicions on anything they themselves saw & didn't even know who the tipster was. Police corroborated the following things in the anonymous tip: gender, race, location, dress. But that was not enough b/c its even less than what happened in *White*, the guy was just standing there, anybody can look out their window, see someone standing there & call police. In *White*, the informant had more insider information, knew details about D's schedule so it was more likely to be reliable. The fact that he knew future details made it more reliable (if in *Draper* it were an anonymous informant it would look just like *White)*.
  (i) Knowledge about a person's future movements indicates some familiarity w/ the person's affairs. Here, there was **no predictive information** given in tip so police had no means to test informant's knowledge or credibility. **It lacked an indicia of reliability.**
  (ii) Fact that tipster described his location & physical appearance was not enough b/c such a tip does not show that the tipster has knowledge of concealed criminal activity. **RS requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.**

- ***Illinois v. Wardlow:*** Officers enter high crime area known for drug smuggling, D was standing on street holding a bag, as soon as he saw officers, he turned & ran completely unprovoked. Officers follow & terry frisk him, squeeze his bag, feel a gun in his bag & arrest him. Court says this was okay b/c his unprovoked flight in high crime area created RS.
  (i) Can't draw inferences from someone who merely refuses to cooperate. D did not merely refuse to cooperate here, he ran unprovoked. **Unprovoked flight is not a mere refusal to cooperate,** flight by its very nature is not "going about one's business" it is just the opposite.
  (ii) Note that in ***Hodari D***, police had no RS until D threw away the drugs. But here, b/c he ran in a high crime area, it gave rise to RS. So no *Hodari D* problem here.

- **Hypo:** Car drives up windy road that leads to military base, he sees the base & executes a legal U-turn. Can police stop him?
  ANS: Argue both ways.
  • Yes police can stop him b/c like *Wardlaw* this is unprovoked flight, he saw base, & took off. But base was not in a high crime neighborhood whereas *Wardlaw* was. However, we can argue this is they type of high security neighborhood where if you are up to no good you will turn around, an innocent person would not have turned around (but remember you have a constitutional right to decline an encounter w/ police). So 2 things we must argue under *Wardlaw* are unprovoked flight & high crime neighborhood; here you have unprovoked flight but no high crime neighborhood, so analogize to high security neighborhood & argue it that way.
  • No police cant stop him b/c he has a constitutional right to decline encounter w/ police *(Drayton Bostick)*, the mere avoiding of an encounter cant be enough to arouse suspicion

- **Hypo 2:** What if the u-turn is illegal but the way the road is constituted makes it such that there is no way to turn around without violating the u-turn law (it's a forced illegality).
  ANS: When he makes an illegal u-turn the police can stop him, but if the layout forces him to make an illegal u-turn that violates the deeper principle of his right to decline a police encounter. But this argument will probably lose.

(C) Racial Profiling & Police Discretion

- ***Whren:*** Police see 2 young men in car w/ temporary plates who stop too long at stop sign & driver is looking into passengers lap. Police make u turn to follow the car & it speeds away

recklessly. On that alone police can stop the car for speeding. But D argues speeding was just a pretext, officers stopped them b/c they were racially profiling & though they were doing drugs in the car. Court holds stop/seizure was okay, subjective motivations of police don't matter as long as there is RS/PC for any crime. Officers had PC to believe a traffic violation was committed so they had PC to stop them (they did not need PC to think a drug crime was being committed).

- ***People v. Kail:*** They arrest a prostitute for violating a bicycle bell ordinance, the fact that they did it b/c she was a prostitute (pretext) is okay as under *Whren*. But it is an equal protection violation b/c they only enforced this ordinance against prostitutes.

- ***Ashcroft v. Al-kidd:*** The material witness statute says you can detain somebody but not b/c you have RS or PC that they committed a crime, but b/c they are a material witness & you are going to have trouble getting them to come to trial. So it is not their wrongdoing that is keeping them there. Government used this statute to detain Muslim men & we had this question of pretext b/c the govt had no intention of calling him as a material witness, they used the statute just b/c they had no PC or RS to detain him. The court says that is okay, it is just the same as *Whren.*

- ***Hiibel:*** Nevada passed an identification statute that says if there is a legal Terry stop, then you have to identify yourself & if you don't then that is a separate crime. Can Nevada do that?
  ANS: Yes. Under the 4th amend, we ask does this identification requirement render the seizure unreasonable? Court says no b/c a Terry stop is a brief investigatory detention so police can ask you for identification. This is a reasonableness inquiry & it is a strong government interest balanced against a slight intrusion. This statute does not change the nature, duration, or intrusiveness of the stop itself, it doesn't make it any longer or shorter, asking one more question does not make the stop longer.

- If police write you a speeding ticket & ask you one more question like do you have drugs or guns in the car, court says that is okay too b/c they can ask you anything (they can even ask you if you are just walking down the street). Doing a thing that is not a seizure, in the course of a seizure, is not itself a seizure.

(D) Roadblocks

- Usually, if police have no individualized suspicion they can't stop you b/c it's not reasonable. But roadblocks are bulk suspicion-less stops where police have zero individualized suspicion but stop you anyway. As long as its a systematic, legitimate, random program where they do it to everyone & don't single people out, it's reasonable.

- **Two Part Test for Valid Roadblock:**
  (1) Police Discretion-Must be constrained such that police can't exercise their discretion in picking who gets stopped & who doesn't. As long as the roadblock has rules for constraining that police discretion, it is fair and reasonable.
  (2) Purpose of the Roadblock- Two inquiries here
    (a) Programmatic Purpose (what is the roadblock really for?) Need an important, weighty government purpose. General crime control is not enough.
      • For border & sobriety cases, programmatic purpose was weighty & important.

    (b) Is it tailored to do that (is it being conducted in the right way for that)?
      • Border case was tailored b/c checkpoint was actually near the border.

- **Martinez-Fuerte (near the border)**: YES
  Sitz (sobriety): YES
  Edmonds (drugs): NO
  Lidster (information): YES

- ***Edmonds:*** Drug interdiction roadblock where police check cars randomly for drugs w/o any individualized suspicion. Court holds that is indistinguishable from just stopping people for general crimes & a programmatic purpose of general crime control is not a compelling enough interest & does not justify a roadblock. Also, not narrowly tailored, so it flunks this test.

- ***Illinois v. Lidster:*** Police set up checkpoint in location where there was a hit & run death one week ago to ask drivers if they saw anything. D was drunk, got stopped & arrested. Court upheld roadblock b/c police have strong concern in finding hit & run driver, it's not just general crime control. It was narrowly tailored to get the type of info police were looking for.

VI. Exclusionary Rule Exceptions

- 4th Amendment violations do not always trigger the exclusionary rule. If call of the question says "was there a 4th Amendment violation," that is a different question from "is the evidence admissible."

(A) Consent Searches

(i) Regular Consent Rule

- Consent is an exception to the PC requirement, b/c police don't need PC to search if you consent. Police can ask anyone for consent anytime, they don't need RS or PC to ask you.

- Consent is tricky b/c it is hard to understand the difference between the standard for whether a person has consented and whether or not they have been seized. They are two separate lines of argument & we argue them separately (see rule below).

- **Black Letter Rule for Consent**

  (a) Did D Consent to a *Search*: Question of whether a consent to a search was in fact **voluntary** or was the product of duress or coercion, express or implied, is a question of fact to be **determined from the totality of the circumstances.**

  - **Looking for absence of coercion (voluntariness).** What did police do & was it coercive, did it look like duress or was it congenial?

    (***Schneckloth)***

  (b) Has D Been *Seized*: Did D feel like he was free to decline the encounter?

  - Remember you can't consent to a seizure, either you are seized or not. When asking whether D has been seized, ultimate question is whether court thinks D was free to decline the encounter or not?

    (Drayton, Bostick, Hodari D)

- **A person can be seized & nevertheless give voluntary consent to a search** as long as that consent was voluntary in the totality of the circumstances. Just b/c you are seized does not mean any consent you give to a search is involuntary.

- **A regular Terry stop is NOT coercive,** but being threatened w/ arrest during that terry stop would be coercive such that any consent given after that is no longer voluntary.

- **Police do not have to tell D that he has a right to refuse consenting to a search** b/c D's knowledge or lack of knowledge is not dispositive for the voluntariness inquiry, it is merely one factor in the analysis. **So D does not have to know that he has a right to refuse in order for his consent to the search to be valid.**
    - That is b/c consent to a 4th Amend search need be ***voluntary only in the sense that it is not coerced,*** b/c the **4th Amend is not about giving you a fair trial.** By contrast, since the 5th Amendment is about ensuring you a fair trial, you must know about that right before you can validly waive it.

- ***Schneckloth v. Bustamonte:*** Police pull over guys in car for a valid traffic stop (basically a Terry stop where they are seized & not free to leave). Police ask for ID & ask if they can search the car. D says yes go ahead. Police find evidence & D is convicted. D says his consent was not valid b/c he didn't know he could say no. Court holds his consent to the search was valid in totality of circumstances even though he was seized when he gave it. **Police didn't threaten him w/ arrest before he consented & didn't yell & scream at him, so he was not coerced into consenting**.

(ii) Third Party Consent Rule

- If you have two co-inhabitants at the door, one who consents to the search & one who does not, the objector wins. We let objectors trump consenters when the objector is:
    (1) Physically present; AND
    (2) Expressly asserting their objection.

- If you're asleep in the back & don't hear police at the door, it automatically becomes okay if your coinhabitant consents.
    - Idea is that if you are sharing a duffel bag or a home, you assume the risk that the other person will consent to a search of it.

- But police can't purposely arrange it so that the person is not physically there to object.

- If police reasonably think one person has authority to consent, but in reality she does not, that is still okay and evidence is admissible against the objector.

- ***Georgia v. Randolph:*** Wife calls police & tells them her husband does drugs, there are drugs in the house & they can search it. Husband is there & objects to the search. Court holds evidence was not admissible against the husband, his non consent trumped her consent.
    • Note: Police can argue there is PC b/c wife says there are drugs inside & there is exigency b/c he's going to destroy the drugs so we should be able to get in w/o a warrant.

- ***Matlock:*** Guy was arrested in yard of his house & detained in the back of a squad car nearby. When police go to the door, the other occupant consented to search of the house. D objects to the evidence taken in the warrantless search. Court holds the consent of one who possesses common authority over premises or effects is valid against the absent, non-consenting person with whom the authority is shared.

- ***Rodriguez:*** Person consents to search but she did not have authority to consent to that search. Girlfriend still has extra key to boyfriends apartment & she gives consent although it was not an apartment she lived in. Police thought she did. Court says police reasonably believed she had authority so it's okay. If person reasonably seems like they have authority, the police can rely on that apparent authority.

- ***Florida v. Jimeno:*** When a person consents, what is the scope of that consent? When D says you can search my car, does that mean they can search the brown paper bag in the back? Court says if it was reasonable to believe the scope of that consent included that paper bag then it's okay, if it was a locked briefcase then that would not be reasonable.

(B) Good Faith Exception to the Exclusionary Rule

- **If police rely in good faith on a facially valid <u>warrant</u>, there is no exclusion of evidence b/c there is no deterrence in that scenario**. Only justification for exclusionary rule is to **deter bad police behavior** & where there is no benefit of deterrence, the cost of letting guilty people go free is too expensive.

- ***Leon* says we exclude evidence (obtained with invalid warrant) when police are not acting in good faith (4 options):**
  (1) Police officer lies in the affidavit: Lying is the opposite of good faith & it helps further deterrence.
  (2) Not neutral magistrate: No reasonably well trained officer should rely on a warrant issued by a non-neutral magistrate b/c officers should know how it works & that is not in good faith.
  (3) Clearly lacking probable cause: So lacking indicia of PC as to render official belief in its existence entirely unreasonable (i.e., officer can't just say I think he's a criminal & I'm really sure). Note that in *Leon,* the court said there was no PC but it was not so lacking in PC as to trigger this. So all close calls go to the side of the police.
  (4) Facially invalid (if it is not particular enough): Officer should know the warrant has to be particular.

- But there is no good faith exception to a ***warrantless*** search yet.

- No exclusion for a judicial mistake b/c we are not trying to deter the judiciary.

- ***Herring* Rule:** To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it & sufficiently culpable that deterrence is worth the price paid by the justice system. **The rule deters (meaning exclusion happens) if police conduct is deliberate, reckless, grossly negligent, or recurring or systematic negligence. If its one time non-recurring negligence, then no suppression.**

- ***Leon:*** Police get anonymous tip that D is selling drugs, they corroborate & find stuff & put the info into an affidavit for a warrant. Magistrate grants it. Later trial court says magistrate was wrong there was not enough PC. So now in effect we have a warrantless search BUT court holds the evidence should not be excluded b/c police relied on it in good faith.

- ***Arizona v. Evans***: *Leon* said it was all about deterring bad ***police conduct***, we have no reason to think judicial officers need deterrence, so fact that magistrate got it wrong is not something we care about deterring. In this case, police make a traffic stop & run D's name in database & find outstanding arrest warrant. They arrest him & in search incident to arrest, find drugs. In reality there was no outstanding warrant, the court clerk made a mistake in putting the D's name into the database. Court says no exclusion for a judicial mistake b/c we are not trying to deter the judiciary. Rule will not have an effect on court employees b/c they have no stake in it.

- ***Herring:*** Officer asks warrant clerk to search for outstanding warrants on D. She can't find any but her counterpart in next county does, officer asks her to fax it over & meanwhile arrests D & finds drugs. They later find out the warrant was invalid & through negligence the system was never updated. Court holds evidence should not be suppressed b/c officer did nothing improper here. The error was negligent but not reckless or deliberate & does not justify extreme sanction of exclusion.
    - **Ginsburg Dissent:** This means no more majestic conception of the 4th Amend. 4th Amend is now just mere words, there is no more judicial integrity & judiciary is complicit in the violation by allowing all of this evidence in.

- ***Davis****:* Police rely on *Belton* to search D's car. Before case is resolved on appeal, *Gant* is decided & says police couldn't search this way. They had searched D's car that way & D appealed on the validity of the car search. Now police could not have done it under *Gant* b/c it violates 4th Amend. But court says no exclusion. Police conduct was not intentional, grossly negligent, reckless, or systematic negligence; police were just complying w/ law as it was at the time. If police are relying on good law, there is no bad conduct & nothing to deter.

(C) Standing

- Standing is about who gets to complain when the 4th Amendment is violated. Rule says that to get standing to complain about a 4th Amendment violation you need **EITHER:**
    (1) A reasonable expectation of privacy in it; OR
    (2) You have a possessory interest in it.

- Overnight guests have reasonable expectations of privacy in wherever they are staying (i.e. hotel room or someone's house) b/c that is what society expects, so they would have standing to complain about illegal searches. ***(Minnesota v. Olson)***

- But people who are merely present w/ the consent of the homeowner do not have REOP (i.e., social guests have no REOP). For example, in *Carter,* the factors that deprived the two men of a REOP in someone else's house is b/c:
    (1) Temporary-Were there temporarily, only spent 2 hours, brief & fleeting.
    (2) Business Purpose- Were only there for business.
    (3) Have No Social Connection to Her- Did not know the homeowner otherwise.
    • On a different set of facts, perhaps normal social guests like friends will be entitled to a REOP in a friend's house.

- ***Minnesota v. Carter:*** Police get tip from informant that people are bagging drugs in an apartment. Police look through a window & see two men & a girl bagging cocaine. Two men get up to leave & police stop them in their car. Later they go back & arrest the girl in the apartment who is the

owner. The men lived in another state & used the apartment just for the purpose of bagging cocaine for a few hours. Men move to suppress the evidence saying police looking through window constituted an unreasonable search & all evidence obtained after it was fruit of the poisonous tree. Court holds yes there was an illegal search here but the men lack standing to complain about it b/c they had no REOP (girl does have standing to complain about the search).

- ***Rakas:*** Car is illegally searched. D did not own the car he was driving nor the gun found in the car. Court holds he lacked standing to complain about the illegal car search b/c he had no REOP in that stuff & had no possessory interest in any of it. Your 4th Amendment rights are not violated if the search was of property belonging to someone else.

- ***Payner***: D charged w/ falsifying taxes. Police want to find out if he has a foreign bank account (he denies) so they steal his accountant's briefcase to find evidence on the account. Court holds D lacks standing complain about this briefcase b/c he had neither a REOP nor a possessory interest in it. Only person who has standing to complain is the accountant.

- ***Rawlings***: His drugs were in someone else's purse & court says he lacks standing to complain b/c he has no REOP in someone else's purse.
  --An example of where just a possessory interest is enough to give you standing is if you have drugs in your fanny pack inside someone else's purse & police search it all, you have standing to complain about the fanny pack search.

(D) Fruit of the Poisonous Tree (FOPT)

(i) What is FOPT & How Does it Apply?

- When evidence is obtained as a result of a constitutional violation, any evidence that comes afterward must also be excluded b/c it is fruit of the poisonous tree & is tainted. But that is not always the case. It may be that the **evidence is so attenuated from the original violation that the taint has dissipated sufficiently to permit use of that evidence.** Two ways of understanding how FOPT applies:

  (1) But For Cause: Did police find this evidence b/c of the violation or was there an independent source for it, or would they have found it inevitably (independent source & inevitable discovery).

  - If there is independent source or inevitable discovery, evidence is not FOPT & is admissible even after the constitutional violation.

  (2) Proximate Cause: Idea of attenuation & taint. Even if they got the evidence b/c of the illegality, how remote is it? It is so removed from the original illegality that we can allow it to come in (for example, like if an intermediate voluntary witness came in to say something of her own free will--that makes it so attenuated as to dissipate the taint). **See *Wong Sun & Ceccolini.***

- ***Wong Sun:*** Hom Way is arrested w/ drugs & tells police he bought them from Toy, who has a laundry on X Street. Police go to a laundromat on X street owned by a James Toy, knock on door & say they are there for laundry, but when they tell him they are narcotics agents he runs away, they break down door & arrest him in his bedroom & find no drugs. But he tells them he smoked drugs with Yee. They go to Yee's house & find drugs in his bedroom. Yee tells them the drugs were given to him by Wong Sun. They go to Wong Sun's house & arrest him but find no drugs. Wong Sun, Toy & Yee were interrogated a few days later after they were released. Wong Sun & Toy gave statements but refused to sign them. Government's has 4 pieces of evidence: (1) Toy's

statement in his bedroom at time of arrest; (2) Drugs surrendered to the police by Yee; (3) Toy's unsigned statement; (4) Wong Sun's unsigned statement.

(a) Toy: Toy is arrested illegally b/c they had no PC (Hom Way's statements + Toy's flight not enough to create PC) so chief potential poisonous tree was Toy's arrest. Toy's statements at scene of his arrest were fruit of that arrest. So everything related to Toy is tainted, his arrest & his **statement** are inadmissible. The drugs found in Yee's bedroom were also the fruit of Toy's arrest so the drugs are inadmissible against Toy.

(b)Wong Sun: Wong Sun's arrest is illegal b/c they have no PC BUT his unsigned statement is admissible b/c that statement is not a fruit of his illegal arrest. He came back voluntarily after he was released to give that statement so the **connection between the arrest & the statement had become so attenuated as to dissipate the taint.** Doesn't matter that he didn't sign it. If he had made the statement at the time of his arrest then it would likely be FOPT & not admissible. But here he came back later of his own free will & made the statement so the chain of causation was broken. Also, the drugs taken from Yee are admissible against Wong Sun b/c he was arrested later & his 4th Amendment rights were not violated.

- ***Ceccolini*** (attenuation): Illegal search took place in D's shop where officer opened an envelope & found papers in it, but he put it back unnoticed. Relying on what he saw, officer was able to find a witness who later testified & convicted D. D argues that testimony should be suppressed as the fruit of that illegal search. Court says no. The greater the willingness of the witness to testify, the greater he will be discovered by legal means. **Witnesses often come forward & testify of their own volition, so the degree of free will necessary to dissipate the taint is often found in the case of live witness testimony.** This witness testified of her own free will, she wasn't coerced or induced & the stuff the officer found wasn't even used in questioning her. Her free will testimony was so attenuated as to dissipate the taint from the initial illegality.

(ii) Independent Source Doctrine & Inevitable Discovery Doctrine

- **Independent Source Doctrine**: If the government **gets the evidence through an independent source (gets it someplace else) then it is admissible.** It applies to evidence initially discovered during an unlawful search, but later obtained independently from activities untainted by the initial illegality.

  • ***Murray:*** Police get tip from informant about Murray & friends, follow them & see them leave warehouse w/ trucks. Trucks are stopped & legally arrested & contain drugs. They then force entry into the warehouse w/o a warrant & see drugs. They apply for a warrant but don't tell the judge about the initial illegal entry & don't rely on anything they saw during that to obtain the warrant. D's move to suppress the warehouse evidence saying the warrant was tainted by the initial entry. Court says no b/c of independent source doctrine. When challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been absent any violation (and point of exclusionary rule is to put them in the same position they would have been in if not for the illegal search/seizure, not worse).

- **Inevitable Discovery Doctrine:** If the govt would have found the evidence anyway legally (inevitably), it is as if they had an independent source for it & it is admissible.

  • ***Nix v. Williams:*** Incriminating statements were obtained from D in violation of his RTC & that led police to the body. D moves to suppress evidence related to the body as a result of that taint. Court said no, body would have inevitably been discovered b/c police were searching for it (2 miles away) & they called off the search only b/c of D's admission.

(iii) Knock & Announce violation does not require suppression.

- ***Hudson v. Michigan*:** Police violate knock & announce requirement when executing a search warrant on D's house. D moves to suppress saying premature entry violated his 4th Amend rights. Court says no exclusion for knock & announce violations. Purpose of knock & announce rule is to protect human life & property. This is a 4th amendment violation, but the remedy is not exclusion b/c they had a warrant, they were justified in going in, they didn't violate privacy that they couldn't violate. **The way they violated it was too unrelated to that core privacy interest.** Knock & announce rule protects many things but it does not protect police from seeing the cocaine, b/c they have a warrant for the cocaine. They went & got the warrant so we are not going to exclude the drugs b/c they waited too short a time to execute a valid warrant that they had to breach the privacy they had a right to breach anyway. In sum, the social costs of applying the exclusionary rule to knock & announce violations are considerable and civil liability is enough of a deterrent for police here.

FIFTH AMENDMENT (SELF INCRIMINATION)

I. Fifth Amendment

- Fifth Amendment is NOT self-executing, you **have to assert it for it to apply or else you are deemed to have waived it.**
    - Except in a **custodial interrogation** where it is self-executing (i.e., Miranda)

- 5th Amendment privilege protects people from being compelled to give testimonial & incriminating evidence against themselves. It applies before administrative agencies too, b/c it turns on the consequences of those hearings, and not necessarily the nature of the proceeding itself.

- Must meet all 3 prongs for the 5th Amendment privilege to apply:
    (1) Compelled; AND
    (2) Incriminating; AND
    (3) Testimonial

(1) What is Compelled?

(A) Compelled means it is involuntary & the witness's will has been overborne.

(i) Classic examples include **sworn testimony under threat of legal penalty in court (threatened w/ contempt)** AND **police custodial interrogation.**

(ii) Other examples of compulsion include the **potential loss of one's livelihood (either by losing your job or losing a license essential to your job)** b/c having to choose between incriminating yourself & losing your means of livelihood is the type of choice that would compel someone to be a witness against himself, unless you are given immunity.

- Getting disbarred & losing government contracts are things that lead to compulsion. An employer cannot make it a condition of employment that people have to testify in order to get the job.
- Note mere financial pressure is NOT enough for compulsion, but a threat of losing your job when that is your means of livelihood is compulsion.

(iii) ***Griffin v. CA***: Prosecutor cannot comment on D's failure to testify in his own criminal trial b/c it puts so much pressure on D to waive his 5th Amend right & testify so as not to leave a bad impression on the jury.

(iv) Witnesses: Person who wishes to claim the privilege has to show up & take the stand & then say "I invoke the privilege," you can't just not show up.

(B) Voluntary proceedings that witness chooses to participate in are NOT compulsion:

(i) Clemency Proceeding- D says clemency proceedings for death row inmates put a lot of pressure on D's to testify b/c they obviously want to get off death row. Court says no, that is not compulsion b/c it is entirely up to D to testify or not, he **has a choice. The mere fact that we will draw adverse inferences from D's who don't testify does not not mean it is compelled**.

(ii) The mere fact that a benefit can be obtained (or a penalty avoided) by participating/testifying does not make the proceeding compulsory.

(iii) Sex Offender Treatment Programs- Asking D to participate in program where he has to confess to his crimes or else lose privileges in jail (or be moved to max security jail) is not compulsion as long as a D's failure to participate does not increase his time in jail or send him back to jail (if he is out on probation). Government has valid penological reasons for doing these things in jails.

- ***McKune:*** D was convicted as a sex offender & ordered to participate in sex abuse rehab program where he has to confess to his crime & any other sex crimes he's committed even if he hasn't been prosecuted for them. If D does not testify some of his conveniences in jail would be taken away (visitation rights, working privileges) & he would be moved to a max security jail. D says this is compelled b/c he is not being given immunity & he knows if he doesn't testify these things will be taken away from him. Court says this is not compelled. It's just an unpleasant choice, you either choose to participate in the program or not, it does not rise to compulsion b/c it doesn't extend time of incarceration. Prisons have valid penological reasons for doing things like this & it is not like curtailing his rights out in the real world would be.
  - **But see** ***Antelope:*** Same type of sex offender program except here it is a condition of D's probation that he got to rehab & confess w/o immunity. If he doesn't he will be put back in jail. Court says this is coercion b/c we're incarcerating him for failure to speak & actually extending his time in jail.

(2) What is Incriminating?

When does the privilege apply (i.e. what is incriminating)?

(A) In any **criminal proceeding; AND**

(B) Whenever the answers might be used later in a criminal proceeding.

(i) Criminal proceeding is **broad**, it includes *(Ward):*

(a) Forfeiture Proceedings-anything that leads to a forfeiture (of your house or car for example) is incriminating.

(b) Quasi-criminal proceedings where the penalty resembles a criminal penalty.

• ***Ward****:* Difference between criminal & civil penalty. Oil spill statute says if you spill oil you have to report it to authorities & we will give you immunity by not prosecuting you for it but we will not give you immunity from a civil fine. Court says a fine is usually a civil, not criminal punishment, therefore we can compel you to report it & not give you immunity. Look at legislative intent to determine if civil or criminal. Court holds this is clearly civil penalty so we can compel you to report it.

- Way to classify a penalty as civil or criminal is to look at legislative intent (statutory construction). 2 step test:
  - **(1) Intent**-Did Congress indicate (express or implied) whether this is a civil or criminal penalty (what label did Congress put on it); AND
  - **(2) Functional Approach**-Even if Congress says it is civil, is it so punitive & functions in such a punitive way that it would be disingenuous to call it civil b/c it looks really criminal? Factors to look at:
    - **(a)** Is the penalty being used, as retribution (criminal b/c we're going after the company just b/c they're bad) or restitution (civil)?
    - **(b)** Has it historically been regarded as punishment?
    - **(c)** Does it come into play only when we find they had intent (like criminal)?
    - **(d)** Is behavior to which it applies already a crime?
    - **(e)** Is there an alternative purpose (civil penalties usually have an alternative purpose)?

(c) Looking at the **nature of the proceeding** AND the **penalty** (do you get locked up, house taken away, or just fined) tells us whether the evidence would be incriminating.

• Post punishment sex offender statutes that impose treatment requirements on sexual predators are not punishment, they are civil disabilities, therefore there is no 5th Amendment privilege to protect you against that consequence.

(ii) Even being a **link in the chain** that can lead you to prosecution might be enough, it need not be directly incriminating. See *Hiibel.*

• ***Hibbel****:* Police get phone call reporting assault by someone in a truck. They stop a truck that fits the description but the driver refuses to give them his name. He is charged w/ violating a stop & identify statute & claims the statute violates the 5th Amendment b/c having to give your name can be incriminating. Court says no, most of the time stating your name is just a routine thing that doesn't lead to prosecution & D here didn't give his name b/c he didn't feel like it (he

wasn't afraid of anything). BUT court says it can imagine a case where giving your name can furnish a link in a chain that can lead you to prosecution, so it is a **factual inquiry.** In sum, people have to give their names unless they can articulate a fear, in which case the privilege may protect you.

(iii) Immunity

(a) But if the witness is given **use/derivative use immunity,** the 5th Amendment privilege is satisfied b/c the testimony cannot be used against him in a criminal proceeding (getting immunity takes away the incriminatingness of it). Once you're given immunity, you must testify.

- **Use & Derivative Use Immunity** says the evidence you give us can't be used in any way in our prosecution of you. They can still prosecute you but they can't use your admission they have to find an independent source of evidence (it immunizes your testimony & any evidence derived from it for use against you).
  - **Example:** If you say "I shot the sheriff," under use & derivative use immunity, they can still prosecute you for shooting the sheriff, they just can't use your admission in your prosecution.

(b) Transactional Immunity is an even greater protection & also satisfies the privilege (it's actually greater than the privilege).

- **Transactional Immunity** is when the government promises not to prosecute you for anything about which you testify (there will be no new prosecution type transaction).

- ***Kastigar*** says we don't have to give you transactional immunity, giving use & derivative use immunity is enough b/c it is **"coextensive with the rule,"** meaning it protects the same things that the 5th Amendment privilege is supposed to protect, namely the extortion of information from you (it puts the govt in the same place in the same place as if you had exercised the privilege & not said anything). You are not entitled to more b/c the privilege is not that broad (transactional immunity is broader than the privilege).

- ***US v. Helmsley:*** D testifies about her corporate business, a newspaper reporter listens to it & writes a separate article that leads to a separate tax fraud prosecution against her. She says that only happened b/c I gave this immunized testimony, court says no this investigator intervened & broke the chain of causation, so it was fine.

- In compulsion, question is how much pressure can the govt put on me to get me to open my mouth. Incrimination is about what the govt will do after I open my mouth. The government can compel you to say things that are not incriminating.

(3) What is Testimonial?

- Evidence is testimonial when it is **<u>communicative</u> & reveals your thought processes** (what you say, what you're thinking, what's on your mind--i.e., when we force you to speak your guilt).

- Evidence that is not testimonial is not protected & CAN be compelled from you.

- Way to figure it out is: **if you can lie about it, it is probably testimonial, if you can't lie about it is not testimonial** (i.e., you can't lie in a blood test so not testimnial).

- Examples of things that are not testimonial & can be compelled:

  (1) Any type of **physical evidence** (blood sample, DNA, fingerprints, voice sample, handwriting sample, etc) is not testimonial b/c it is not communicative in the way that oral testimony is.

  (2) Making D wear specific clothing & stand in a lineup is not testimonial.

  (3) D having slurred speech or stumbling around is not testimonial b/c we focus on the way D is speaking not on the contents.

  (4) Ordering D to sign a release from the bank to release records to police is NOT testimonial:

    (i) But ordering D to give them the combination to his safe IS testimonial.
    (ii) Dissent says signing bank release is testimonial b/c he is signing something giving authorization to them, that seems like something mental process-ey, he is exercising his free will to give this authorization.

  (5) ***Munitz****:* Drunk driving case where D is asked his name, address & the date of his 6th b-day. He answered in a slurred way & couldn't get the date right. His slurred speech is not testimonial but his **response to the 6th B-day question IS testimonial b/c that is about the content of his mind, you are forcing him to do a cognitive process.**

II. Miranda

- 5th Amendment has to apply in the first place (meaning it has to be compelled, testimonial & incriminating), in order for Miranda to apply. For example, in *Schmerber,* they didn't have to mirandize him before taking his blood b/c 5th Amendment didn't apply (b/c physical evidence is not testimonial).

- **Miranda ONLY applies to Custodial Interrogations.** That means police are required to give you a Miranda warning only if it is a custodial interrogation.

- The reasons is b/c we are worried about the **inherent compulsion that characterizes all custodial interrogations** (just being in that scenario is a form of coercion that poses a great threat to the integrity of the 5th Amendment). Therefore, during a custodial interrogation police must warn you & after they warn you, the inherent compulsion dissipates & you have the choice whether to speak or not.

(A) History Before Miranda & Other Types of Violations

(1) *Bram* Traditional Involuntariness- D is taken into detective's office naked & alone. Detective talks to him & says we are trying to unravel this situation & someone saw you do it, etc. Court holds D's statements are inadmissible b/c they were not a **purely voluntary action & must have necessarily been the result of hope or fear or both** on his part b/c of the situation he was in.

(i) *Bram* is still good law & says if the confession is **involuntary it is inadmissible under the 5th Amendment.**

• Your confession is involuntary when you are **not making it out of your own free will** and are motivated & **pressured by hope or fear** b/c your will is being pushed around & your will is overborne (it's not just hope or fear, it's being naked in detective's office alone & embarrassed & trapped)

(ii) Bram did not have to invoke the 5th Amendment, it automatically applied b/c he was in a custodial interrogation.

(iii) The Bram voluntariness question is completely different from the un-mirandized question (two separate paragraphs in your essay).

(iv) Bram violations trigger FOPT b/c they are constitutional violations.

(2) Due Process Cases-Line of cases that say you violate due process when you torture/beat people to get confessions out of them (black D's in south). These were not 5th Amendment violations b/c the 5th Amend did not apply to the states. Today we don't really make due process arguments anymore b/c everything is based on Miranda and both Miranda & the 5th Amendment apply to the states.

(3) *Massiah* 6th Amendment RTC- D was indicted/charged on drugs & released on bail. While out, he had a conversation w/ a co-defendant who was wearing a wire & being recorded by police, in which he made incriminating statements. Court holds his statements are inadmissible b/c he was already charged & the adversarial process had begun. **Once the adversarial process begins, D's 6th Amendment RTC attaches & the govt is not allowed to deliberately elicit incriminating information from him b/c he is entitled to have a lawyer with him at all critical stages of the case.** D's statement violated his **6th Amendment RTC** but it is triggered b/c of the 5th Amendment (you are entitled to have your lawyer there to protect you & enforce your 5th Amendment rights).

(i) *Massiah* applies ONLY after the D has been charged.

(ii) *Perkins* comes out the opposite way b/c the D had not been charged on *THAT* crime yet (and the RTC is charge specific).

(4) Miranda-After *Massiah,* police began interrogating people before charging them so as not to violate *Massiah.* That is where *Miranda* comes in.

(i) Miranda happens before you are charged & before your RTC has attached. In Miranda, the adversarial process has not begun so you don't have a 6th Amendment RTC. **Your Miranda RTC is a 5th Amendment right to counsel, NOT a 6th Amendment RTC.** It is a RTC right that is triggered to protect your 5th Amendment privilege against self incrimination.

(ii) Miranda warnings must be given before custodial interrogations b/c we need protective, **prophylactic** procedures.

- Prosecution may not use use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the D **unless it demonstrates the use of procedural safeguards effective to secure the privilege against self incrimination.**

(iii) Constitutional Problem: Court says we might not find D's statements in a particular case to be involuntary in traditional terms (i.e., Bram involuntariness) and that creates a constitutional problem of excluding voluntary statements under Miranda (when the 5th Amendment only excludes involuntary statements), but we don't care. We do it b/c the danger of violating the 5th Amendment is so great, it is a preemptive strike, you don't need to show involuntariness on a case by case basis for custodial interrogations.

(iv) Difference Between Involuntary (Bram) & UnMirandized: If we don't have Miranda warnings the court is afraid people will **feel like they must speak** (& have no free choice) during custodial interrogation. **But that is different from involuntariness in the traditional sense** (i.e., from Bram involuntariness) **b/c we can't tell in every instance of custodial interrogation whether a person's will was overborne like it was in *Gram*,** so we just give the prophylactic warning. It's the difference between a Gram involuntary statement (which is inadmissible b/c it violates the 5th Amendment) & an unmiandized statement (inadmissible b/c it is unmirandized & violates Miranda).

(v) The inquiry is: did the police use protective procedures to ensure that it was a product of free choice (i.e., did they warn). If they didn't warn, it can't be used b/c it lacked procedural safeguards (it violated Miranda), not b/c it was involuntary. We can't know if someone is acting voluntarily or not unless they were warned, b/c of the inherently coercive nature of custodial interrogation, and that **justifies the warning requirement.**

(vi) If not properly Mirandized, your statements get excluded under the exclusionary rule, but **Miranda does not trigger FOPT** b/c it is not a constitutional violation. Bram does trigger FOPT.

(vii) Hypo: I'm arrested & taken to station. They're very nice to me, give me coffee & do pleasant interrogation. They don't Mirandize me. Was it involuntary?

---No it was not involuntary under *Bram*. Your will was not overborne & there is no hope & fear inquiry. The only thing that makes it coercivey is the fact that it is a custodial interrogation, but just b/c it is a custodial interrogation does NOT mean it is involuntary per se.

---But this is inadmissible under Miranda b/c it is unwarned.

(viii) But D can **waive** all of these rights as long as the waiver is **voluntary knowing & intelligent.** Once you are warned, you know you have the right & then it can be waived.

(viiii) Dissent says if we think every custodial interrogation is inherently coercive then how can we permit waiver (i.e. how can we accept the D rejecting the offer to see a lawyer or refusing to remain silent as okay)?

--When police warn you it cures the problem; the **warning dispels the coercion inherent in custodial interrogation**, you now have free choice.

(viiii) It is **ONLY police coercion that triggers 5th amendment,** not the voices in your head telling you to confess.

- A statement might be inadmissible b/c: it violates *Bram* (involuntary confession); or b/c it violates *Miranda* (unmirandized); or b/c it violates *Massiah* (6th Amendment RTC).

(B) What is Custodial Interrogation (remember Miranda ONLY applies to CI)

- Miranda is a two step test:

(1) Were they in custody; AND

(2) Were they being interrogated (if they were just in custody but not being interrogated, it doesn't apply. So if D blurts out "I did it" that is okay).

(1) Custody: Was the person **not free to leave in a way that was coercive.** Do not actually have to be in police station to qualify as being in custody:

(i) Police bursting into someone's house in middle of night & questioning him in his bedroom qualifies as custody b/c he's not free to leave in a way that's coercive

(ii) Being under attest is custody (so must Mirandize).

(iii) A **regular** Terry or traffic stop is NOT custody, so no Miranda. *Berkemer*

- Although you are not free to leave it is not a coercive type of not free to leave. Note an extraordinary terry/traffic stop might be custody.
- This means **you can be seized but that does not qualify as custody.**

(iv) A probation interview is NOT custody. *Murphy*

(v) The standard for whether someone is in custody is an **objective reasonable person standard.**

--After *JDB v. North Carolina*, we are allowed to consider the objective criteria of **age** in determining whether a reasonable person would feel free to leave or not.

• ***Berkemer:*** D pulled over for traffic/terry stop & told to perform field sobriety test. He fails. Officer asks him (asking is an interrogation) if he's high & he says yes. Court holds its admissible b/c D was not in custody yet so officer did not have to Mirandize him before asking. A regular Terry/traffic stop is not custody b/c (1) nature of a traffic stop is that it's temporary you know it will only last short time & (2) it is public in plain view of people. So this is a different type of not free to leave (it's not a coercive type of not free to leave). BUT if this were an extraordinary traffic stop with officers yelling & taking you into semi-private places then we say it doesn't look like ordinary Berkemer traffic stop.

--Note: This stop was probably also voluntary under Bram.

• ***Murphy:*** D was out on probation & during treatment program confessed to a rape & murder. They told his probation officer. She tells him to come see her, he comes & she says he has to confess to police about it or else she had a duty to turn him in. She did turn him in & he was convicted. D says it was custodial interrogation & probation officer should have mirandized him.

--Court holds he was NOT in custody. This was not an inherently coercive situation where he felt he had no choice (not the kind of lack of choice/not free to leave scenario that we mean by custody) he could have walked out at any moment. **It does NOT matter that he had to go see the probation officer or else**.

--The other inquiry is a pure 5th Amendment inquiry (compelled, testimonial, incriminating): This was incriminating & testimonial; we can argue it might or might not be compelled (see other sex offender cases). But reason he didn't get this 5th Amendment protection is because he did NOT invoke it himself. **If you are not in a custodial interrogation you have to invoke 5th Amend yourself b/c its not self-executing.**

• ***JDB v. North Carolina:*** 7th grader is suspected of stealing, they go into his school & pull him out of class into principal's office. They have 2 cops & administrators, they don't mirandize him & he confesses. Was this custody & can we take his age into account? Court says here a an objective reasonable person would not think they are in custody in the principal's office. **BUT we must consider other objective criteria. You can consider things like age b/c that is an objective criteria** (not what this specific 13 year old though but what all children would think). Kids objectively respond to & behave differently from adults. So now we include in our inquiry (<u>for the custody factor ONLY</u>), whether a reasonable person would feel free to leave or not. **Court is not saying age is dispositive, just saying you can consider it b/c its a objective factor that bears on the circumstances whether someone thought they were in custody or not.**

(2) Interrogation: Interrogation is either:

(1) Express questioning-directly asking u a question with ? at the end; **OR**

(2) Functional equivalent-words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. ***(Innis)***

(i) Subjective intent of police does not matter except when they are trying not to elicit a confession, in that case we don't penalize them. See ***Mauro*.**

(ii) If a suspect does not know that he is talking to an officer (i.e., undercover agent situation) then there is no police dominated atmosphere & no fear of coercion, so concerns of Miranda are not implicated. ***Perkins***

- But see ***Fulemante.***

(iii) Routine Booking Exception-routine booking questions are interrogation b/c we allow the police to do it b/c they need to do their job, so no need to Mirandize you before asking you routine booking questions.

- ***Rhode Island v. Innis:*** D arrested for murder & asked for a lawyer after being given Miranda warning. They put him in a police car & officers start talking to each other about gun they had not found & how they were afraid handicapped kids might find it & hurt themselves. D spoke up & told them where it was. Court holds it's admissible b/c D was not being interrogated (i.e., not functional equivalent) when he made the statement. A practice that police should know is reasonably likely to evoke an incriminating response is interrogation, but police shouldn't be held accountable for the unforeseeable results of their words or actions.
  - **What the police did here is NOT words or actions that are reasonably likely to elicit an incriminating response**, so this is not functional equivalent.
    --In this case it did elicit an incriminating response. That is probably what the police wanted but the **subjective intent of the police does not matter.**
  - Don't be distracted by fact that he invoked, it's still ok b/c this was not an interrogation.

- ***Arizona v. Mauro***: Wife wants to talk to husband who is in custody. Police tell her it's a bad idea b/c they will be able to listen to their conversation & any incriminating statements they make. Police know that letting wife see him is reasonably likely to elicit an incriminating response BUT the police discouraged her from doing it. This was not a psychological ploy on part of police to get them to talk, so it's not functional equivalent of interrogation. When the police are trying not to elicit incriminating responses they will not be punished for the actions of D's.

- ***Illinois v. Perkins:*** D is charged w/ crime 1. That triggers his RTC b/c adversarial process has begun. **RTC is charge specific.** Police also suspect him of a different crime (crime 2) for which he has not been charged yet, so they put undercover agent in his cell & D tells the agent about crime 2. D claims he should have been Mirandized b/c this was a custodial interrogation. Court says no this was okay.

  (i) If govt put undercover agent to get info for crime 1, that he was already charged with, that would not be okay (it would be *Messiah*) b/c his *RTC for crime 1* had already attached. **Police cannot deliberately elicit incriminating info from a charged suspect in violation of his RTC.** But his RTC for crime 2 had not attached yet so it was ok.

  (ii) Also, they didn't need to Mirandize him b/c convos between suspects & undercover agents, **where D does not know he is talking to police, do not implicate the concerns of Miranda b/c they are not coercive in the way that Miranda is worried about.** There is no police dominated atmosphere when the D is clueless so he's not coerced.
  --This is just like the technical move back to first principals in IAC claims, where Nix said the two Strickland prongs were met but the guy got a fair trial anyway & that is enough b/c point of giving effective counsel is to ensure you get fair trial.

- ***Fulemante:*** D is incarcerated & makes friends w/FBI informant who pretends to be a crime boss. Rather than asking D questions, the snitch exploits the fact that D is being threatened in jail (snitch says I'll protect you from threats if you give me this info). Court says this is involuntary b/c govt is being part of the threat in prison & extorting him, the govt was part of that coercion. **BUT this is not a Miranda violation case, this is an involuntary case like *Bram.***

- ***Muniz***: D arrested for drunk driving, taken to station & booked. During booking officer asked questions about name, age, address, etc. Court held these administrative questions fell into routine booking exception to Miranda & police are allowed to ask them b/c they need to do their job.

(C) What Does the Miranda Warning Have to Include?

The language in Miranda is the standard: Prior to any questioning the police must:

(1) Warn the person that he has a right to **remain silent.**

- Warning is absolute prerequisite, it doesn't matter if D knows his right already.

(2) That any statements he makes may be **used as evidence against him.**

(3) Has a right to the **presence of an attorney** & if he can't afford one, one will be appointed to him (can have the lawyer with him during the interrogation).

- **MUST warn you no matter who you are** (even crim pro professor who knows the rules)

- But not every valid warning has to have this ideal language, the bottom line is that it must convey the **"essential information"** that Miranda articulates.

- ***Florida v. Powell****:* Warning implied that D could consult w/ a lawyer before questioning but not during. Court said it was acceptable b/c words were sufficiently comprehensive & comprehensible when given a commonsense reading & communicated the essential message.

- ***Duckworth****:* Police say you have the right to a lawyer, we can't give you one right now, but if you go to court you will get one. Court says this is enough. But just saying you have a right to lawyer is not enough, D needs to know one will be appointed if he can't afford one.

III. Invocation & Waiver

- Merely being in custody is not enough to trigger need for a Miranda warning, you need to be being interrogated. Until there is a custodial interrogation there is no need for a warning. Before the custodial interrogation starts, anything the D says is admissible.

- Has to fit into 1of 3 boxes: (1) police gave no warning, or
  (2) police warn & D invoked or (3) police warn & D waived.

(A) Invocation

D can invoke his right to remain silent (RTRS) or his right to counsel (RTC), or both. But they each trigger different protections & the RTC invocation is the stronger protection.

(1) If D invokes RTRS:

(i) ***Berguis*** says invocation of RTRS must be **unambiguous**.

- Sitting there silently w/o saying anything for 3 hours is NOT an invocation of RTRS.

(ii) ***Mosley*** says invocation of RTRS triggers your right to **cut off questioning**. Police must stop talking to you immediately. **That invocation protection lasts two hours.** After two hours, police can come back & rewarn you & start again.

Ultimate inquiry is, **were the two interrogations sufficiently distinct so that the second warning was effective & the waiver was valid the second time. FACTORS to look at are:**

(1) Different officers
(2) Different location
(3) Different crimes
(4) How much time passed between the two interrogations.

(2) If D invokes RTC:

(i) ***Davis*** says invocation of RTC must be **unambiguous**. Saying "I think I might want a lawyer" is NOT enough & police can keep questioning you.

• Must articulate desire to have counsel sufficiently clearly so that a r**easonable police officer** would understand it. Example:

(a) D agreeing to talk to police, but refusing to make a written statement w/o counsel present is not a valid invocation of RTC.
(b) D requesting his probation officer to be present is not the same as requesting an attorney & D's statements made after the request are admissible b/c no valid invocation of RTC.

(ii) ***Edwards*** says invocation of RTC means the **police can no longer speak to you (for 2 weeks/14 days) UNLESS you reinitiate.** 2 weeks is enough time & after that police can reinitiate questioning after they warn you.

• That break in custody provides plenty of time for the suspect to get re-acclimated to life & shake off residual coercive effect of his prior custody. Being home for 2 weeks, whether your home is a castle or jail, dissipates the coerciveness (the fact that this guy was sitting in jail doesn't matter, that's not the type of coercive we are talking about here). ***Schatzer.***

• ***Roberson*****:** D is arrested, given warning, invokes RTC. 3 days later new officer givesD warning & questions him about another crime. He agrees to talk this time. Court says not admissible. Reaffirms *Edwards* rule & says **3 days later is not okay** to talk to D if he invokes RTC & did not reinitiate, even if it's about a different crime w/ different police officer. (*Burghuis* doesn't apply here b/c Roberson invoked).

• ***Minnick:*** D invokes RTC, is allowed to consult w/ his counsel, and is thereafter given a new warning & interrogation. Court holds this violates *Edwards* b/c *Edwards* not only entitled you to consult with a lawyer, it entitled you to have the lawyer there. **You cannot reinterrogate him without his lawyer present.**

(iii) What is Re-initiation?

(a) Note that re-initiation restarts the clock but it is NOT a waiver.

(b) Once D reinitiates, **police must rewarn him**, then his statements are admissible.

(c) Saying "what is going to happen to me now" is enough for reinitiation.

(d) But sometime a **bare inquiry by a D or a police officer should not be enough to initiate** a conversation in this sense, like asking where is the bathroom (or do you want water, do you want to make a phone call). **Were looking for a desire to initiate a conversation <u>about the investigation</u>**.

- If D invokes & police then say would you like to go to the bathroom & he blurts out a confession, that is admissible b/c no CI.

(iv) RTC gets more protection than RTRS b/c when you ask for a lawyer it's a sign you are feeling more coerced (saying I really need help & protection from coercion, can't do this by myself) than if you merely say I don't want to talk to you. We give people counsel to counteract the coercive nature of it. ***Edwards.***

- ***Michigan v. Mosley* (RTRS)**: D is arrested for robbery & is in custodial interrogation. He is warned & invokes his RTRS so police stop questioning him. 2 hours later another police officer at another location rewarns him & interrogates him about an entirely different crime. D gives incriminating statement. Court holds that first invocation does not render the second statement inadmissible. This case is the blueprint for what is okay. Interrogations were about different crimes, done by different officers, 2 hour gap in between, etc., so all these factors make us think it was not coercive. His first right to cut off questioning was scrupulously honored. Police gave ample time in between & gave new warnings before starting each interrogation.

- ***Westover**:* D was in custodial interrogation & got no warning. Then there is a break. Then new police (FBI) take over & warn & interrogate him about a different bank robbery, and that leads to a confession. **Court says the second interrogation w/ the warning benefitted from the coercive nature of the first unwarned interrogation,** so the second one was NOT an effective warning. Court says this was just really like one long interrogation, it was not two separate interrogations so the break could not work to dispel anything. (Note this is not about taint, there is no FOPT argument here, just ineffective warning).

- ***Edwards v. Arizona* (RTC):** D is warned & invokes his RTC. There is a break. They warn him again & interrogate him & he confesses. Court holds it is not admissible. (*D is arrested & warned & is willing to talk. They told him someone else implicated him & he gave a taped statement of alibi. He said he wanted to make a deal, but wanted an attorney before making the deal. The questioning stopped after he said that. The next day, new officers visited him & he said he didn't want to talk. Police give him new warning & he confesses. Court holds he did not validly waive his RTC on the second interrogation*). **B/c he invoked his RTC they could not come back to him at all unless he reinitiated.** His waiver on the 2nd day was invalid b/c he invoked his RTC, whereas in *Mosley* it was valid b/c he only waived his RTRS. Waiver of RTC must be knowing & intelligent, just being voluntary isn't enough (here it was just voluntary). Reinitiation starts clock all over again, but it's not a waiver, he's just giving up the shield. **His waiver would be invalid even after *Berghuis* b/c *Berghuis* ONLY applies if there's no invocation in the first place.**

- ***Maryland v. Schatzer*:** Police warn D & he invokes RTC. 2.5 years go buy & he is sitting in jail. Police come back & rewarn him & reinterrogate. He waives & confesses. Court holds it is admissible b/c this was a long enough break in custody.

- ***Bradshaw* (Reinitiation):** D invokes his RTC & officers stop talking. Then they are driving in car & D says "so what is going to happen to me now." Court says D reinitiated a conversation w/ police about his case, he was rewarned, and so his subsequent statements are admissible. **The words he used are enough like talking about your case so that now you have given up the armor of your RTC invocation.** Looking for desire to initiate a conversation about investigation.

- **Hypo:** D is warned & invokes RTC. Police cut off questioning. Then D blurts. That blurt is admissible b/c it was not generated by any improper police conduct & it was a reinitiation. Next, if they rewarn him, everything else he says is admissible b/c that is course of conduct that is the equivalent of a waiver. If they don't rewarn him, it is harder to find that there was a waiver (b/c it's hard to find it was knowing & intelligent w/o warning him).

- **Hypo 2:** D arrested & invokes RTC & sits silently for hours. D has not been charged w/ a crime yet. Then they put him in a cell w/a snitch & he talks to the snitch. What he tells the snitch IS admissible b/c he was not charged with a crime yet, so 6th Amendment RTC has not attached yet.

(B) Waiver

- Whether a D never invokes in the first place OR invokes then reinitiates, **we MUST still always ask whether there was a valid waiver of his Miranda rights.** If there was no valid waiver his statements are inadmissible.

- **Waiver does NOT have to be unequivocal,** can infer a waiver from course of conduct.

- Waiver must be **voluntary** (was he not coerced into waiving), **knowing & intelligent** (does he understand the consequences of giving it up).

- ***Burghuis* Black-letter Rule for Valid Waiver:** We can **imply** a valid waiver from D's **course of conduct** as long as the following three prongs are satisfied:
  (1) Miranda warning is given; and
  (2) D made an uncoerced (voluntary) statement; and
  (3) D understood his rights (reading the statement out loud & demonstrating literacy is enough to show he understood it knowingly + intelligently) ***Burghuis***

  • If all three are satisfied, the **fact that the D spoke after all this** is enough to show a course of conduct indicating waiver.

  • *Berghuis* ONLY applies if there is no invocation in the first place, if D invokes then waives, we have to apply *Mosley, Edwards,etc.*

- **Specifics of the Rule & Examples:**
  (a) Events occurring outside of the presence of the D & entirely unknown to him can have no bearing on his capacity to comprehend & knowingly relinquish his right. So even if the police lie to or trick your lawyer, that does not invalidate your waiver b/c it doesn't affect your understanding of your rights. ***Moran v. Burbine***
    •Even tricking the D like they did in *Illinois v. Perkins* (snitch in cell) is ok

(b) But tricking a D ***into waiving*** is not okay b/c it messes up the warning so you can't lie about the warning (i.e., if you waive we won't charge you).

(c) Can trick D into confessing once they've waived (once D waives police can say victim died when in reality victim didn't or vice versa).

- But even if D waived police can't say "I'm glad you waived, if you confess you won't be charged."

(d) Can knowingly & intelligently waive even if you don't know all the crimes they might go after you for (they don't tell you the crimes they are going to interrogate you about). This is not a trick & is okay. ***Colorado v. Spring.***

(e) Even if D refuses to sign the waiver form, we can still say he validly waived. *(Burguis & Butler).*

- ***Moran v. Burbine*** **(knowing & intelligent):** D is given warning & signs waiver. His attorney was trying to get in touch w/ him & he did not know about it. Police tricked his attorney by telling her they are not interrogating her client. His waiver was voluntary but was it knowing & intelligent? Yes. These facts do not invalidate D's waiver b/c D was warned so he knew what his rights were, knew what he was giving up, & knew the consequences of waiving, etc. He got exactly what he was entitled to. End of story. The warning is the thing that is doing all the work here. Events occurring outside the presence of D & entirely unknown to him can have no bearing on his capacity to comprehend & knowingly relinquish his right a constitutional right. The info might have been useful to D & changed his decision to confess but that does NOT effect waiver analysis
  - Police conduct here did not violate DP b/c it didn't shock the conscience & mess with fundamental fairness/underpinnings of justice system. Not eggregious enough, need more

- ***Berghuis*** **(waiver):** D is arrested & warned. Officer read form to him & ask him to read a part of it to make sure he knew how to read & understood english. D refuses to sign the waiver form. D does not invoke RTRS or RTC. He just sits there quietly for 3 hours & says nothing during the interrogation. Toward the end he responds to 3 questions about god & says yes to wanting forgiveness for shooting victim. Even though he didn't invoke, we still need to find a valid waiver for his statements to be admissible. Court holds there was a valid waiver here. We do not need unequivocal express waivers, implicit waivers are enough. A waiver may be inferred by D's silence + coupled with his understanding of the rights by reading them outloud + a course of conduct indicating waiver (here, speaking). Here course of conduct indicating waiver was his confession itself. If you have understanding, no coercion, &course of conduct indicating waiver that is enough for waiver. Before this case, that was not true.
  (i) If at the beginning of the 3 hours D said I don't want to talk to you that is invocation of RTRS so police would have to cut off questioning & come back later.
  (ii) If D said I feel like I need a lawyer, that is NOT an invocation of RTC b/c it is equivocal. So police can keep going until waiver happens (or real invocation happens).

- ***North Carolina v. Butler****:* D was given Miranda warnings & said he understood but he refused to sign the paper acknowledging that. He said I will talk to you but I won't sign a form. Court held that was a valid waiver, he just didn't want to sign that does not mean it was an invalid waiver.

• **Review:**Under 4th Amend, consent for searches merely needs to be voluntary, don't need knowing & intelligent. Knowing/intellignt/voluntary (i.e. waiver) requirement only applies to things that are supposed to guarantee a fair trial (RTC; confession/Miranda; & pleas), that's why you get warnings for those things.

VI. Miranda's Constitutional Status

(A) Constitutional Status of the Violation

(a) Bram: Involuntary confessions are inadmissible b/c they violate the 5th Amendment & FOPT applies. (The exceptions below do NOT apply to mere involuntary confessions).

(b) Miranda: Warnings are required to dispel possibility of coercion in custodial interrogation. Unwarned statements are inadmissible b/c they violate the rule in Miranda. FOPT does NOT apply b/c this is not a constitutional violation.

- **Exceptions to Miranda** (these are not exceptions to Bram violations too, just Miranda):

  (1) Public Safety Exception-Exception to protect concerns of public safety.

  • ***Quarles****:* D in public market w/ empty holster. Police ask where is the gun w/o giving Miranda warning? D tells them. Statements & gun obtained through unwarned questioning is admissible b/c questioning was to promote public safety, it was not done to obtain evidence. The need for answers in situations posing a threat to public safety outweighs the need for the prophylactic Miranda rule.

  (2) Impeachment Exception-Statements obtained in violation of the rule can be used for impeachment, so that the truth finding function of the trial is not distorted

  • ***Harris:*** Unmirandized statement is inadmissible in the prosecutor's case in chief (it can't be used as the evidence that the person did it), but if D gets on the stand & says something different from the statement, his unmirandized statement can be used to impeach him.

  (3) Physical Evidence Exception-Any physical evidence obtained as the result of an unmirandized statement IS admissible. ***(Patane)***

  • **BUT** if the original statement was involuntary under Bram, then it is a 5th Amendment violation and the subsequent physical evidence does not come in b/c FOPT applies (if something dissipates the taint like in *Wong Sun* then it can come in).

- ***Dickerson***: These cases acknowledge that Miranda is not a constitutional violation, it is just a prophylactic thing. Congress tries to overturn Miranda statutorily by saying all statements are admissible as long as they are voluntary. Court holds Congress cannot overrule Miranda b/c **it is a constitutional rule that is rooted in and required by the dictates of the Constitution even though a violation of Miranda is not a violation of the 5th Amendment.** So Congress cannot supersede it legislatively.

(B) The Problem: Sequential Interrogation & FOPT

- The problem that this dynamic creates is: An unmirandized confession on its own does not violate the Constitution, it just violates Miranda, so it does not trigger the FOPT. So

what do we do with sequential interrogations where the first interrogation is inadmissible b/c it's unwarned, then they warn him & interrogate him again.

Interrogation 1(unwarned) - statement 1 - WARNING - Interrogation 2 -Statement2

Is statement 2 admissible or not?

- It depends on whether the midstream **warning was effective, meaning, did it actually convey to the suspect that they have real choice**. **5 Factor Test to determine if the warning worked or not:**

(1) The completeness & detail of the questions & answers in the first round of interrogation (in *Elstad* it was not complete &was just brief, but in Seibert it was complete);

(2) The overlapping content of the two statements (did D let the whole cat out of the bag in the first statement or did he just saying small);

- **Cat out of the bag theory:** Once you have already said something inculpatory, that is going to affect your willingness to make another inculpatory statement b/c you've already let the cat out of the bag. If D's first & second statements completely reveal everything & he says the same thing in both of them (like in Seibert where she confessed fully both times), then the second warning was not effective to dispel coercion b/c there is no way D would think the first statement is going to be inadmissible, so the second statement is inadmissible. But if D's first & second statement were not exactly the same thing, and D only let a paw out of the bag (like in Patane), then the midstream warning is okay to dispel coercion.

(3) The timing & setting of the first & second interrogations;

(4) The continuity of police personnel;

(5) The degree to which the interrogator's questions treated the second round as continuous with the first (if police tell the D that what he said in the first round is not admissible then that would satisfy this factor).

- ***Oregon v. Elstad:*** Police come to D's house (D is a kid) & take him down to station. At the house, Mom says where are you taking him, they say he's suspected of robbery & kid in response makes an incriminating statement. This statement was unwarned & inadmissible. Then they put him in police car, get to station & mirandize him. So there was a break between the two scenarios. He then confesses. The initial unwarned interrogation in his house was a custodial interrogation so that initial statement was an unwarned & inadmissible. What impact does that have on the second warned confession?

Holding 1 = No FOPT. The first statement that was improperly obtained does not taint the second one.

Holding 2 = No problem w/ the second confession b/c they were two different events, there was a long break between them, different location, etc. The warning given in the

second interrogation is meaningful & dispels the coercion inherent in interrogation. Therefore, there is no reason not to admit this second confession.

Hypo: Imagine the first statement was not merely unwarned but involuntary, meaning it violated the 5th Amendment. Then they take D to station, mirandize him & he confesses. **Now we analyze whether what he said the second time is the fruit of the first one.** Argue yes b/c he already said it, he is still in fear, there was no act of free will that intervened in between them so the first coercion taints the second one; OR argue no b/c there was no taint since the second one was so different from the first & they didn't exploit the first to get the second & the taint dissipated.

- ***Missouri v. Seibert:*** D is arrested & interrogated for 40 minutes w/o a warning. Officers squeeze her arm too. She confesses. They give her a 20 minute break, then give her a warning, she signs a waiver, and she confesses again. Court holds second confession inadmissible b/c warning was not effective. Fails 5 factor test b/c warning was not effective to dispel coercion & did not convey she had free choice. Objective of this interrogation technique is to render Miranda warnings ineffective by waiting to give them after D has already confessed. The purpose is to get a confession D would not make if D understood her rights at the outset; D would hardly think she had a right to remain silent after that.

- **Review-**Sequential interrogation cases are *Mosley, Westover, Elstad & Seibert:*

  (1) Mosley: RTRS invocation. Waiting 2 hours between the two permits the second warning to be fully effective.

  (2) Westover: Unwarned & no statement. Then FBI takes over & gives a warning (midstream warning) & get a statement. Court says this was just like one long interrogation, it was not two separate interrogation so the break could not work to dispel anything. Thats why its inadmissible.

  (3) Elstad: Brief interrogation. Gap. Very different type of interrogation. But this is more like *Mosley* b/c there is a real break between the two, they were sufficiently different & the warning was effective for what Miranda is trying to accomplish.

  (4) Seibert: Long unwarned confession. Small 20 min break. Warning. Then repeat confession verbatim. Court says this is more like *Westover* than *Elstad* b/c this warning could not have possibly worked, nobody in her shoes would have thought she could remain silent after she just confessed. Therefore, in effect it is like she was never warned.
  - For new fact patterns, argue if something is more like Elstad or more like Seibert, etc.

- ***Patane* (physical evidence):** D is not warned & police ask about his gun. D was reluctant to answer but eventually did & they seized the gun. Court holds admission of the gun into evidence does not violate Miranda. No FOPT for unwarned statements, so any subsequent statement is governed by elstad &seibert. But any tangible physical evidence that comes afterward is admissible b/c there is nothing that says it isn't. So when he goes to trial they can admit the gun but not his statement. But we do exclude physical fruits of actually coerced involuntary statements.

GUILTY PLEAS

- A guilty plea is essentially a waiver of your right to trial, right to remain silent, and right against self incrimination. That's why it has to be voluntary, knowing & intelligent.

I. Requirements For a Valid Guilty Plea

A valid guilty plea requires the following 3 prongs (these requirements are codified in **Rule 11**):

(1) Voluntary-Court usually deems a plea to be voluntary if the D **(SEE *Brady*):**

(a) Was advised by competent counsel; **AND**

(b) Had a full opportunity to assess he advantages & disadvantages (i.e. he had time to rationally think everything through); **AND**

(c) Not subjected to threat of/or actual physical harm or mental coercion.

(i) Pleading guilty b/c you are afraid of getting the death penalty (or getting a harsher sentence) does not mean your plea was coerced or involuntary. You have a bunch of choices & must consider all the circumstances, and the threat of a heavier sentence is just one of the factors in this consideration.

(ii) This is different from involuntariness under Bram b/c Bram was just an irrational, immediate response to all the pressure of being naked, alone, scared & interrogated in a room. Here, for voluntariness, court is looking for **systemic choices**; they can create the death penalty as a possible punishment & that can have a pressuring effect on people, **but if that is why you make the choice that does not mean it is illegitimate.**

(iii) But the prosecutor is allowed to make the following threats & your plea is still considered voluntary:

(1) Can threaten you w/ death penalty.

(2) Can threaten to reindict you on more serious charges if you don't plead guilty (if he has PC you did the more serious crime).

(3) Can offer to drop charges in exchange for testimony.

(4) Can threaten to indict your family if you don't plead guilty.

(2) Knowing & Intelligent (Rule 11 sets out the requirements)

(a) Court must address D personally in open court

(b) D must be told about the general procedural rights that he has, such as, right to trial, RTC, right to cross examine witnesses, right to not self-incriminate.

(c) D must be informed of the nature of the charges against him.

(d) D must be told what the maximum possible penalty is (he does not have to be told what punishment he will actually get).

(e) D does NOT have to be told about his possible defenses.

• D's ignorance about a possible defense does not make a plea unintelligent. By pleading guilty, **D waives any possible defenses that he had, even if he did not know about them at the time**. **SEE *Broce.***

• A change in the law later on or D's own ignorance about a defense does not make the plea unintelligent.

(3) Have a Strong Factual Basis-A factual basis is any basis for finding that the D did it (assertions of facts to support it). It is super easy to show & is NOT an evaluation of the strength of the governments case.

• Usually a guilty plea is justified (meaning it is voluntary) by the fact that the person is admitting his own guilt by pleading guilty. However, there is a special problem with innocence b/c court is afraid that actually innocent people are pleading guilty b/c they are scared of the punishment otherwise. Court's solution to this justification problem is to require a **strong factual basis (from which court can determine it is legitimate to take the plea)** before taking the plea.

• If there is no admission by the D, **factual basis will be satisfied w/ strong evidence before the judge of actual guilt.**

• ***NC v. Alford*** explains what kind of factual basis is required (especially when the D proclaims he didn't do & is pleading guilty only b/c he's afraid of harsher punishment). The following is **enough** for strong factual basis:

(1) Sworn testimony of police officer saying here is what we have +

(2) Two witnesses testified against D (witnesses say D came home & said he committed murder).

-This is all circumstantial evidence, there are no actual eyewitnesses, but court says it's enough. So any facts more than this are good, anything less might be problematic.

- **What can't a prosecutor do?**

(1) Can't make misrepresentation (i.e., prosecutor can't lie about what charges will be filed against you).

(2) Can't make improper promises (i.e. prosecutor can't bribe you, but their version of bribe is not what we think of as a bribe, so lots of things would be acceptable here).

(3) Can't physically harm you.

(4) Can't engage in prosecutorial vindictiveness like ***Blackledge***, where D was punished for exercising a right that he lawfully had the right to exercise.

- ***Bordenkircher*** **(voluntary):** D forges $88 check. By statute, that carries a sentence of 2-10 years. Prosecutor offers D 5 years if D pleads guilty. Prosecutor says if you don't plead guilty I'll recharge you as a recidivist & that carries a mandatory life imprisonment if D loses. D does not take it. He gets reindicted, goes to trial, & loses. Can the prosecutor exercise this authority in the negotiating process or is it a threat that the government cannot make? Court holds prosecutor can do this. It is just one of many things D can consider in deciding to plead guilty or not. There are a lot of options & this is one of them. Prosecutor could have charged him with this crime in the first place, so he can do it now too. What prosecutor can't do is engage in **prosecutorial vindictiveness** like in ***Blackledge.***

- ***Blackledge*****:**D was convicted in a lower court, appealed and went to a higher court to ask for a new trial. The prosecutor in response reindicted him for a more serious offense. Court says prosecutor can't do that b/c it is not part of the give & take in negotiating or bargaining, that is just prosecutorial vindictiveness. This case looks very similar to ***Bordenkircher***, the only

difference is that one takes place via a negotiation (Bordenkircher knew the prosecutor was going to come back & reindict him) whereas in *Blackledge* prosecutor just reindicted him w/o warning.

-- If it is a negotiation point (i.e. it is being made an option for the D), then the prosecutor can use any tool at her disposal such as: reindictment, threatening to indict D's family members, etc.

-- So in *Blackledge* if the prosecutor had warned D before D appealed that would have made the prosecutor's conduct okay (as long as the warning was given before D made his initial decision whether to plead or not; a warning after his trial but before the appeal would probably not work).

- ***Brady* (voluntary):** Brings plea bargaining out in the open. Two issues:
(1)Voluntary: D says his plea was not voluntary b/c he pled guilty out of fear of death penalty. Court says that's okay, it's still voluntary if he had a chance to **rationally work out the scenario & had full knowledge w/ competent counsel.** Involuntariness, like in Bram is different, it is an irrational response to some pressure happening right there at that moment (naked, scared, alone). Brady is different b/c he had plenty of time to think it over, had counsel, & it was not an impulsive response. He had a bunch of choices to consider & the threat of the death penalty is just one of these choices.
(2) K&I: D says his plea was not knowingly made b/c the law was later changed so that his crime could not get the death penalty. Court says it was still K&I b/c he was advised by counsel & knew nature of the charges against him. Just b/c the law later changed or he did the cost benefit analysis wrongs does not render plea unintelligent.

- ***Broce* (knowing & intelligent):** D had a decent double jeopardy defense (charged for two counts of conspiracy but in reality there was only 1 conspiracy so sentence for second charge should be barred by double jeopardy), but he didn't know it at the time & pled guilty. Court says it doesn't matter, this does not effect the knowing & intelligent nature of his plea so the plea is still valid.
(i) A conscious waiver is not necessary w/ respect to each potential defense relinquished by a guilty plea. **Relinquishment derives not from any inquiry into a D's subjective understanding of the range of potential defenses**, but from the admission necessarily made upon entry of a voluntary plea of guilty. **If you engage in a knowing & intelligent waiver, you have in effect waived any defenses even if you did not know about them.**
(ii) You can intelligently waive a defense you don't know about b/c for waiver you only need to know the core pieces of knowledge required. The waiver wipes everything else out. Waiver does not mean you know everything that is going on. **You just have to know you are giving up your opportunity to contest your case but that does not mean you have to know what would go into your case.**

- ***North Carolina v. Alford* (factual basis):** D charged w/ murder says he is pleading guilty only to avoid death penalty & is actually innocent. Court holds plea is valid b/c:
(1) It was knowing & intelligent b/c he thought about it, had competent counsel, etc. It was product of his free & rational choice.
(2) There was a strong factual basis of his guilt. There is enough evidence here (this is not a "no evidence case" in which it would be a violation of DP to convict someone with no evidence).

II. IAC as Basis For Collateral Attack On Guilty Pleas

- **Hill (would have gone to trial):** In Hill, counsel miscalculates D's jail time. D pleads guilty then finds out he has to serve more time in jail than what he though. D appeals & says his plea was ineffective (it was deficient). Court says yes it was deficient, but it was not prejudicial (IAC requires deficiency + prejudice). For prejudice you need to show a reasonable probability that, but for counsel's error, he would not have pled guilty & would have insisted on going to trial. Hard to show that here.

- **Padilla:** Court holds failure to advise on deportation consequence is a deficiency. Important b/c this used to be a collateral consequence & didn't matter. Criminal convictions have lots of collateral consequences & lawyers do not have to tell clients about most of them (but Court says now they need to tell D's about immigration collateral consequences).
    - So we can imagine that there might be other things out there that are just as important as immigration consequences, b/c they affect your willingness to plead guilty or not.

- **Missouri v. Frye (attorney's failure to inform D about plea offer is a deficiency):**D charged w/ driving w/ revoked license which carries max term of 4 years in prison. Prosecutor sent his lawyer a plea offer for less time. Lawyer never told D about the offer & it expired. Before his preliminary hearing for the charge, D was again arrested for driving w/o license. At the prelim for the first charge he pled guilty & got 3 years. D appeals saying his lawyers failure to tell him about the offer was IAC b/c he would have pled guilty had he known about it. Court says there is no entitlement to a plea, it is in the prosecutor's discretion, but we need to regulate it b/c it's used so much in the system.

    - **Rule:** Lawyer has a duty to communicate plea offers to his client, if he doesn't communicate them then he is **deficient.** That deficiency is **prejudicial IF**:
        (1) D can demonstrate to a reasonable probability that he would have accepted the earlier plea offer if he knew about it; **AND**
        (2) D must also demonstrate to a reasonable probability that prosecutor would have kept the offer open & the court would have accepted it.

  D will easily meet prong 1 here b/c he later pled guilty to a longer sentence, but he will likely fail on prong 2 b/c he committed the same crime again & it's likely prosecutor would take the offer off the table after that.

- **Laughler v. Cooper (would have taken plea):** Bad advice from counsel leads D to go to trial (he would have taken a plea if he hadn't listened to his stupid attorney who told him that he can't be found guilty of intentional murder b/c/ he shot victim below waist). Court holds this is a deficiency.