CRIMINAL PROCEDURE: ADJUDICATION

OVERVIEW

- **Discretion –** In (1) Whether to arrest, (2) What to arrest for, (3) Dismissal or going forward with charges, (4) Whether to indict and for what, (5) Offering guilty plea or going to trial, (6) Accepting a guilty plea or going to trial, (7) Sentencing.

INCORPORATION AND THE BILL OF RIGHTS

- **All BoR Rights Incorporated**
  - **Selective Incorporation** used via 14th Amendment.
    - **Old:** Only 14th amendment applied; no incorporation.
    - **Various descriptions.** "Implicit in the concept of ordered liberty," etc.
    - ***Generally* apply 100%.**
      - **Exception: <u>Jury trial.</u>**
        - **Generally:** Right to jury trial for "serious offenses" incorporated to the states (6th->14th->States). *Duncan v. Louisiana*. "Serious" means more than 6 months imprisonment. *Baldwin v. NY*. No requirement of 12 member jury. *Williams v. Florida*. Juries may convict via less than unanimity. *Apodaca v. Oregon*. Must be unanimous for six-member jury. *Burch v. Louisiana*.
  - **EXCEPT:** 5th grand jury indictment requirement (*explicitly not incorporated*), 8th Am. excessive fines/bail, 6th Vicinage requirement (close trial)

THE RIGHT TO COUNSEL

THE RIGHT TO COUNSEL AND RELATED MATTERS

- **THE SIXTH AMENDMENT**
  - **U.S. Const. Sixth Am. –** "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."
    - **Right to counsel "fundamental and essential to a fair trial."** *Gideon v. Wainwright* (applying to states), *Johnson v. Zerbst* (federal trials).
  - **For effective and conflict-free counsel at any [1] "critical stage of the criminal prosecution" after [2] "initiation of adversary judicial criminal proceedings"**
    - **Req. 1: CRITICAL STAGE.**
      - **"The most critical period" of the proceeding** [generally, from arraignment forward]. *Massiah v. US,* quoting *Powell v. Alabama, Brewer v. Williams,* etc. when "**potential substantial prejudice to the defendant's rights** inheres in the particular confrontation" and "the ability of counsel [can] help avoid the prejudice" *US v. Wade.*
      - **"Actual Imprisonment Rule" –** Absolutely no imprisonment unless represented by counsel at trial. *Argersinger v. Hamlin*
        - **INCLUDES:. Appeals as of right.** *Douglas v. California.* **Post-indictment pretrial lineups** (*US v. Wade*), **Preliminary hearings** (*Coleman v. Alabama*), **Post-indictment Interrogations** and other attempts to elicit incriminating statements (*Massiah v. US*), and **arraignments** (*Hamilton v. Alabama*), **Activation of suspended sentence** (*Alabama v. Shelton*), **initial appearance (if plea may be used later), arraignment (if defenses must be declared), jury selection, trial, sentencing.**
          - **INCLUDES PLEA BARGAINING.** See below.
        - **DOES NOT INCLUDE: Permissive appeals** (*Ross v. Moffitt),* **Parole hearings or probation revocation hearings** (*Gagnon v. Scarpelli*), **use of uncounseled misdemeanor for sentence enhancement,** *Nichols v. US,* **habeas corpus proceedings or other civil matters** (*Pennsylvania v. Finley*), **photo lineups, _____; grand jury hearings.** *US v. Mandujano,* **$50 fines.** *Scott v. Illinois.*
          - **Up to state.** May still require – "Flexible" approach of Powell in *Argersinger.*
          - Means no right to counsel EVEN AFTER INITIATION.
    - **Req. 2: INITIATION OF ADVERSARY JUDICIAL CRIMINAL PROCEEDINGS**
      - **Depends on state law, *normally* at appearance before judicial officer.** *Rothergy v. Gillespie Co.*
      - **NOT JUST ARREST.** Must be more than that.
      - **Activates automatically.** *Brewer v. Williams.*
        - **Regardless of whether or not prosecutor is present.** *Rothgery v. Gillespie County.*
    - **Applies to states via 14th Amendment.** *Gideon v. Wainwright.*
  - **EXCEPTIONS**
    - **(1)WAVABLE:** Must give a knowing, intelligent, and voluntary waiver. **SEE SECTION (C)**
    - **(2)Forfeiture ("Waiver by Conduct") if**
      - **(A) MISCONDUCT** (assault of lawyer, etc) or
      - **(B)FAILURE TO OBTAIN COUNSEL** (without reasonable explanation)

- **(A) RIGHT TO COUNSEL (CHOICE + APPOINTMENT)**
  - **(1) Appointment of Counsel**
    - **Right to counsel for trial + counsel for first appeal as of right,** but no counsel of choice if on the gov't's dime.
    - **Right to the appointment of counsel for trial.** *Gideon v. Wainwright* (but no standard for appointment set)
      - **Approaches:** (1) Public Defender system, (2) Assigned-counsel system, (3) Contract attorneys
      - **Extends to the provision of psychologists, other "basic tools" etc.** *Ake v. Oklahoma*
      - **Indigent Ds get counsel during first appeal as of right.** *Douglas v. Cali.*
        - Even if pleaded guilty. *Halbert v. Michigan.*
        - But no constitutional right to appeal. *Smith v. Robbins.*
        - **Counsel may refuse to file frivolous claim**, may file "Anders brief" with everything arguably supported. *Anders v. Cali.*
      - **Does not appeal to discretionary reviews/appeals.** *Ross v. Moffitt.*
        - **EXCEPTION: FIRST TIER CONVICTION REVIEW:** if first appeal from guilty determination, must provide counsel even if system considers first appeal discretionary. *Halbert v. Michigan.*
      - **Also extends to materials for appeal.** (the "***Griffin-Douglas* doctrine")
        - **Generally must be a virtual necessity.** Emphasis on saving money, not wasting court time.
        - Transcripts (*Griffin v. IL*), waiver of filing fees, free post-conviction transcripts, etc.

- "A criminal trial is fundamentally unfair if the State proceeds against an individual defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake v. Oklahoma*

- **Counsel may withdraw on appeal if no merit, BUT must file an overview brief.** *Smith v. Robbins.*

- **(2) Choice of Counsel**
  - **Can generally choose if can hire/afford.** *US v. Gonzalez-Lopez.*
    - **BUT** "[An indigent] defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant." *Wheat v. US*
  - **EXCEPTIONS:**
    - **(A) Prudential limitations** (lawyer unavailability, etc)
    - **(B) Conflicts of Interest** (below)
    - **(C) No guarantee of "meaningful relationship" with counsel.** *Morris v. Slappy.*
    - **(D) No right to portion of stolen money for paying for counsel.** *Caplin & Drysdale v. US.*
    - **(E) Indigent clients.** No right to appointed "counsel of choice." *US v. Gonzalez-Lopez.*
    - **(F) No right to be represented by a non-lawyer**. *US v. Turnbull.*
    - **(G) No right of waive-in for D's lawyer.** *Leis v. Flynt.*
    - **(H) No right to require appointed counsel present a nonfrivolous claim on appeal.** *Jones v. Barnes.*
  - **Failure** (i.e. forcing a specific lawyer or denying one) **is structural error,** automatic reversal. *US v. Gonzalez-Lopez.*

- **(B) WAIVER (AND USE OF RIGHT OF SELF REPRESENTATION)**
  - **Defendant may waive right to counsel and represent self IF (1) "competent" and waiver (2) voluntary, (3) knowing, (4) intelligent, and (5) timely.** *Faretta v. California.*
    - *Two independent rights* – right to counsel + right to represent self.
    - **(1) "COMPETENT"**
      - **State may *force* D competent to stand trial to acquire counsel per "realistic account of the particular defendant's particular capacities".** *Indiana v. Edwards.* Mental impairedness, etc usually influential.
        - **Even if D is otherwise *competent to stand trial*** (defined as "Rational and factual understanding of the proceedings against him" + "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." In *Dusky*)
        - Implies some ability by judge to reject. However, structural error if denied. -> CONFLICT.
    - **(2) VOLUNTARY (+COMPETENT)**
      - **SEE VOLUNTARINESS (below) (government coercion, etc).**
    - **(3) KNOWING + (4) INTELLIGENT**
      - **Court not required to inform D of right to represent self.** *Faretta v. Cali.*
      - When invoked, **D must be made "aware of the dangers and disadvantages of self-representation."** *Faretta.*
    - **[5] TIMELINESS**
      - Must be "well before" trial begins. *Faretta* (implied?)
      - Too late in process = probably denial. *McCaskle.*
      - Only during trial, never appeal. *Martinez v. Scott.*
    - **[6] STANDBY COUNSEL** may be appointed. *Faretta*; *McKaskle v. Wiggins*
      - **TEST:**
        - **(1) "[Pro se D] is entitled to preserve actual control** over the case he chooses to present to the jury" *McCaskle v. Wiggins.* AND
          - **No "Puppet Mastering" or hybrid representation.** *McCaskle v. Wiggins; Faretta*
          - **Standby counsel has virtually no duties.** No duty to investigate, etc. No IAoC claims. *Faretta.* JUST answering questions.
        - (2) "[P]articipation by standby counsel without the defendant's consent [does not] **destroy the jury's perception that the defendant is representing himself**" *McCaskle v. Wiggins.*
        - [3] NO HYBRID REPRESENTATION, EVER.
    - **[7] No right to represent self on appeal.** *Martinez v. Court of Appeal.*
    - **[8] Structural Error.** Results in **automatic reversal if denied**. *Faretta.*
    - **[9] Result/Scope**
      - **D gets right to transcripts, free filing fees, etc.** *Griffin v. IL.*
      - **No right on appeal.** *Martinez v. Scott.*
      - **May be forfeited if obstructionist, etc.**
      - **No subsequent IAOC claims.** *Faretta*

- **(C) *STRICKLAND* INEFFECTIVE ASSISTANCE OF COUNSEL** *(DUTY OF CARE)*
  - **OLD:** "Farse and Mockery" test – very hard to beat. Alt "checklist approach" also insufficient.
    - New rule possibly influenced by Brady/Bagley disclosure rules.
  - **Right to "effective" assistance of counsel.** *Powell v. Alabama.*
  - **[0] APPLICABILITY**
    - **!!! - 6th Amendment Right to Counsel must apply.**
    - **Does not apply to self**. *Faretta v. Cali.*
    - **Both appointed and retained counsel subject to IAOC.**
    - **D HAS BURDEN OF PROOF.**
  - **(1) ATTORNEY ERROR**
    - **Counsel's conduct must fall below the [highly deferential] "Objective Standard of Reasonableness".** *Strickland.*
      - **i.e. cannot behave "outside the wide range of professionally competent assistance."** *Strickland.*
      - "assistance rendered by counsel was constitutionally deficient in that counsel made errors so serious that **counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment.**'" *Strickland*
      - **"No particular set of detailed rules for counsel's conduct** can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*
      - **DEFERENTIAL:** "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland; Yarborough* (also deferential)
        - **Presumption that behavior fell within bounds.** *Strickland*
        - **Hindsight prohibited.** *Strickland.*
        - **Presumption of tactical discretion** when different arguments made. *Id.*
    - **(i) COUNSEL VS CLIENT CHOICES**
      - **(1) "TACTICAL" DECISIONS -> LAWYER** (*Jones v. Barnes; Florida v. Nixon*).
        - **"Virtually unchallengeable" if made via analysis of law and fact.** *Strickland.*
          - **But** if "less than complete", challengeable. *Strickland.*
        - **Includes** Calling/cross-examining witnesses, nature of oral argument, etc. Accord MRPC 102(a).
        - **No duty to raise every "colorable" argument.** *Jones v. Barnes.*
        - **Basic procedural failures do not constitute "decisions."** Example: forgetting to file appeals papers. *Roe v. Flores-Ortega.*
        - **Decisions not to act,** especially where client screwed, okay. *Knowles v. Mirzayance.*
      - **(2) "FUNDAMENTAL" AND "IMPORTANT" DECISIONS -> CLIENT** (*Jones; Florida v. Nixon*).
        - ***IAOC only if fundamental decision, generally.***
        - **"FUNDAMENTAL" DECISIONS –** Duty to consult and obey client. *Florida v. Nixon.*
          - **(A)** Pleading, **(B)** Jury Trial or not, **(C)** Testify or not, **(D)** Appeal or Not. *Jones v. Barnes*
        - **"IMPORTANT DECISIONS" –** Duty to consult, NOT to obey. *Florida v. Nixon.*
          - i.e. those involving "basic trial rights." *Florida v. Nixon.*
          - **MRPC 104(a) –** Lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplish."
        - **MRPC 104(b) –** [L must explain to allow client to make informed decisions]
        - **Silence may imply consent.** *Florida v. Nixon* (unresponsive after found out death penalty), *Jones v. Barnes.* BUT this is generally not favored, may be emergency-only situation.
      - **(3) Failure to Consult**
        - **Does not necessarily entitle D to new trial.** *Roe v. Flores-Ortega*
    - **(ii) *KINDA-PER-SE* DUTIES**
      - **To search for mitigating evidence to a reasonable degree.** Ex: searching through prior convictions, mental capacity records, etc. *Rompilla v. Beard; Williams v. Taylor; Wiggins v. Smith; Porter v. McCollum.*
        - **BUT not a duty to search endlessly.** *Burger v. Kemp* (did not discover enough about D's background – sharply divided court).
      - **To handle evidence that "stare[s] them right in the face" or info "apparent" from documents.** *Bobby v. Van Hook.*
      - **Informing client of plea bargains,** *Missouri v. Frye*, and **consequences of a guilty plea**, *Padilla v. Kentucky*.
        - **BUT If in error, must show "but for counsel's errors he would have accepted the plea."** *Lafler v. Cooper.* – Prejudice prong still exists.
      - **To know the relevant law.** Ex: lack of knowledge of fourth amendment. *Kimmelman v. Morrison.*
    - **(iii) CHOICES ON APPEAL**
      - **"[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal** when there is reason to think either **(1)** that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or **(2)** that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known. *"Roe v. Flores-Ortega.*

- **No duty for appointed counsel to present a nonfrivolous claim on appeal.** *Jones v. Barnes*
- **No right to represent self or decide which issues raised on appeal.** *Martinez v. Scott*
- **Must prove but-for harm if appeal not filed.** *Roe v. Flores-Ortega.*
- **Can file brief and leave, pending lawyer lists all arguments.** *Smith v. Robbins.* Due process under this system unclear.

▪ **(iv) EXCEPTIONS**
- **No right to have counsel engage in dishonest or unethical behavior.** *Nix v. Whiteside.*

▪ **(v) MRPC Standards (Defense(?))**
- **No deference to ABA standards, etc.** *Bobby v. Van Hook.*
  - **But may be safeguard to IAOC claim.** *Wiggins v. Smith.*
- M.R. 1.2 – **[Consultation and Authorization] (a)** a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive a jury trial, and whether the client will testify. **(b)** Representation not endorsement. **(c)** A lawyer may limit the scope of the representation if the limitation is [1] reasonable under the circumstances [2] and the client gives informed consent. **(d)** No illegal or fraudulent acts. **(e)** No threats of criminal charges or prof'l misconduct allegations for gain.
- M.R. 1.4 – **[Communication] (a)** A lawyer shall: **(1)** promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; **(2)** reasonably consult with the client about the means by which the client's objectives are to be accomplished; **(3)** keep the client reasonably informed about the status of the matter; **(4)** promptly comply with reasonable requests for information; and **(5)** consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. **(b)** A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

o **(2) PREJUDICE**

▪ "[A] defendant must show that **'there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different**.'" *Strickland*
- **TOTALITY OF THE EVIDENCE [requiring less than a preponderance of the evidence].** *Strickland.*
  - **NOT outcome determinative test.** *Strickland,* **NOT more likely than not**. *Nix v. Whiteside*
- Rendering result "**unreliable or the proceeding fundamentally unfair**." *Lockhart v. Fretwell* (such that "the claimed lapses in counsel's performance rendered the trial unfair so as to '**undermine confidence in the outcome'** of the trial" *Nix v. Whiteside,* citing *Strickland.)*
- **Includes duty to investigate**, *Porter v. McCollum.*
- **WAIVES ATTORNEY-CLIENT PRIVILEGE** narrowly and under judicial supervision.

▪ **Presumed (AUTOMATIC) Prejudice under *Cronic***
- **(A) Complete denial of counsel –** i.e. rejection of right to lawyer.
- **(B) Counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing"**
  - **Must be complete failure –** That is, 0%. Renders this part almost null. *Bell v. Cone*
- **(C) No lawyer could provide effective assistance.** *Powell v. Alabama*, etc.
- Non-*Cronic*
  - **[D] State unconstitutionally interferes with counsel's assistance**. *Strickland*
  - **[E] Conflicts of Interest** (see below)

▪ **In Context**
- **At Trial –** Reasonable probability that, absent errors, reasonable doubt as to guilt.
- **Capital Sentencing -** Reasonable probability that, absent errors, jury would have concluded that balance of factors did not warrant death.
- **At Appeal –** Reasonable probability that, absent errors, result of appeal would have been different.
- **At guilty plea –** Reasonable probability that, absent errors, D would have insisted on going to trial.

▪ **Limits**
- **Prejudice cannot be shown if un-presented evidence was client or perjured testimony.** *Nix v. Whiteside.*
- **Prejudice cannot be shown if failure to lodge objection was legally valid at time of execution and no longer valid now.** *Lockhart v. Fretwell.*

- **(D) CONFLICTS OF INTEREST** *(DUTY OF LOYALTY)*
  - **Types:** Joint (*Cuyler*), successive (*Mickens*), D + witness, fee arrangements, counsel under investigation, counsel as witness.
  - **General: Right to conflict-free counsel, presumed IAOC if not if meet rules below.** *Cuyler v. Sullivan; Mickens v. Taylor.*

  - **(1) *Holloway* OBJECTION BEFORE TRIAL RULE ->** *"Duty to inquire"*
    - **If objection raised,** Trial Court has **duty to inquire as to conflict** with **"probing and specific" questions and to either (1) appoint separate counsel or (2) determine too remote**. *Holloway v. Arkansas* (joint rep)
      - **Result:** Trial judge *must* "either [appoint] separate counsel or [take] adequate steps to ascertain whether the risk was too remote to warrant separate counsel." *Holloway v. Arkansas*
      - **Automatic reversal if ignores objection & forces representation.** *Holloway v. Arkansas*
      - **No duty to investigate without objection**. *Cuyler v. Sullivan;* but see FR Crim P 44(c)(2).

  - **(2) *Cuyler/Mickens* AFTER TRIAL RULE ->** *No objection, but reversal.*
    - **Prejudice is presumed IF:** "defendant [...] demonstrate[s] that **an [A] actual conflict of interest [B] adversely affected his lawyer's performance**." *Cuyler v. Sullivan.*
      - **Never harmless error.** *Cuyler v. Sullivan.*
      - **Lower standard than IAoC.** Reflects presumption by Court that Duty of Loyalty > Care?
    - **(A) ACTUAL CONFLICT -** (Counsel actively represented conflicting interests)
      - **Joint Conflict –** *Cuyler*
        - M.R. 1.7 – **[CONFLICT – "*Cuyler* Rule"]** (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be **directly adverse to another client**; or (2) there is a **significant risk that the representation of one or more clients will be materially limited** by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. **(b) [WAIVER ALLOWED IF]**: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives **informed consent**, confirmed in writing.
      - **Successive Conflict –** *Mickens*
        - M.R. 1.9(a) – **[SUCCESSIVE CONFLICT – "*Mickens* rule"]** A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a **substantially related matter** in which that person's interests are **materially adverse** to the interests of the former client unless the former client gives informed consent, confirmed in writing. **(b) --**A lawyer shall not knowingly represent a person in the **same or a substantially related matter** in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
      - **MUST BE ACTIVE.** *Mickens* (open question if applies outside this context)
    - **(B) ADVERSE EFFECT –** (Conflict adversely effected counsel's performance)
      - **Focus on performance of counsel.** Not concerned with outcome, etc.
        - **But-for argument works well.**
      - **Automatic reversal if forced to double-represent.** *Holloway.*

  - **(3) WAIVER**
    - K-I-V, but **trial court may not accept and force a split/etc**. *Wheat v. US* ("substantial latitude" to reject)*; Holloway v. Arkansas*
    - See also M.R. 1.7(b) (joint conflicts) – Specified rules.
    - See also M.R. 1.9(a) (successive conflicts) – written consent enough

CONFESSIONS (VOLUNTARINESS, *MIRANDA*, COUNSEL DURING) AND IDENTIFICATION PROCEDURES

CONFESSIONS

DIVIDE BY STATEMENT/CONFESSION AND WORK BACKWARDS, APPLYING ALL

Voluntariness (DPC+5th Self-Inc)	*Miranda* (5th Am.)	Right to Counsel (6th Am.)

• Suspect's will must be overborne (both subjective/objective)
• Coercive government conduct must be involved
	• Must be in Custody
	• Interrogation (from objective standard)
	  ○ D must know cop is a cop
	• Waiver K-I-V *plus* additional safeguards.
	• Includes an implicit right to counsel outside the 6th Am.
	• No fruit of poisonous tree doctrine
		• No custody, but formal proceedings must begin + critical stage
		• Offense specific
		• Police must deliberately elicit statements (subjective from cop's perspective)
		  ○ Knowledge of police or not irrelevant – undercover cops apply
		• Waiver K-I-V, *minus* additional safeguards
		• Fruit of poisonous tree applies except for inevitable discovery

Any time	**Custody**	**Formal Proceedings**

- **(1)VOLUNTARINESS**
  - **5th Am:** Due Process Clause ("[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.") + Compulsory Incrimination ("[n]o person . . . shall be compelled in any criminal case to be a witness against himself.") – There is a distinction, but the Supreme Court tends to conflate.
  - **Purposes:** Prevent false confessions, fundamental fairness, offensive to civilized society, not inquisitorial system, human dignity
  - **(1) Overreaching** (old: Suspect's will overborne) (*Brown v. Mississippi*) by **(2)** coercive government conduct? *Colorado v. Connelly*
    - **Totality of the Circumstances**. (*Dickerson v. US; Arizona v. Fulminante*) - **BOTH Objective**("Empirical") and **Subjective** ("Normative")
    - **P's Burden:** Preponderance of evidence for trial (*Lego v. Twomey*), erroneous admission must be refuted by appeal by proof it was "harmless beyond a reasonable doubt." *Chapman v. California.*
    - **Violates 5th Amendment.** *Bram v. US*. **AND DPC.** ("Compelled" in 5th similar to "involuntary" in DPC) – "parallel" and "unifying" test. *Missouri v. Seibert.*
    - **JUSTIFICATIONS:** (1) Fairness (2) Accuracy (3) Offense to civilized justice system, (4) Not inquisitorial system, (5) Human dignity.
  - **(1) Suspect's Will "Overborne" (= Gov't Overreaching)**
    - ***Essentially a normative question of how much pressure police may place on suspects.***
      - **FOCUS ON OVERREACHING.** Reliability, "overbearing" of will less relevant – focus on how police overreach certain boundaries. *Colorado v. Connelly* (schizophrenia not state action).
      - Thus, knowledge of mental issues, etc virtually irrelevant. *Colorado v. Connelly (*dissent, complaining re:). BUT probably requires following the strictures of *Miranda.*
    - **Substantially dead, no subjectivity allowed (in a way).** *Colorado v. Connelly* (largely ignoring insanity insofar as *Miranda* complied with).
      - **BUT: violence generally still *per se* coercion.** *Arizona v. Fulminante* (prison violence).
    - **Factors**
      - **Characteristics of Accused –**
        - **Age, Education, and Mental Condition –** Mental illnesses create involuntary confessions only if the mental condition is the result of police misconduct. *Colorado v. Connelly* (did not throw out despite schizo episode).
      - **Circumstances of Interrogation –**
        - **Length –** If very long period of time, depriving food/water, etc -> Involuntary. *Ashcraft v. TN.*
        - **Force or Threats of Force** – Even indirect, like saying prison people will harm D. *AZ v. Fulminante*
        - **Coercion (Psychological Pressure) –** High pressure interrogation, using friends etc, pushing to fatigue and confession. *Spano v. NY; Ashcraft v. TN.*
          - **Deception.** Criticized heavily in *Miranda.*
        - **Promises of leniency, etc.** *Brahm v. US; Lynumn v. Illinois.*
      - **Deception ALLOWED.**
  - **(2) "Coercive Government Conduct"**
    - **State action required –** Coercive conduct cannot be from, for example, D's mental illness. *Colorado v. Connelly.*
    - **BUT police may not take advantage of external forces.** *Mincey v. Arizona* (interrogation in hospital when in pain).

- **[3] Result**
  - **Confessions[and Evidence] gained involuntarily <u>inadmissible</u>.** *Brown v. Mississippi* **for ALL PURPOSES (including impeachment, etc).** *Mincey v. Arizona.*
    - **ADMISSION = REVERSAL *unless*** P can prove beyond a reasonable doubt that admission did not affect trial outcome. *Arizona v. Fulminante.*
    - Fruit of poisonous tree generally presumed to apply.
      - **<u>BUT</u> "Inevitable Discovery Doctrine" –** Would have found anyway (in scope of search, etc).
  - **Can lead to <u>civil suit</u> even if not used (independent violation).** *Chavez v. Martinez* (splintered court, but generally agrees on concept)

- **(2) *Miranda* In-Custodial Interrogations**
  - "The person **[1] in custody** must**, [2] prior to interrogation**, **[3] be clearly informed** that he has **[4] the right to remain silent,** and that **[5] anything he says will be used against him in court;** he must be clearly informed that **[6] he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him."** *Miranda.*
    - No violation until attempt at use. *Chavez v. Martinez.*
    - **Broader than 5th Am. – independent prophylactic rules.** *Oregon v. Elstad.*
  - **Lead-up:** 6th vio where police used wire to elicit info. *Massiah v. US* [can't avoid counsel]. Refusal to allow a defendant to see lawyer a 6th violation (couched as right to counsel, later limited to facts as self-incrimination). *Escobido v. Illinois.* 6th used heavily because 5th considered only applicable to court testimony. 6th incorporated in *Mally v. Hegen.*
    - **Attempts to curtail:** 18 USC 3501 attempted to curtail, etc. **Made constitutional (but only semi)** by ct. *Dickerson v. US.*
    - **Now not a strictly constitutional rule – "Prophylactic".** *Oregon v. Elstad; US v. Patane.*
  - **(1)"CUSTODY"**
    - **"A person is in custody if from an <u>objective perspective</u> the person is under arrest or otherwise not free to leave."** *Yarborough v. Alvarado* - **Focusing on "How a reasonable person in the suspect's situation would perceive his circumstances."** *Yarborough v. Alvarado*
      - **<u>Objective standard of reasonable person.</u>** Ex: If cop knows he will arrest but suspect feels free, no custody. *Berkemer v. McCarty.* **NEVER SUBJECTIVE VIA EITHER PARTY.** *Stansbury v. Cali.*
      - **FACTORS: (1)** "What were the circumstances surrounding the interrogation?" and **(2)** "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave?" *Miranda.*
    - **<u>If free to leave, no custody.</u>** *Oregon v. Mathiason.*
      - **Factors**: Formal arrest, restraint of freedom, "coercive environment," etc.
        - (A) Before, (B) During, (C) After
      - **<u>Age</u> a factor, *when known or objectively apparent to a reasonable officer.*** *JDB v. NC*; reversing emphasis of objectivity in *Yarborough.*
    - **No locale distinctions.** Includes <u>own home</u> (*Orozco*), <u>state prison</u> (*Mathias; Howes v. Fields.*)
    - **Regardless of severity of charged offense.** *Berkemer v. McCarty* (traffic stop).
    - **<u>Noncustodial Examples</u>:** *Beckwith v. US* (IRS investigation), *Minnesota v. Murphy* (probation officer)
  - **(2) "INTERROGATION"**
    - **"*Miranda* safeguards come into play whenever a person in custody is subjected to <u>either express questioning or its functional equivalent.</u>"** *Rhode Island v. Innis* (lost shotgun)
      - **<u>"Functional Equivalent":</u>** "<u>any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.</u>" *Rhode Island v. Innis*
      - **Focus "primarily on the perceptions of the suspect".** *Rhode Island v. Innis*
        - **But reality:** OBJECTIVE evaluation of OFFICER'S actions considering a HYPOTHETICAL subject.
        - Cop's knowledge relevant, but intent irrelevant.
      - "Interrogation [is] a **<u>measure of compulsion above and beyond that inherent in custody itself</u>**." *Rhode Island v. Innis.*
      - **<u>Testimonial/communicative element</u> –** Does not involve, for example, observations of how a suspect is drunk. *Pennsylvania v. Muniz.*
    - **Any statement given freely is admissible.** *Rhode Island v. Innis.*
    - **(A) "PASSIVE LISTENING"**

- **Perception of D relevant, so if no knowledge of listening/no questioning from identifiable cops -> No vio.** Undercover cop discussions not interrogations. *Illinois v. Perkins.*
- Listening in on spouse not interrogation. *Arizona v. Mauro*

▪ **(B) ROUTINE BOOKINGS ->**see exceptions

○ **(3) ADEQUACY (LANGUAGE AND TIMING) OF WARNINGS**

▪ **Bright Line Rule: No "talismanic incantation" required,** but LEO must **"reasonably convey rights" via a "fully effective equivalent" of the *Miranda* warnings**. *Cali v. Prisock.* Fairly loose standard.

- ***Miranda* language:** Must **(1)** "in clear and unequivocal terms" indicate right to remain silent, **(2)** "must be accompanied by the explanation that anything said can and will be used against the individual in court," **(3)** must "clearly" be informed that "he has the right to consult with a lawyer and to have the lawyer with him during interrogation.", **(4)** police must inform him that "if he is indigent a lawyer will be appointed to represent him."
- **Generally:** (1) cannot give shorthand descriptions. (2) No requirement of giving explanatory details.
- ***May* require full reading.** *US v. Patane* (inference in plurality op.)
- **Generally cannot imply false "limitations" on the rights.** *Cali v. Prysock* (dicta); *Duckworth v. Eagan.*
- **Exactitude (word-for-word) not required.** *Duckworth v. Eagan.*
  - Order of warnings not strictly relevant. *Cali v. Prysock.*
  - "If you go to court" statement OK. *Duckworth v. Eagan* (correct under state law)

▪ **Must be given BEFORE questioning** (no question-then-warn). *Missouri v. Seibert.*

▪ *Overhearing* a *Miranda* warning -> unclear.

○ **(4) INVOCATION, RESULT, AND WAIVER**

▪ **(A) INVOCATION**

- **(a) COUNSEL**
  - **OBJECTIVE STANDARD: Invocation must be unambiguous.** *Davis v. US.*
  - **MUST BE "sufficiently clear** that a reasonably police officer in the circumstances would understand the statement to be a request for an attorney." *Berghuis v. Thompkins* (applying *Davis* to counsel).
  - **Must be counsel for interrogation purposes.** Suspect must express "his wish for the particularly sort of lawyerly assistance that is the subject of *Miranda* [...] an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation with the police.*" *McNeil v. Wisconsin.*
  - **Cannot invoke in anticipation.** *McNeil v. Wisconsin.*
  - Speech perfection not required. *Davis.*
  - Clarifying questions not required. *Davis.*
- **(b) SILENCE**
  - **Invocation via silence or explicit invocation,** but talking is waiver. *NC v. Butler.*
    - If the suspect "indicates in **any manner, at any time** prior to or during questioning, that he wishes to remain silent [interrogation must cease]" *Miranda.*
  - Speech perfection not required. *Davis.*
  - Clarifying questions not required. *Davis.*

▪ **(B) RESULT ("ADDITIONAL SAFEGUARDS")**

- **General: When invoked, cannot re-interrogate until D initiates, att'y present (if requested), or until certain expiration periods.** *Edwards.*
- **(a)COUNSEL**
  - Once invoked, Suspect "is **not subject to further interrogation** by the authorities **until counsel has been made available to him, unless** the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona; Minick v. Mississippi* **[EDWARDS-MINICK PROTECTIVE SHIELD]**
    - **Applies to *any and all crimes*,** even new or unrelated ones
  - **UNTIL**
    - **(i) ATTORNEY PRESENT**
      - **Counsel *must be present during questioning.*** Cannot force the lawyer to stay outside, etc. *Minnick v. Mississippi.*
    - **(ii) DEFENDANT INITIATES**.
      - **"INITIATION" –** When D "**suggests willingness and a desire for a generalized discussion about the investigation and** [not] merely a

necessary inquiry arising out of the incidents of the custodial relationship." *Oregon v. Bradshaw.*
- **Objective <u>from LEO's perspective</u>.** Thus favors LEO.
- **Can be implied, vague.** *Bradshaw* (responding with question
- **<u>Waiver still required.</u>** Allows re-Mirandizing, but *not* questioning without waiver.

▪ **(iii) BREAK IN CUSTODY - <u>14 DAYS.</u>** (A) Break in custody ("return[ing] to his normal life") for (B) 14 days and (3) Different charge involved in interrogation. *Maryland v. Shatzer*

- **BUT 6th AM DESTROYS – Once "formal" proceedings begin,** 6th amendment to counsel re-attaches, new waiver needed. *Mintejo v. Louisiana,*

• **(b)<u>SILENCE</u>**
- Once invoked, right must be **<u>"scrupulously honored."</u>** *Michigan v. Mosley* (arguably loose).
- **UNTIL**

▪ **(i) RE-INTERROGATION** allowed after (A) "significant period of time," (B) "fresh set of warnings," and *maybe* [c] a new subject and [d] new officers. *Michigan v. Mosley*
- Allows cops to wait (2.5 hours in *Mosley*) and re-try.

▪ **(ii) DEFENDANT INITIATION** (SEE ABOVE)

▪ **(iii) RE-INTERROGATION -** Allowed after **(A)** "significant period of time**," (B)** "fresh set of warnings," and ***<u>maybe</u>* [c]** a new subject and **[d]** new officers. *Michigan v. Mosley*
- Allows cops to wait (2.5 hours in *Mosley*) and re-try?

▪

▪ **(C) WAIVER** (*After* add'l safeguards met)
- ALLOWED, but must meet the "heavy burden" of proving it is K-I-(V). *Miranda; Edwards v. Arizona.* High bar for implied waiver. Once gotten, a "virtual ticket of admissibility." *Missouri v. Seibert.*
- **<u>Cannot</u> anticipatorily waive.** *McNeil v. Wisconsin.*
- **<u>Totality of the circumstances test.</u>** *Fare v. Michael C.*
  - **P has "heavy burden" to prove by prep. of ev..** *Colorado v. Connelly.*
  - <u>Cannot</u> anticipatorily waive.
- **<u>K-I-V</u>**
  - **Requires full warnings given, no matter the evidence showing knowledge.** *Miranda*
  - **[K-I]** "[The] waiver must have been made with **full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it**." *Moran v. Burbine.*
    - **Totality of the circumstances.** *Moran v. Burbine.*
    - **No amount of circumstantial evidence counts as constructive warning.** *Miranda.*
    - **DOES NOT COUNT:** <u>Nature of crime/legal consequences</u> ("consequence of invoking the privilege"). *Colorado v. Spring.* <u>Lawyer wanting to talk.</u> *Moran v. Burbine.*
  - **[V]** "**Voluntary in** the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine.*
- **<u>Express Waiver</u>** – Obviously allowed/preferred.
- **<u>Implied Waiver</u>**
  - **(i) FOR <u>SILENCE</u> –** Talking after not invoking. *NC v. Burler*
    - **NEVER by being silent.** *NC v. Butler.*
  - **(ii) FOR <u>COUNSEL</u> –** Failure to give "unambiguous" invocation. *Davis v. US*
    - **Waived UNTIL formal proceedings - 5th and 6th right separate –** 5th attaches upon invocation, waiver by silence allows police to interrogate *until right attaches during the beginning of formal proceedings per the 6th Am. Montejo v. Louisiana.*
  - **Cannot be solely from warning + statement. <u>Understanding</u> must be shown.** *NC v. Butler*

- **(5) RESULT OF VIOLATION**

▪ **(A)No warning ->CONFESSION ITSELF INADMISSIBLE.** *Miranda.*
- Some members of the court seem to indicate that the rejection of the confession alone is sufficient punishment. *See, e.g., US v. Patane.*

▪ **(B) <u>Exceptions Apply.</u>** (Physical evidence, impeachment evidence, etc).

- **(6)EXCEPTIONS**
  - **(A) Physical Evidence**
    - **Physical evidence admissible.** *US v. Patane*
  - **(B) Subsequently Acquired Evidence**
    - **Allowed in – no fruit of poisonous tree doctrine.** *Oregon v. Elstad.*
      - *Miranda* is not a constitutional provision, so does not get benefit of fruit of poisonous tree doctrine. *Oregon v. Elstad.*
      - **EXCEPTION:** Question-first then-warn approaches, though likely limited to facts of case. *Missouri v. Seibert.*
    - **THUS:** If Statement -> Warning -> Statement, *probably* disallowed per *Seibert,* but if Warning (Failure) -> Statement, subsequent statements *probably* admissible under *Elstad.*
  - **(C) Impeachment Purposes**
    - Statements gained from D are **admissible for impeachment purposes *if* the D chooses to testify at trial**. *Harris v. NY.*
      - Prevents *Miranda* from being a "shield [...] to use perjury by way of defense." *Id.*
  - **(D) Public Safety**
    - ***NY v. Quarles*** (supermarket gun case)
      - **(1)** "Objectively reasonable need to protect the police or public from [an] immediate danger." [as perceived by objectively reasonable police officer]
        - **"Public" –** Probably prevents "emergencies" in private homes or areas where public is not present.
      - **(2) "Exigency** requiring immediate action by the officers beyond the normal need expediously to solve a serious crime."
        - **"Safety" –** Probably implies some form of imminence requirement.
      - **(3) Questions must be** "reasonably prompted by a concern for the public safety."
        - "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens […] is not affected by our holding." *Miranda.*
  - **(E) Routine Booking**
    - Police can ask a person **"routine booking questions" that are "reasonably related to the police's administrative concerns."** Answers to these questions are admissible without *Miranda* warnings. *Pennsylvania v. Muniz* (drunk during booking)
      - **Allowed:** Age, experience, name, etc. *Id.*
      - **Focus:** Questions relating to managing custody of a suspect, etc.
      - **BUT** "[w]ithout obtaining a waiver of the suspect's Miranda rights, the police may not ask questions, even during booking, that are designed to elicit incriminating admissions." *Penn v. Muniz.*
  - **(F) Unaware a Cop –** No custody, undercover cop, etc. *Illinois v. Perkins.*
  - **(G) Waiver –** *see above.*
- **(3) Procedure**
  - **Pre-trial suppression hearing** allowed. *Jackson v. Denno*
    - P must prove by preponderance of evidence that evidence is admissible. *Lego v. Twomey*
    - Even if D loses against P, can still argue in trial. *Jackson v. Denno.*

- **(3) RIGHT TO COUNSEL DURING POST-INDICTMENT INTERROGATIONS**
  - **6th Amendment prohibits all efforts by [1] state agents to [2] deliberately elicit** statements from a person during **[3]** critical stages after **[4]** formal criminal proceedings have initiated. *Massiah v. US; Brewer v. Williams; Escobedo v. Illinois.*
  - **LIMITED APPLICABILITY. Only for critical stages after formal proceedings (i.e. 6th Am, above),**
    - So generally *Miranda* is the go-to, except when (as usual with here) snitches used.
  - **(0) No Invocation**
    - No invocation required to attach, but "cut off" req'd for any request of counsel. *Michigan v. Jackson.*
  - **(1) STATE AGENT**
    - **Includes "snitches".** (Where 6th Applies + Gov't Agent + Deliberate elicitation of info, VIO, NO WAIVER)
  - **(2) "DELIBERATELY ELICIT"**
    - **"DELIBERATE"**
      - Police **cannot "deliberately elicit" incriminating statements** (with confidential informants, etc) from a represented D. *Brewer v. Williams* ("Christian Burial Speech"), *US v. Henry* (but see *Kuhlmann* passive listener)
        - **SUBJECTIVE intent of officer.** *Henry* (paid informant questioning) vs. *Kuhlmann* ("passive listener")
      - **Deliberate elicitation when the government:**
        - **(1)** acts with the purpose of eliciting incriminating information from the accused regarding the pending charges, without regard to the likelihood that the elicitation will be successful (*Massiah, Williams*);
        - **(2)** purposely sets up an encounter in which incriminating information is likely to be elicited (*Henry*, involving snitches); or
        - **(3)** exploits an encounter set up by the accused with the agent of the government that it knows is likely to result in incriminating information (*Maine v. Moulton,* snitch co-conspirator where D asked to meet).
      - NOT "interrogate". Broader application. *Rhode Island v. Innis.*
    - **"ELICITATION"**
      - **REQUIRES ACTION - *"Passive Listening" exempt*.** *Kuhlmann.*
  - **(3) OFFENSE SPECIFICITY** *(unlike 5th Am.)*
    - **Right is offense-specific.** Must be the same offense or related by the *Blockburger* test. *Texas v. Cobb; McNeil v. Wisconsin.*
      - ***Blockburger* Test:** "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."
      - "It cannot be invoked once and for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings. *"McNeil v. Wisconsin; Texas v. Cobb.* Subject to *Blockburger* test to separate offenses. *Texas v. Cobb.*
      - **ISSUE:** May connect to double jeopardy use of *Blockburger* and allow two separate sovereigns immunity from each others' 6th am. Activity.
    - **Multiple pending cases** largely irrelevant, still inadmissible if 6th has attached, and admissible if not. *Maine v. Moulton.*
  - **(4) RESULT**
    - **Violated based on use of testimony.** *Massiah v. US*
    - **May also sue government for violation, whether or not used at trial.** *Kansas v. Ventris.*
  - **(5) EXCEPTIONS**
    - **(A) Physical evidence**
    - **(B) Inevitable Discovery/Independent source/Attenuated Connection.** *Brewer v. Williams (Williams II)*
      - **BUT Fruit of the Poisonous Tree otherwise applies for case-in-chief.** Inevitable discovery is an *exception to* the fruit of the poisonous tree doctrine.
    - **(C) Impeachment Purposes**. *Kansas v. Ventris.*
    - **(D) WAIVER**
      - **"[M]ay be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent."** [Same as *Miranda*, but NO "additional safeguards."] *Montejo v. Louisiana.*
        - **Waiver of *Miranda* counsel right -> Waiver of 6th.** *Patterson v. Illinois*
          - i.e. ***Miranda* warning provides enough for K-I.** *Patterson v. Illinois*
        - **No "additional safeguards" –** do not serve to do much. *Montejo v. Louisiana.*
      - **Cannot waive after being forced to interrogation.** *Michigan v. Jackson.*
    - **(E) Other Charges –** For offenses other than the crime to which the 6th Am. has attached. *Maine v. Moulton.*
    - **(F) Non-Personal Use.** Right is personal to D, meaning lawyer, etc cannot invoke. *Texas v. Cobb.*

IDENTIFICATION PROCEDURES

- **(1) SIXTH AMENDMENT RIGHT TO COUNSEL DURING POST-INDICTMENT LINEUPS**
  - **IF 6th Amendment test applies (above), post indictment lineups = "Critical Stage".** *US v. Wade; Kirby v. Illinois.*
    - **"Critical Stages."**
      - Bars both **witness identifications in court influenced by lineups** (*Wade*) as well as direct **evidence of testimony at lineup itself** (*Gilbert v. California.*)
        - **P must prove by clear and convincing evidence that in-court ID is not tainted.** Factors include (1) prior opportunity to view, (2) discrepancies, (3) ID prior to lineup, (4) ID by picture prior to lineup, (5) failure to ID in prior occasions, and (5) lapse between act and lineup. *US v. Wade* (VERY SIMILAR To *Biggers* test, but not exactly that).
      - **Does not apply to photographic identifications(not critical stage(s)).***US v. Ash.* (not present, no probability of being confused by law, focus on prosecutorial ability to work before trial).
    - **NOT PRE-INDICTMENT – must meet 6th Am.**. *Kirby v. Illinois* (if not, go to DP inquiry, below)
    - **Waiver still allowed.**
    - **BUT ALSO SUBJECT TO INDEPENDENT SOURCE EXCEPTION (below).** P may prove through C&C evidence that in-court ID was not based on prior lineup. *US v. Wade.*

- **(2) DUE PROCESS CLAUSE FOR LINEUPS/ETC**

  - **TEST:** Admissible with **(A) Suggestive Procedures** (via police conduct) only if **(B) Sufficient Indicia of Reliability** are present; *Stovall v. Denno*, BUT reliability is the lynchpin per *Manson v. Brathwaite.*

  - **(0) BEFORE: Right to Counsel? If 6th Am. Applies, see test *above.***

  - **(A) SUGGESTIVE PROCEDURES** (*Minor* factor per *Manson v. Brathwaite*)
    - **The state's procedures must be "[s]o unnecessarily suggestive and conductive to irreparable mistaken identification as to be a denial of due process of law.** *"Foster v. Cali*
      - **Totality of the circumstances test.** *Stovall v. Denno.*
      - **Social Scientist Recommendations:** (1) Inform eyewitness that offender may not be in lineup, (2) suspect should not stand out, (3) process should be conducted by someone who does not know subject to avoid subconscious prompting, and (4) certainty should be confirmed before any other questions.
      - Includes: Showing W only one person (example in *Denno*), two lineups for confused W with person (*Foster v. Cali*).
    - **LIMITS on "Suggestive" Finding**
      - **(i) EXIGENCY/NECESSITY –** LOW bar – may even be overcome by proving Ds are "at large." *Simmons v. US.* Critical injury of V, etc. *Stovall.*
      - **(ii) STATE CONDUCT –** If no state conduct (i.e. state made suggestive procedures), no violation. *Perry v. NH.*

  - **(B) SUFFICIENT INDICATIONS OF RELIABILITY** (*MAJOR* FACTOR per *Manson v. Brathwaite*)
    - **Totality of the Circumstances - *Biggers* Factors:**
      - **(1)** Opportunity for Witness to View Criminal
      - **(2)** Witness' Degree of Attention
      - **(3)** Accuracy of the Witness' Prior Description of the Crimnal
      - **(4)**W's demonstrated level of certainty, and
      - **(5)** Time between the crime and the confrontation
    - **Arguably the only factor of importance**. *Manson v. Brathwaite* ("reliability is the linchpin in determining the admissibility of identification testimony").

  - **(C) RESULT OF VIOLATION**
    - **May not admit AT ALL unless independent source.**
      - **No in-court identification allowed either UNLESS out-of-court procedure did not create "a very substantial likelihood of *irreparable* misidentification."** *Simmons v. US.*
    - **EXCEPTION: Independent Sources**
      - Prove with **clear and convincing evidence** that in-court ID was not based on pre-trial lineup.
      - **Factors:** (1) Prior opportunity to observe criminal act, (2) Existence of any discrepancy between pre-lineup description and actual description, (3) ID of picture by D prior to lineup, (4) Failure to ID D on prior occasion, (5) Lapse of time between alleged act and lineup ID. (6) Facts re: lineup.

- **(3) 5th Amendment Irrelevant.** *US v. Wade* (no self-incrimination involved in lineups, etc.)

INITIATING PROSECUTION, DISCOVERY

INITIATING PROSECUTION

- **(1) CHARGING DECISION**
  - **Probable Cause** required to arrest, but does not involve prosecutor.
  - **Probable Cause hearing** required 48 hours after arrest – judicial assessment of probable cause for arrest.
  - **Prosecutor may then charge or release.**
    - Prosecutors may not be compelled to prosecute. *Inmates of Attica Corr. Fac. v. Rockefeller.*

- **(2) LIMITS ON PROSECUTORIAL DISCRETION**

  - **(A) STATUTORY/ADMIN LIMITS**
    - Prosecutors may handle criminal contempt, pending prosecutor not victim. *Young v. US ex rel Vuitton et Fils S.A.*

  - **(B) ETHICAL LIMITS**
    - MRPC 3.8 – "Prosecutor in a criminal case shall [...] refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;"
    - ABA Standards from Crim J – **Seven factors: [(i)** whether the prosecutor harbors a reasonable doubt regarding whether the accused is in fact guilty; **(ii)** the harm caused by the offense; **(iii)** whether the authorized punishment is proportionate to the offender and his actual conduct; **(iv)** possible improper motives of the complaining witness; **(v)** the reluctance of a witness to testify; **(vi)** the offender's assistance in prosecuting others; and **(vii)** prosecution of the offender in other jurisdictions.]

  - **(C) CONSTITUTIONAL LIMITS**

    - **(i) SELECTIVE PROSECUTION**
      - "[T]he decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *US v. Armstrong,* nor may it be based on "the exercise of protected statutory and constitutional rights." *Wayte v. US.*
      - **ORDINARY EQUAL PROTECTION RULES: (1) EFFECT + (2) PURPOSE**
        - i.e. Claimant must demonstrate "that [the policy/etc] had a discriminatory effect and that it was motivated by a discriminatory purpose." *US v. Armstrong.*
      - **(1) DISCRIMINATORY EFFECT**
        - **Discriminatory Effect** must be proven by claimant showing "that similarly situated individuals of a different race were not prosecuted." *US v. Armstrong.* Allows discovery.
          - **i.e.** must find "some evidence that similarly situated defendants of other races could have been prosecuted, but were not." *US v. Armstrong.*
      - **(2) DISCRIMINATORY PURPOSE**
        - **"Presumption of Regularity:"** In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "clear evidence to the contrary." *US v. Armstrong* (race)
        - **High Burden: Must show actual targeting.** *Wayte v. US* (draft dodging)
      - **[3] REMEDY**
        - Court has "never determined" whether remedy is dismissal or "some other sanction." *US v. Armstrong*

    - **(ii) VINDICATIVE PROSECUTION**
      - **Test: Where D argues P has brought additional or greater charges "motivated by a desire to punish him for doing something that the law plainly allowed him to do." *US v. Goodwin.***
      - **No Presumption** (Must "prove objectively that the prosecutor's charging decision was motivated by a desire to punish him." *US v. Goodwin.*)
        - Increasing charges after a refusal of a plea offer, *Bordenkircher v. Hayes*,
        - After D requests a jury trial. *US v. Goodwin*
        - Charges increased pretrial. *US v. Goodwin.*
      - ***Per Se* Vindictiveness**
        - **May not *increase* sentence on retrial (i.e. punishment for appeal).** *Blackledge v. Perry.*
          - **Exception:** If the state proves "that it was impossible to proceed on the more serious charge at the outset." *Blackledge v. Perry.*
        - **May not raise punishment after successful appeal.** *NC v. Pearce.*

  - **(3) FORMAL CHARGING MECHANISMS**
    - **(i) Grand Jury –** Only required for infamous crimes (if it can result in imprisonment in a penitentiary or hard labor, *Ex Parte Wilson*), and only for federal prosecutions. *Hurtado v. Cali.* 23 citizens on federal GJ. FRCP 6(a).
      - US Const. 5th Am – "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on an … indictment of a Grand Jury."

- **NOT INCORPORATED. Required in Federal system only.**
- **NOT CRITICAL STAGE/NO RIGHT TO COUNSEL.** *US v. Mandujano.*

- **No evidentiary limitations.** *Costello v. US* (hearsay evidence allowed); *US v. Williams* (no need to present exculpatory evidence).
- **Violations become moot once convicted.** *US v. Mechanik.*
- Transcripts remain secret until requesting party shows particularized need. FRCP 6(e).
- "Target" of jury versus "Subject" indirectly involved
- **Wavable and often waived.**

- (ii) **Preliminary Hearing –** Also used in some states. Judge presides over and D has right to be represented by counsel and to be present, *Coleman v. Alabama,* hearsay evidence may be presented but some limited cross ability. Fed. R. Evid. 1101(d)(3).
  - **CRITICAL STAGE.** Subject to 6th Am right to counsel.
  - **Evidence rules generally do not apply.**
  - **Testimony can be used in court if unavailable.** *Crawford v. Washington.*

(4) SEVERANCE AND JOINDER

- Generally preferable to prevent duplicitous cases, etc.
- FRCrimP 8
  - (a) **Joinder of Offenses.** The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.
    - **Worry:** Theoretically, two different rapes at two different times could be merged together – highly prejudicial?
  - (b) **Joinder of Defendants.** The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.
    - **Narrower than offenses.** Must be in the same act or transaction, meaning distance in time, etc prohibits.
    - **Worry:** *Bruton* problems as well as general trial right conflicts.
- FRCrimP 14(a) **– [Severance]** If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.
  - **i.e. court should sever where** "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. US*
  - **NOT where** a defendant might have a better chance at acquittal, [a] defendant could not stand the expense or physical strain of a lengthy joint trial, that other defendants had a criminal record [...] that there might be hostility or conflict of interest between the defendants [...] that different defendants wished to rely on different defenses [or] that evidence may be admissible against one defendant but not against others.
  - **Emphasis on use of limiting instructions** to avoid separation. *Zafiro v. US.*

- (1) ***BRUTON* PROBLEMS – CONFLICTING DEFENSES**
  - **WHERE: (1) Multiple Ds, (2) One confesses and implicates others, but (3) Not available for cross -> MUST BE REMEDIED**
    - **Where codefendant cannot cross-examine D on confession -> NO LIM INST.**
    - "Because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of [a D's] confession in this joint trial violate[s] a [P's] right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Bruton v. US.*
    - **Remedies**
      - (a) **Separate Trials**
      - (b) **Forgo use of confession**
      - (c) **Redaction**
        - **NO:** "Deleted" still implying more people. *Gray v. Maryland*
        - **YES:** Complete redaction removing existence of other parties. *Richardson v. Marsh*

(5) Indictments (Duplicity, Multiplicity, and Variance)

- **Indictment –** Outlines rough charge.
  - **Bill of Particulars –** Can be demanded, provides more information
- **Objections**
  - **Duplicity –** 2 or more distinct offenses in single charge – runs risk of multiple jurors agreeing with parts to find violation of whole. ***Curable by selection (pick one theory or other).***
  - **Multiplicity –** Single offense in multiple counts (ex: robbery with gun and knife -> RwG+RwK). ***Generally curable by election (dismissing redundant count(s)).***
  - **Variance –** Where evidence at trial proves facts other than those charged. ***New trial if prejudicial.***
- **Other Cures:** (1) Dismissal of count, (2) Amendment (if non-substantive), (3) Supersedement (new indictment, no limits, fixes substantive issues)

- **(6) BAIL AND PRETRIAL DETENTION**
  - US Const 8th Am – "[e]xcessive bail shall not be required"
    - **BUT** may condition freedom on "adequate assurance that [the accused] will stand trial and submit to sentence if found guilty." *Stack v. Boyle.*
    - **NOT INCORPORATED AND NO 6TH AM RIGHT, BUT** every state by constitution or statute prohibits excessive bail.
      - **Right to counsel, but NOT constitutionally based, during setting of bail.** Fed R. Crim P 44(a).
    - **Types**
      - **(ROR) Released on Own Recognizance Bond –** Allows on own recognizance, no money
      - **Conditions of Pretrial Release Bond –** Conditions on drug testing, etc
      - **Financial Bond -** Secured Bond (against property) vs. Unsecured Bond.
    - **No right to bail.** *Stack v. Boyle.*
    - **No right to pay bail with illegal funds.** *US v. Nebbia* ("*Nebbia* hearing")
    - **Failure to comply -> loss of bail.** Fed. R. Crim. Proc. 46(f).

  - **(i) PRETRIAL DETENTION / SETTING OF BAIL**
    - **Emphasis on "no or least restrictive conditions."** Bail Reform Act of 1984.
    - **(a) DETENTION**
      - Bail Reform Act of 1984 – [Prefers OR or unsecured appearance bond. **Allows pretrial detention IF**, after a hearing, magistrate determines that **"no condition or combination of conditions will reasonably assure the [1] appearance of the person as required and [2] the safety of any other person and the community"**
      - Gov't must prove necessity with **"clear and convincing evidence."** 18 USC. 3142(f)
        - **But** rebuttable presumption that detention is necessary if firearms or drug charge or if committed crime on pretrial release (within 5yrs). 18 USC 3142(e)
        - **Statutory Factors for both criterion:** Include the (1) nature of the offense charged, the (2) weight of the evidence against the defendant, and (3) the history and characteristics of the person, including her (a) physical and mental condition, (b) her ties to family and the community, and (c) whether, at the time of the current arrest, she was already on probation or parole or on pretrial release from another offense
      - 18 USC 3141(a) – [Pretrial determination of detention]
      - 18 USC 3142(e)(1) – "If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial."
      - **Not considered "punishment" - REGULATORY.** Because court says so. *US v. Salerno* (not violation of substantive due process, procedural D.P., eighth amendment)
    - **(b) BAIL**
      - **Typically considered factors for bail:** (1) seriousness of offense, (2) punishment D faces, (3) D's prior criminal record, (4) D's ties to community, (5) D's character, (6) D's financial status, (7) any other info relevant to determine if D is a flight risk or poses future risk to community.
      - **May not set bail that (intentionally) "results in the pretrial detention of the person."** Bail Reform Act of 1984.

  - **(ii) PREVENTATIVE DETENTION OF SEXUAL PREDATORS**
    - **"Civil Detention" –** Presumptively civil if said so unless "where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the state's] intention' to deem it 'civil'" *Kansas v. Hendricks.*
    - **Does not violate Due Process or Double Jeopardy Clause.** *Kansas v. Hendricks* (hinging on requiring prior conviction, proof of present mental condition, etc).
    - **GENERALLY REQUIRES:** (1) D is convicted of or charged with offense, (2) Mental abnormality or personality defect, and (3) Likely to engage in predatory acts of sexual violence.
      - **Low standard.** Could include "antisocial personality disorder"

DISCOVERY

- **(1)FRCP RULES** (STATUTORY RULES (TWO WAY STREET))
  - **TO D**
    - **FRCrimP 16(a)(1)(A) –** "Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial."
      - **FRCrimP 26(2) (*Jencks* Act) –** [Requires P disclose witness' pretrial statements after witness testifies on direct so that the statements can be used for impeachment]
    - **FRCrimP 16(a)(1) (B) – "**Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following: **(i)** any relevant written or recorded statement by the defendant if: **[a]** statement is within the government's possession, custody, or control; and **[b]** the attorney for the government knows—or through due diligence could know—that the statement exists; **(ii)** the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and **(iii)** the defendant's recorded testimony before a grand jury relating to the charged offense."
    - **FRCrimP 16(a)(1) (D) –** [Must disclose prior record]
    - **FRCrimP 16(a)(1) (E) –** [Must disclose and make available documents, tangible stuff, etc IF] (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.
    - **FRCrimP 16(a)(1) (F),(G) –** [Right to access to records or reports or tests; Expert witness summaries]
  - **FROM D**
    - **FRCrimP 16(b)(1) –** [D must disclose documents and objects, reports, expert witnesses, etc].
      - **FRCrimP 12.1 – [D must give notice of an intention to present alibi defense]**
        - **Not violation of privilege against self-incrimination or due process.** *Williams v. Florida*
        - **Refusal to provide psych eval = can be used against.**
      - **FRCrimP 12.2 –** [D must give notice of intention to provide mental defense at trial]
  - **FRCrimP 16(c) – [CONTINUING DUTY TO DISCLOSE]**

- **(2)DUE PROCESS P-D RULES** (CONSTITUTIONAL RULES)
  - **Fashioned as part of due process.** No explicit Constitutional provision.
  - **(A) Permissible Statutory Schemes/Rules**
    - **Pre-trial disclosure requirements** (like notice of alibi requirements) **OK.** *Williams v. Florida*
      - **MUST BE MUTUAL.** *Wardius v. Oregon.*
    - **May punish either party for not providing evidence per disclosure rules.** *Taylor v. Illinois.*
  - **(B) P MUST DISCLOSE EVIDENCE FAVORABLE TO ACCUSED (*BRADY*)**
    - **P must disclose "evidence favorable to the accused [...] where the evidence is *material either to guilt or punishment* [including impeachment evidence]" -> ERROR IF IT "undermines confidence in the outcome of the trial".** *Brady v. Maryland; US v. Bagley*
    - **(1)SUPPRESSION BY PROSECUTION**
      - **No request required.** *Brady; Bagley.*
        - **Specific requests** put P on notice, arguably higher burden.
        - **Nature of evidence** may put P on higher notice as well. (evidence "obviously of such substantial value to the defense that elementary fairness" requires disclosure especially, *Brady*).
      - **BUT** No disclosure requirement for guilty pleas or related pretrial matters. *US v. Ruiz.*
    - **(2) OF EVIDENCE FAVORABLE TO D**
      - **Both impeachment evidence and exculpatory evidence.** *US v. Giglio.*
    - **(3) MATERIALITY OF EVIDENCE (PREJUDICE)**
      - **"Material" –** If "there is a **reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different**" *US v. Bagley (Strickland* standard, modifying *Agurs* standard)
        - **"Reasonable Probability" –** Probability sufficient to undermine confidence in outcome. *Bagley.*
          - If *sine qua non* of conviction, unquestionably material. *Smith v. Cain.*
        - **Evidence treated collectively, even if individually weak.** *Kyles v. Whitley.*
        - **Request by D = evidence of materiality,** but not required.
        - Does not require proof that acquittal would result – just "reasonable probability" of *Strickland*. *Kyles v. Whitley.*
          - Not a sufficiency of evidence or preponderance of the evidence test. *Kyles v. Whitley.*

- [4] **Admissibility Requirement –** Must be EITHER (1) ADMISSIBLE or (2) LEAD TO OTHER EVIDENCE. Open question.
  - **Includes impeachment evidence.** *Giglio v. US.*
- [5] **No request necessary** (but gives inference of materiality)
- [6] **Constitutional Issues**
  - TRIAL RIGHT – Applies only until trial (but withholding before may still violate DP). *US v. Ruiz.*
  - **Applies even if not technically in hands of prosecution.**
  - **Good faith IRRELEVANT.** *Brady v. Maryland.*
  - **Due Diligence ability IRRELEVANT**

  [7] **REMEDY**
  - **NO HARMLESS ERROR -> ERROR MEANS NEW TRIAL.** *Kyles v. Whitley.*

- (3) MRPC 3.8(d) **– [Must disclose all info] "**[Prosecutor will] make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;"

- **(3) FALSE EVIDENCE CLAIMS**
  - If P knowingly provides false evidence, or fails to correct false evidence presented to tribunal, New Trial UNLESS beyond a reasonable doubt false evidence did not contribute to verdict.
- **(4) DUTY TO PRESERVE EVIDENCE**
  - "**Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."** *Arizona v. Youngblood* (sexual assault evidence).
    - **Police do not have to maintain breath samples.** *California v. Trombetta* (unlikely to help D's defense).
    - **No Due Process right to post-conviction DNA testing.** *District Atty's Office for the Third Judicial District v. Osborne.*
    - Some states place higher burden.
  - **Deportation of Witnesses disallowed IF** D can prove evidence lost was (1) favorable and (2) material
- **(5) "Open File" Discovery –** Rarely done.

PLEA BARGAINING/GUILTY PLEAS

- **(1) PLEA BARGAINING**
  - **Not unconstitutional per se.** *Brady v. US; McMann v. Richardson.*
  - **FRCP + VOLUNTARINESS INQUIRY.**
  - FRCrimP 11(c)
    - (1) **In General.** An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will: **(A)** not bring, or will move to dismiss, other charges; **(B)** recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or **(C)** agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).
      - **GUILTY PLEAS SUBJECT TO RULES BELOW.**
      - **Prosecutors can *raise OR lower* charges based on acceptance or rejection of plea offer**. *Bordenkircher v. Hayes* (desire to elicit guilty plea OK)
        - **UNLESS:** "the selection [in enforcement] was [...] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification" *Bordenkircher*
        - **Connected to vindictive prosecution.**
    - (2) **Disclosing a Plea Agreement.** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.
    - (3) **Judicial Consideration of a Plea Agreement. (A)** To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report**. (B)** To the extent the plea agreement is [re: sentencing ranges] the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.
    - (4) **Accepting a Plea Agreement.** If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.
    - (5) **Rejecting a Plea Agreement.** If the court rejects a plea agreement [for (A) or (C) above, it must...] **(A)** inform the parties that the court rejects the plea agreement; **(B)** advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and **(C)** advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

- FRCrimP(d) **Withdrawing a Guilty or Nolo Contendere Plea**. A defendant may withdraw a plea of guilty or nolo contendere: **(1)** before the court accepts the plea, for any reason or no reason; or **(2)** after the court accepts the plea, but before it imposes sentence if: (A) the court rejects a plea agreement under 11(c)(5); or (B) the defendant can show a fair and just reason for requesting the withdrawal.
- FRCrimP(e) **Finality of a Guilty or Nolo Contendere Plea.** After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.
- FRCrimP(f) **Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.** The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.
- FRCrimP(g) **Recording the Proceedings.** The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).
- FRCrimP (h) **Harmless Error.** A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

- (2) **GUILTY PLEAS**
  - **K-I-V-(A) standard for waiver, which waives a host of constitutional rights, but withdrawal allowed and IAOC claims still permissible.**
  - (A) **K-I-V-(A) Waiver**. *Boykin v. Alabama*
    - **Involves waiver of LOTS of rights –** thus, waiver applies generally.
    - (i) **VOLUNTARINESS.** Applies. *Boykin v. Alabama.*
      - **(Statutory) pressure for D to plead guilty *generally* impermissible.** *Brady v. US; US v. Jackson* (death penalty on the table unless guilty plea)
      - Not much case-wise, but generally means no threats, etc.
    - (ii) **INTELLIGENTLY**
      - (A) **Must be appraised of nature of offense –** "real notice of the true nature of the charge against him". *Henderson v. Morgan.*
        - **Includes elements of the offense – "SUFFICIENT DETAIL" of the "TRUE NATURE" of the crime.** *Henderson v. Morgan* (BUT: limited to "critical" elements in that case?)
        - Sufficient for record to show defense counsel explained nature of charges. *Bradshaw v. Stumpf; Henderson v. Morgan.*
        - **BUT Later judicial decisions** do not factor(*Brady v. US* – death penalty applicability)
      - (B) **Must also be appraised of direct consequences (but *not* collateral consequences) of pleading guilty.** (Max poss. Sentence, etc.)
        - **"Direct" Consequences –** Probably includes maximum possible sentence, etc.
        - **"Collateral" Consequences –** Probably civil forfeiture rules, loss of ability to carry a gun. Nature of parole eligibility date as held in *Hill v. Lockhart.*
      - **Inefficient Assistance of Counsel if should have been advised of blatantly obvious fact.** *Padilla v. Kentucky* (immigration status after conviction).
    - (iii) **KNOWINGLY**
      - (C) **Must know he is waiving:** (i) jury trial, (ii) self-incrimination, (iii) right/confront witnesses. *Boykin v. Alabama.*
        - ***Generally* must be explicit.** Most courts consider NOT reversible error if record indicates D knew he was waiving those rights. *Boykin v. Alabama*
      - **Cannot plea from silence.** *Boykin v. Alabama.*
    - [iv] **["ACTUALLY" – *Alford* Pleas + Court Rejection]**
      - ***Alford* Pleas - Courts may, *but are not required to*, accept guilty pleas where D claims s/he did not commit the crime.** Requires some "Factual basis for the guilty plea." Courts may also reject. *NC v. Alford*
        - Applies where state requires inquiry into factual basis for plea OR where D explicitly maintains s/he is innocent.
    - FRCrimP 11(a) – **(1)** [May plead guilty, not guilty, or with court permission, *nolo contendre*] **(2)** [Conditional plea of guilty or NC allowed reserving in writing ability to have appellate court review specific pretrial motion.] **(3)** [Before accepting *nolo contendre* plea, court must consider "the parties' views and the public interest in the effective administration of justice"]. **(4)** [Failure to enter plea = Not guilty plea]
    - FRCrimP 11(b) –
      - (1)**Advising and Questioning the Defendant**. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and **determine that the defendant understands, the following: (A)** the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath; **(B)** the right to plead not guilty, or having already so pleaded, to persist in that plea; **(C)** the right to a jury trial; **(D)** the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding; **(E)** the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; **(F)** the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere; **(G)** the nature of each charge to which the defendant is

pleading; (**H**) any maximum possible penalty, including imprisonment, fine, and term of supervised release; (**I**) any mandatory minimum penalty; (**J**) any applicable forfeiture; (**K**) the court's authority to order restitution; (**L**) the court's obligation to impose a special assessment**; (M)** in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a); and **(N)** the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

- (2)**Ensuring That a Plea Is Voluntary**. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).
- (3)**Determining the Factual Basis for a Plea.** Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

- **(C)IAOC and Guilty Pleas**
  - **PLEA BARGAINS CRITICAL STAGE – SIXTH AMENDMENT APPLIES.** *Padilla v. Kentucky* (immigration case).
  - **IAOC – *Strickland* prejudice standard - Ineffective assistance of counsel** if lawyer fails to provide information, etc. *Missouri v. Frye*
    - **If plea bargain info in error, must show "but for counsel's errors he would have accepted the plea." AND plea would have been entered without prosecution cancelling it or court rejecting it.** *Lafler v. Cooper.*
    - **Probably means that direct consequences only need to be told.**
    - **Result:** Somewhere between forcing re-offer and forcing certain result.
  - **See above re:** 6th.
- **(D) Conditional Pleas**
  - **Sometimes allowed –** usually done to reserve specific ruling for appeal, conceding rest. FRCrimP 11(a)(2).
- **(E) Withdrawal**
  - **May do any time before entry**
    - Entry involves DPC, makes official. *Mabry v. Johnson.*
  - **After entry, may do so only** per "fair and just" reason. FRCrimP11.
- **(F) Constitutional Effects**
  - **Generally waives right to challenge constitutional effects prior to guilty plea, EXCEPT FOR (1) IaoC, (2) Prosecutorial Vindictiveness,** *Blackledge v. Perry,* **(3) Double Jeopardy,** *Menna v. NY*. **See Also** *McMann v. Richardson* (waives confession, possibility for claims related to the incorrectness of attorney's assessment of law and facts)*, Tollett v. Henderson.*

- **(C)Violations of Plea Agreements**
  - THEORY: Detrimental reliance and duty of good faith and fair dealing.
  - **Contract-like approach to plea agreements.**
  - **Prosecution must live up to terms of plea agreement.** *Santobello v. NY* (specific performance vs. withdrawal of plea not clear)
    - Justified by due process clause. *Mabry v. Johnson* (false promise by prosecutor theory)
  - **D must hold up own end of bargain or Prosecution can entirely rescind/try D.** *Ricketts v. Adamson* (materiality determines if plea can be rescinded).

SPEEDY TRIAL RIGHTS

- **(A) DUE PROCESS – From discovery of crime to charging**
  - **Multi-factor inquiry**, focusing on the reasons for delay as well as prejudice to the accused.*US v. Lovasco*
    - 6th doesn't apply. *US v. Marion.*
  - **(1) INVESTIGATIVE DELAY -> OK**
    - **Generally OK, as long as not tactical.** *US v. Lovasco* (considers beneficial to both P and D)
  - **(2) PREJUDICE TO D -> NOT OK**
    - Must show **(1) prejudice that was caused by (2) reasons for the delay other than ordinary delays – theoretically, something like an attempt to gain a tactical advantage by P.** *US v. Lovasco.*
    - **Loss of evidence, etc.**
    - **Remedy –** Dismissal with prejudice?? Analogize to *Strunk v. US* (6th am remedy, below).
- **(B) SIXTH AMENDMENT – From charging to trial**
  - **U.S. Const. 6th Am. –** "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ..."
    - **Incorporated through DPC.**
  - **BEGINS:** when "the putative defendant in some way becomes an accused." *US v. Marion*
  - ***Barker* BALANCING TEST** *(Barker v. Wingo)*
    - **(1) Length of Delay (TRIGGER)**
      - **"Triggering Mechanism" by "Presumptively Prejudicial" delay.** Generally 9mos+. *Baker; Doggett.* Especially as it approaches one year. *Doggett v. US.*
        - **Short (unprejudicial) delay = go no further.**

- Depends on nature of crime – complex crimes get more deference. *Barker v. Wingo*

▪ **(2) Reason for the Delay**

- **Tactical decisions** weigh against P, **whereas legitimate reasons** (unavailability of witness, etc) weigh in favor of P. *Barker v. Wingo*
  - Official negligence and court congestion are "more neutral." *Barker v. Wingo.*
  - Runaway/hiding D = more deference to delay. *Doggett.*
- **State actor requirement - Delays due to D's issues do not count.** Appointed lawyers don't count. *Vermont v. Brillon.*
  - But delay from "systemic breakdown" in public defender system may be imputed to the state. *Vermont v. Brillon.*

▪ **(3) Defendant's assertion of his right, and**

- i.e. insistence upon trial, IF D KNOWS CHARGES EXIST.
- "defendant's assertion of his speedy trial right … is entitled to strong evidentiary weight …. [F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker v. Wingo*

▪ **(4) Prejudice to the D**

- **Low bar, often presumed if delay over a year.** *Doggett* ("presumptively prejudicial" if over a year?)
- **Assessed in light of interests:** (i) preventing oppressive pretrial incarceration, (ii) minimizing anxiety and concern of the accused, and (iii) to limit the possibility that the defense will be impaired. *Barker v. Wingo*
- **Particularized prejudice not required, especially where opportunities disappear.** *Doggett* (impossible to prove speculation, etc).

▪ **[5] Remedy –** Dismissal with prejudice. (Too much?) *Strunk v. US.*

- Does not apply to period prior to arrest. *US v. Marion.*

- **(C) STATUTORY SPEEDY TRIAL RIGHTS**
  - 18 USC 3161 **– [Speedy Trial Act – Indictment within 30 days of arrest, trial must begin 70 days within filing of indictment, etc]**
    - **Provides statutory discretion on TOP of 6th Am. right.**
    - **Allows "excusable delay"** due to pretrial motions, unavailability of D or witness, etc.
    - **NO PROSPECTIVE WAIVER.** *Zedner v. US* (public interest in speed).
  - FRCrimP 48(b) – [Allows dismissal if "unnecessary delay" in bringing D to trial]
  - 18 USC app 2 – [Interstate Agreement on Detainer Act – provides time limits for juvenile transfer from one place to another.]
- **(D) STATUTES OF LIMITATION**
  - 18 USC 3281 **– [Capital offenses – any time]**
  - 18 USC 3282 **– [Non-capital offenses – 5 years]**
  - 18 USC 3283 **– [Offenses against children – 10 years or for life of child, whichever longer]**
  - 18 USC 3286 **– [Extension of SOL for terrorism offenses]**
  - 18 USC 3290 **– [Fugitive for justice – no SoL]**
  - 18 USC 3293 **– [Financial institution offenses – 10 years]**
  - 18 USC 3294 **– [Theft of artwork – 20 years]**
  - 18 USC 3297 **– [No tolling of SOL until DNA evidence implicates where applicable]**

TRIAL MATTERS – THE JUDGE, JURY AND PRETRIAL PUBLICITY

DETERMINATIONS (BY JUDGE OR JURY)

- **Presumption of Innocence + Beyond a Reasonable Doubt ABSOLUTELY REQUIRED.** *In re Winship.*
  - Proof B.A.R.D not explicit in constitution, but inherent in concepts of due process.
    - NOT "grave uncertainty" or "moral uncertainty" – stricter. *Victor v. Nebraska*
  - **Requires proof of every element B.A.R.D.**
    - May **not instruct to make presumptions**. *Sandstrom v. Montana*, **but permissible presumptions (i.e. non-required presumptions) okay**. *Id.*
    - **Burden-shifting does not count.** *Patterson v. NY.*
  - **Presumption of innocence exists at trial, but does not apply on appeal [i.e. after conviction].**

THE JURY

- U.S. Const. Art. III – "The Trial of all Crimes, except in cases of Impeachment, shall be by Jury, and such Trial shall be held in the States where the said Crimes shall have been committed."
- U.S. Const. 6th Am. – "in all criminal prosecutions" the D is entitled to trial "by an impartial jury of the State and district wherein the crime shall have been committed"
- **(A)Applicability**
  - **Presumption that any offenses at or over six months [aka not a "petty offense" (= <6mos)].** *Baldwin v. New York* (formerly 2 year prison – *Duncan v. LA*)
    - **Overcoming presumption:** Defendant must show that additional statutory penalties "are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Blanton v. City of North Las Vegas*
    - **No aggregation UNLESS no statutory maximum (in which actual punishments imposed should be aggregated), at least if the crime is contempt.** Thus, in general, at least one charge must be at or over 6mos. *Lewis v. US.*
    - **Often broader by state rules.**
  - ***Apprendi Rule* –** "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury."
    - Exception: Prior convictions. *Alemendarez-Torres v. US.*
    - Does not apply to minimum sentence determinations. *Harris v. US.*
  - **Waiver -> Bench Trial**
    - No right to bench trial (i.e. no right to waive). *Sanger v. US.*
    - **FRCrimP 23(a) - Must be waived by both D and P.**
    - **No constitutional right to waive.** Thus, depends on jurisdiction.
- **(B)Number of Jurors – Must be more than 6,** *Ballew v. Georgia,* **but less than 12 okay.** *Williams v. Florida.*
  - Federal law requires 12 jurors for BOTH felony and misdemeanor cases. FRCrimP 23(b).
- **(C)Unanimity Requirement(s)**
  - **IF 12-MEMBER JURY: 12-0, 11-1, 10-2, and 9-3 okay.** *Apodaca v. Oregon* (allowing 10-2)*; Johnson v. US* (allowing 9-3)
  - **If 6, then unanimous requirement.** *Burch v. Louisiana.*
  - **Open question re:lower, but probably not allowed.**
- **(D) Special Jury Ruling Issues**
  - **(i) Nullification –** Allowed, but NO instruction, and virtually no states allow teaching. *US v. Dogherty.*
    - **May challenge/remove juror if expresses intent to nullify.**
  - **(ii) Jury Inconsistency –** Does not make verdict constitutionally infirm (not clear whose ox is gored here). *Dunn v. US*
  - **(iii) Deadlocked Juries (Dynamite Instruction)**
    - ***Allen* "Dynamite Instruction" - May encourage to continue deliberation, but NOT to a particular result.** *US v. Allen; Lowenfield v. Phelps.*
- **(E) Jury Composition**
  - **6th Amendment prohibits systematic exclusion of certain cognizable groups from venire/jury**
    - **(i) FAIR CROSS SECTION REQUIREMENT FOR VENIRE**
      - "[T]he presence of a fair cross section of the community on venires … from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury." *Taylor v. LA*
        - Includes **"distinctive groups in the community", REGARDLESS of discriminatory purpose.** *Taylor v. LA*
          - **No distinct definition of "distinctive group".** *See Lockhart v. McCree*
        - **10% baseline.** But generally flexible depending on community
        - **ONLY APPLIES TO VENIRE.** Does not apply to petit juries, etc. *Lockhart v. McCree*
      - **PER SE VIOLATION: (1)** Excluded group is a "distinctive group in the community," **(2)** representation of this group in the venire is not fair and reasonable in relation to the number of such persons in the community, (**10% threshold), (3)** under-representation is due to systematic exclusion of group in jury selection process. *See Duren v. Missouri.*

- **Then, state must prove** a "significant state interest [is] manifestly and primarily advanced" by the problematic aspects of the selection system. *See Duren v. Missouri.*
- **No particular systematic method** of determining systemic exclusion. *Berghuis v. Smith,* **but seems to imply effect can be challenged without discriminatory terms on the face of the statute.**

- **(ii) CAUSE PREEMPTORTY CHALLENGES**
  - **Bases:(1) BIAS (2) HARDSHIP (3) DESIREABILITY**
    - "in case of special hardship or incapacity and to those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare." *Taylor v. LA*
    - **General disfavor of blanket rules.** *Dennis v. US* (federal employees), *Strauder v. WV* (limiting to white males) BUT jurors with opposition to death penalty.
- **(iii) *BATSON (PER SE)*RACISM IN PREEMPTORY CHALLENGES:**
  - **Right to ask questions IF "significant likelihood of prejudice or bias".** *Ham v. SC* (questions re: prejudice)
  - ***Batson* Purposeful Racial Discrimination*: (Prima Facie case)*** D must show he is
    - **(1)** member of cognizable racial group, [and that the] prosecutor has exercised preemptory challenges to remove from the venire members of the defendant's race.
      - **May use evidence solely from D's trial, so low bar.** *Batson v. Kentucky.*
    - **(2)** D is entitled to rely on fact, as to which there can be no excuse, that preemptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate."
    - **(3) D must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen on the basis of their race.** *Batson v. Kentucky*
      - **Dominant factor.** 1-2 usually granted automatically.
      - **Issue of challenging equally for similar reasons,** etc.
    - **[4] P must show race neutral reason to rebut prima facie showing,** but no "Same race, same mind" argument allowed.
      - **Does not even have to be minimally persuasive, or even plausible**. *Purkett v. Elem*
      - Can have racial impact as long as it is race neutral. *Hernandez v. NY*
      - Court looks to entire record of jury selection. *Miller-El v. Dretke.*
      - **Analysis:** (1) Similarly situated jurors challenged? (2) Disparate questioning? (3) Percentage/number of jurors of race challenged. (4) Manipulation of jury at all tied to race? (5) Prior history of discriminatory use?
    - **[5] Trial Court determines if "race neutral" or "pretextual."**
  - **(a) STANDING –** D has standing to bring excluded juror's EPC claim. *Powers v. Ohio* (white juror could bring black juror's claim)
  - **(b) APPLICABILITY**
    - **(i) CIVIL CASES –** Applies equally. *Edmonson v. Leesville Concrete Co*
    - **(ii) BY DEFENSE –** Applies equally (right of jurors). *Georgia v. McCollum* (constitute state action)
  - **(c) OTHER DISCRIMINATION –** ANY racial preemptory challenges, *Powers v. Ohio,* Ethnicity, *Hernandez v. NY*, and Gender, *JEB v. Alabama*, also included. SCOTUS declined to review decision allowing exclusion on religious grounds. *State v. Davis.*
    - **Many laws extend.**
    - **Open question re: religion.** *See JEB v. Alabama.*
    - If **interracial violent crime**, court must presume possibility of prejudice exists and inquire jurors about attitudes towards race. *Mu'Min v. Virginia*
  - **(d) STANDARD OF PROOF –** Need not prove more likely than not, *Johsnon v. Cali*, but proof of neutral explanation also low pending not "silly" or "fantastic" or like. *Purkett v. Elem.*
    - **Proof can be found from all sorts of evidence.** Types of questions asked jurors, etc.
  - **(e) REMEDY –**FN allows discharging venire and selecting new panel OR reseating improperly stricken juror. *Batson.*
    - **If error in reseating (judge seats juror who should have been stricken), no reversal UNLESS all seated jurors are not qualified/unbiased (low bar).** *Rivera v. Illinois.*

PRETRIAL PUBLICITY

- **1st Amendment** (Free Speech) **v. 6th Am.** (Public Trial)
  - Presumption of openness,
- **(A) DUE PROCESS RIGHT**
  - **(1) Question of PREJUDICE.** *Irwin v. Dowd*
    - **Right to impartial and indifferent jurors.** *Irwin v. Dowd.*

- **Factors include**: Size and characteristics of community, nature of coverage (including whether or not confessions alleged), time difference between coverage and trial, inevitable outcome. *Skilling v. US*
- **Right to inquire if publicity contains substantial prejudicial information.** *Mu'Min v. Virginia.*
  - But no unqualified right to seek information about pre-trial publicity. *Mu'Min v. Virginia.*
- **Affirmative duty of judge to handle/prevent.** *Sheppard v. Maxwell.*
- **Presumed prejudice** if pervasive, prejudicial pre-trial publicity present AND no move of venue where such publicity not present. *Rideau v. LA.*
- **Relatively high bar to prove.** *Skilling v. US.* If jurors can lay aside burden, and/or if judge can use various remedies, reversal nearly impossible.

(2)**Remedy –** Up to judge, including continuing trial, sequestering jury, intense voir dire, cautionary instructions, changing venue, etc.

- (i) **CLOSURE OF COURTROOMS**
  - **Presumption of openness.** *Richmond Newspapers v. Virginia.* Any form of per se rule against publicity disallowed. *Globe Newspaper Co v. Superior Court.* **Right of access**. *Press Enter. v. Superior Court.*
    - Includes *voir dire* process. *Presley v. GA.*
  - **Case-by-case basis of closure allowed.** *Globe Newspaper* footnote 47.
    - **Fair trial vs right of access.**
- (ii) **OTHER REMEDIES**
  - **Changing of Venue** possible, even importing jurors, but expensive.
    - Demographic requirement? "Hostage" jury?
  - **Closure of Courtrooms GENERALLY PROHIBITED.** Must make **PARTICULARIZED FINDINGS** to justify – absolutely no general rule.
  - **Gag Orders on lawyers/witnesses/etc** possible, but may run into issue of prior restraints (see below)
  - **Limits on reporters or nature of reporting in court** generally possible.
  - **Sequestering jury** also option.
  - High deference to judge re: remedies. *Sheppard v. Maxwell* (criticizing for not using).

- **(B) ETHICAL LIMITATIONS ON TRIAL ACTORS**
  - **Ethical rules may prohibit speech "that has a substantial likelihood of materially prejudicing a proceeding."** *Gentile v. State Bar.*
    - **VIOLATE FIRST AMENDMENT where used where no prejudice possible.** *Gentile v. State Bar.*
    - Low bar, but can be crossed. Ex: *US v. Cutler* (rambling).
  - **MRPC Rule 3.6 Trial Publicity**
    - (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
    - (b) Notwithstanding paragraph (a), a lawyer **may state**: **(1)** the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; **(2)** information contained in a public record; **(3)** that an investigation of a matter is in progress; (**4**) the scheduling or result of any step in litigation**; (5)** a request for assistance in obtaining evidence and information necessary thereto; **(6)** a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and **(7)** in a criminal case, in addition to subparagraphs (1) through (6): **(i)** the identity, residence, occupation and family status of the accused**; (ii)** if the accused has not been apprehended, information necessary to aid in apprehension of that person; **(iii)** the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
    - (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to **protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client.** A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
    - (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).
- **(C) PRIOR RESTRAINTS (of the Press)**
  - **VERY DISFAVORED.** Must demonstrate strong, direct prejudice to justify + NARROW TAILORING. But still hypothetically OK. *Nebraska Press Ass'n v. Stuart.*
- **(D) CAMERAS**
  - **No absolute right given.** *Chandler v. FL.* Still, 48 of 50 states allow in some form.
  - **Not *per se* violation of fair trial right.** *Chandler v. FL.*
  - **FRCrimP 53 –** Generally disallows broadcasting of trials.

ARGUMENTS

CONFRONTATION, SELF-INCRIMINATION, RIGHT TO A DEFENSE, ARGUMENTS

CONFRONTATION AND SELF-INCRIMINATION

- **(0) COMPETENCY TO STAND TRIAL**
  - **Prerequisite to trial.** *Drope v. Missouri.*
  - **Competent when he has(1)** "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has a**(2)** "rational as well as factual understanding of the proceedings against him." *Dusky v. US.*
    - **Medication may be allowed.** Only if (1) treatment medically appropriate, (2) substantially unlikely to have serious side effects that will undermine the fairness of the trial, and (3) there are important government interests in having the defendant medicated, such as that he poses a danger to himself or others. *Sell v. US; Riggins v. Nevada;*
    - **Must be competent to be executed.** *Ford v. Wainwright.*[(1) awareness of why he is being executed and (2) awareness of what it means]
      - Unclear if D has to have the capacity to consult with counsel.

- **(A) RIGHT OF CONFRONTATION**
  - **U.S. Const. 6th Am. –** "to be confronted with the witnesses against him"

  - **(1) RIGHT TO BE PRESENT AT TRIAL**
    - **General presumption that D can be present at <u>any and all</u> <u>critical stages</u> trial.** *Illinois v. Allen;* **FRCrimP 43(a).**
      - **CRITICAL STAGES FROM RIGHT TO COUNSEL?**
    - **<u>WAIVER</u> BY BEHAVIOR: –** Where, <u>after a warning</u>, continues to conduct self "in a manner so disorderly, disruptive and disrespectful ... that his trial cannot be carried on with him in the courtroom." *Illinois v. Allen.*
    - **<u>Result of Waiver:</u>** (*Illinois v. Allen*)
      - **(i) Bind/gag**
        - BUT may be independent DPC violation independently WITHOUT SPECIFIC, PARTICULARIZED FACTS (Specific D, specific state interests) – gives inference of guilt. *Deck v. Missouri.*
      - **(ii) Cite for contempt**
        - BUT proportionality issue.
      - **(iii) Take out of courtroom until he promises to behave**
        - BUT no real effect.
    - **<u>RECLAMATION</u>:** May reclaim right <u>after waiver</u> IF "willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Illinois v. Allen*

  - **(2) CONFRONTATION CLAUSE - *CRAWFORD***
    - **Not absolute face-to-face right.** Court may limit access for prudential reasons. *Maryland v. Craig* (admission of "certain hearsay statements" despite inability to confront)
      - **BUT** General presumption of a face-to-face meeting in trial. *Coy v. Iowa.*
      - **Factors persuading court to allow:** (1) Presence of Counsel during cross, (2) W under oath, (3) Cross-examination still possible, (4) jury/finder of fact could still observe demeanor.
    - **(i) <u>TESTIMONIAL HEARSAY</u> is NOT admissible, even if under an exception to the hearsay rule, <u>UNLESS</u> (ii) the witness is (a) <u>UNAVAILABLE</u> <u>AND</u> there was a (b) <u>PRIOR OPPORTUNITY FOR CROSS-EXAMINATION.</u>**
    - **(i) "Testimonial Hearsay"**
      - **<u>COVERS:</u> "Statements that were made under circumstances which would lean an <u>objective witness reasonably to believe that the statement would be available for use at a later trial</u>"**
        - a/k/a "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions" *Crawford*
      - **<u>i.e.:</u> (1) OUT-OF-COURT (2) STATEMENT (3) PROFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED [4] INCRIMINATING A SPECIFIC D**
      - **"TESTIMONY"**
        - **Hinges on <u>belief of declarant</u> re: whether it would be used at trial.**
          - Ex: Statements made to police after DV call. *Hammon v. Indiana.*
        - **<u>Expert reports except DNA</u> analysis generally testimony:** Lab notes indicating guilt without scientist to testify ARE testimonial and thus are barred, *Melendez-Diaz v. Mass.; Bullcoming v. NM*, BUT

- **Not DNA results.** *Williams v. Illinois* (non-TOMA, primary purpose "not" to testify against witness, etc).
- No "surrogate" testimony, regardless of specialty of replacement. *Bullcoming.*

- **"NONTESTIMONY"**
  - **(1) Ongoing Emergency.** *Michigan v. Bryant; (*old: *Davis v. WA, Hammond v. Ind.* (finding none)) – **OBJECTIVE STANDARD -** "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" *Crawford.*
    - **Factors Include:** (1) Circumstances in which encounter occurred (ex: ongoing threats, duration of emergency, etc) and (2) Statements and actions of BOTH declarant and police. *Michigan v. Bryant* (dying homicide victim IDing perp).
  - **(2) Forfeiture --** Exception where party the testimony is used against is the reason why the person is unavailable – intimidation, etc. - *Giles v. California*
    - Requires ***subjective* intent – not incidental –** must prove intent to make unavailable. *Giles v. California*
  - **(3) Dying Declaration–** Mentioned in *Crawford* but not fleshed out
  - **MAYBE (*Williams* Plurality)**
    - **(M-1) Testimony in-court re: reports out-of-court.** Expert testimony re: report, etc. *Williams v. Illinois.*
    - **(M-2) Non-TOMA Facts**. Use by an expert for hypothetical reasoning. *Williams v. Illinois.*
      - **BUT:** Court cannot allow conduits for hearsay, experts cannot disclose inadmissible evidence to jury, instructions must be given re: inadmissibility and weakness of such evidence, and no weight may be given.
    - **(M-3) Non-Incriminating Facts.** Reports, etc not directly incriminating a specific D. *Williams v. Illinois.*
  - **NO RESTRICTION ON NON-TESTIMONIAL HEARSAY.** *Davis v. Washington*
- **(ii) EXCEPTION:** (1) Witness unavailable, and (2) Opportunity to cross by opposing D when made.

- **(B) SELF-INCRIMINATION**
  - **U.S. Const. 5th Am.** – "... nor shall be compelled in any criminal case to be a witness against himself..."
  - **P may not comment on D's refusal to testify.** *Griffin v. California*
    - **No instructions regarding presumptions from silence ("may" OK, not "shall", etc).** *Griffin v. Cali*
      - **"No Adverse Inference" instruction may be requested,** *Carter v. Kentucky*, and **may be given without D's request or allowance.** *Id.*
    - **Includes sentencing phase.** *Mitchell v. US*
    - **Statements in violation of 6th Am.** admissible for impeachment. *Kansas v. Ventris.*
    - But may be used in civil proceeding. *Baxter v. Palmigiano.*
    - May be used if D "opens the door." *US v. Robinson.*

RIGHT TO A DEFENSE; ARGUMENTS

- **Merges DPC, Comp Process and Confrontation Clause.**
- **(A) RIGHT TO PRESENT A DEFENSE**
  - 14th (DP) + 6th (Compulsory Process) + 5th Am (Compelled Testimony) = Right to Defense
  - **No "ARBITRARY AND DISPROPORTIONATE" PROHIBITIONS AS COMPARED TO PURPOSE –** create significant adverse effect on right to present defense.
    - **(1) Determine Purpose, (2) Arbitrary and disproportionate?**
    - INCLUDE: Absolute prohibitions against hypnosis testimony (*Rock v. Arkansas*), **right to present witnesses** (*Washington v. Texas*), impeachment evidence where voluntariness inquiry already made (*Crane v. Kentucky*), **right to cross-examine and impeach own witnesses (no "voucher" limits)** (*Chambers v. Mississippi*), third party guilt (*Homes v. S.C.*).
- **(B) PROSECUTORIAL ARGUMENTS (*DARDEN* TEST)**
  - **Higher burden for prosecutorial arguments.** "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none" *Berger v. US.*
    - Prosecutor is both an advocate and agent of the state – not allowed to seek "foul [blows]" *Berger v. US.*
  - ***Darden* TEST FOR VIOLATION OF DUE PROCESS**
    - **Relevant question: Whether prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.**
    - **(A) Comments**
      - Whether the comments manipulated or misstated the evidence or injected non-record evidence into the proceedings.
        - Includes inflammatory language and personal opinions.

- **MRPC 3.4(e)** – "[A lawyer shall not i]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of the cause, the credibility of the witness, the culpability of a civil litigant or the guilt or innocence of an accused ..." *(Concord ABA Standards).*

- Whether the comments implicated or prejudiced a specific right
- Whether the comments were isolated or pervasive
- Whether the comments were "off the cuff"
- Whether the comments misled the jury about its function or role.

- **(B) Context**
  - Nature of D's/Ps argumentation
    - **"Invited Response" –** Where other lawyer opens the door, more extreme responses in arguments *may* be allowed, but not an excuse. Emphasis on viewing trial as a whole. *Darden v. Wainwright*.
      - **Factors (from dissent in *Darden*):** (1) Lie or not, (2) invitation or not, (3) judge instructions or not, (4) whether harmed party got last word, (5) weight of evidence generally
  - Trial Judge's rulings and instructions
  - If D had an opportunity to respond
  - Weight of the evidence on the relevant question.
- **(C) In summation, did comments render trial fundamentally unfair?**
  - High bar. *Darden.*

- **Judge control.** Judge should militate proceeding, punish if necessary, and generally manage system to prevent abuse. *US v. Young.*
  - Punishments can include formal reprimand, mention in opinions, or disciplinary proceedings, etc. *US v. Modica.*.

POST-TRIAL – DOUBLE JEOPARDY

DOUBLE JEOPARDY

- U.S. Const. 5th Am. – "[...] nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb [...]"
  - Protects against **multiple prosecution(s)** [both after acquittal and conviction] and **multiple punishments for same offense**. *North Carolina v. Pearce*
  - ***"Atrefois acquit, atrefois convict and pardon"*** – Law French for plea of previous acquittal.
  - **Reasoning:** (1) Fairness, (2) Reliability, (3) Finality.
  - Incorporated. *Benton v. Maryland.*
- **(A) APPLICABILITY**
  - **(1) "Criminal Prosecutions" (*Ward* Test + *Hudson v. US*)**
    - ***Ward* test:**
      - **(1) [PRESUMPTION FROM LEGISLATIVE INTENT] Whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other."**
      - **(2) [REJECTING LEGISLATIVE PREFERENCE] "whether the statutory scheme was so punitive either in purpose or effect [as to] transform what was clearly intended as a civil remedy into a criminal penalty." (3) BUT "factors must be considered in relation to the statute on its face" and (4) "only the *clearest proof* will suffice to override legislative intent".**
        - Guideposts: (1) whether sanction involves affirmative disability or restraint, (2) whether it has been historically regarded as punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment – retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connection is assignable for it, (7) whether it appears excessive in relation to the alternative purpose assigned. *Kennedy v. Mendoza-Martinez.*
        - **Civil Forfeitures nearly impossible to contest:** "where the 'clearest proof' indicates that an *in rem* civil forfeiture is 'so punitive either in purpose or effect' as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause." *US v. Ursery.*
  - **(2) "Same Offense"**
    - ***Blockburger* Test:** "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."
      - **Lower Included Offenses [not included] –** Where A = (B+Fact), B is subsumed into A, does NOT pass *Blockburger.*
      - **Exception:** May exist where State cannot proceed with more serious charge at outset due to facts/occurrences that have yet to occur (ex: death of V). *Brown v. Ohio.*
    - **Includes retrial of facts (necessarily?) found during a prior proceeding.** *Ashe v. Swenson.*
  - **(3) When Jeopardy Attaches**
    - Generally: when a defendant's trial begins. If a **jury trial**, then when the jury is impaneled and sworn. If a **bench trial,** then when the judge begins to hear evidence (i.e. when first witness sworn). *Crist v. Bretz.*
    - **Double jeopardy applies only if jeopardy attached** in the original proceeding. *Ex parte Lange.*
    - **"Continuing Jeopardy" - Does not end before/during appeal.** *US v. Scott; Burks v. US*
      - May re-try with previous charges even if original jury found less AS LONG AS no indication of reasoning by previous jury. Otherwise, collateral estoppel-like effect.
- **(B) FOLLOWING CONVICTION OR ACQUITTAL**
  - **(1) No Retrial after Acquittal**
    - General prohibition on re-trying D who was acquitted. *US v. Ball,* even if acquittal based on "an egregiously erroneous foundation." *Fong Foo v. US.*
    - **"Acquittal":** Findings of (1) Not guilty (Acquittal), (2) Insufficient Evidence, *Burks v. US,* (3) Appeals Court finding insufficient evidence. (4) Midtrial rulings for insufficient evidence with no right to reconsider. *Smith v. Mass.* (5) Reversal and reinstatement of jury verdict, etc.
      - **"Implied Acquittal Rule" –** Conviction (or acquittal) of lesser offense = implicitly acquits of higher offense(s). *Green v. US.*
    - **NOT "Acquittal":** (0) Appeals, (1) Reversal based on trial error. *Burks v. United States.* (2) Midtrial rulings for insufficient evidence with a right to reconsider. *Smith v. Mass.* (3) Anything pretrial (no jeopardy has attached). *See Smith v. Mass.*
  - **(2) No Retrial after Conviction**
    - **Bar UNLESS:** (1) Retrial after successful appeal OR (2) trial judge grants a motion for acquittal AFTER conviction by jury [reinstatement by appeal = not re-trial]. *US v. Guadgna.*
    - **If successful appeal and D seeks new trial, waives right.** *US v. Ball.*

- **(C) EXCEPTIONS**
  - **(0) Termination unrelated to guilt or innocence -> NO DJ.** *US v. Scott* (termination re: pre-indictment delay).
  - **(1) AFTER MISTRIALS**
    - **If "manifest necessity" or "the ends of public justice would otherwise be defeated," retrial OK.** *US v. Perez.*
      - Exception to [general rule] right to have trial heard before original jury. *Richardson v. US.*
    - **(a) Hung Jury**
      - **Constitutes "manifest necessity"** due to "societal interest" *US v. Sanford; US v. Perez.*
      - Even after four hours of deliberation. *Renico v. Lett.*
      - No meaning can be ascribed to hung jury, no negative implications. *Yeager v. US.*
    - **(b) Request by D**
      - **Constitutes waiver,** "manifest necessity" irrelevant. *US v. Dinitz.*
      - **EXCEPTION: If prosecutorial provocation ("goad"ing) for mistrial, then double jeopardy applies.** *Oregon v. Kennedy.*
        - **No "bad faith" or "harassment" test per se - inferred from circumstances**. *Oregon v. Kennedy*
        - "The Double Jeopardy clause ... protect[s] a defendant against governmental actions intended to provoke mistrial requests" *US v. Dinitz*
        - Possibly objective, totality of the circumstances test. *Oregon v. Kennedy* (Powell concurrence, controlling plurality)
  - **(2) DUAL SOVEREIGNTY**
    - "[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be [prosecuted and] punished by each." *US v. Lanza.*
    - **Allows EVEN IF *Blockburger* TEST MET.**
    - **Fed-State:** Yes. *Bartkus v. Illinois.*
    - **State-State –** Yes. *Heath v. Alabama.*
    - **Fed-Foreign –** Yes. *US v. Villanueva.*
    - **Local Gov'ts –** NO. *Waller v. Florida.I*
    - **LIMITS**
      - **(i) "Sham" –** If one clearly a mechanism for other (i.e. two prosecutions highly intertwined). *Bartkus v. Illinois.*
      - **(ii) "Petite Policy" of Att'y General –** May not bring successive prosecution unless compelling reason ("demonstrably unvindicated" or "substantial federal interest") to do so and approval from assistant attorney general.
      - **(iii) State Rejection.** Many have rejected power to doubly prosecute. (ex: New Hampshire)
- **(D) MULTIPLE CHARGES/CUMULATIVE PUNISHMENTS**
  - **One activity, multiple punishments *may be provided by legislature.*** *Missouri v. Hunter.*
    - **Legislative intent must be clearly established.** *US v. Universal CIT Credit Corp.*
  - **"Lesser Offenses" - *Blockburger* Test:** "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."
- **(F) COLLATERAL ESTOPPEL**
  - **"[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."** *Ashe v. Swenson.*
    - **TEST**
      - **(1) FACT**
      - **(2) CRITICAL TO OUTCOME**
      - **(3) FOUND NECESSARILY BY PREVIOUS COURT**
        - Must be necessary for judgment (including explicitly found).
  - **General Verdict Standard:** "Where a previous judgment of **acquittal was based upon a general verdict**, [court must] examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe v. Swenson.*
    - The inquiry "**must be set in a practical frame**, and viewed with an eye to all the circumstances of the proceedings." *Sealfon v. United States*
    - **Guilty pleas** inapplicable – no resolution of facts. *Ohio v. Johnson.*