Criminal Procedure Outline

I. Background
   a. Virtually ever defendant pleads guilty. Rarely do cases end up in an actual trial. 3% go to trial and 1.5% are jury trials.
   b. Outline:
      i. Commission of a crime
      ii. Investigation by the police (theoretical) – a criminal investigation begins when a police officer, on the basis of her own observations and/or those of an informant, comes to believe that criminal activity may be afoot or has already occurred.
         1. No investigation needed
         2. reactive investigation
         3. proactive investigation
         4. prosecutorial investigation
      iii. Arrest
         1. 75 to 85% of defendants cannot afford a lawyer; they get one appointed or a public defender
         2. when a routine arrest occurs in a private home, the police must ordinarily be armed with a warrant to take the suspect into custody.
         3. arrests in public places usually can be made without an arrest warrant.
      iv. Post-Arrest Investigation
      v. Prosecutorial Discretion
         1. enormous discretion is given to prosecutors
      vi. Filing a complaint – not tested on the bar
      vii. Initial Appearance
         1. Gerstein hearing
            a. Following a warrantless arrest, the 4th Amendment requires that a prompt judicial determination of probable cause be made as a precondition to any extended restraint of the arrestee's liberty.
            b. defendant doesn't have to be present, is not entitled to representation by counsel, and testimony can be based on hearsay.
            c. In many jurisdictions, the probable cause hearing is conducted in the suspect's presence at her first appearance before a judicial officer.
         2. Initial Appearance before a magistrate
            a. The arrestee receives formal notice of the charges against her, her constitutional rights in the impending prosecution are explained to her, and a date is set for the preliminary hearing.
            b. If the suspect is indigent and not presently represented by counsel, a lawyer is appointed.
            c. A Gerstein hearing may be conducted.
            d. The magistrate determines whether the arrestee should be set free on her own recognizance, released on bail, or detained pending further proceedings.
      viii. Grand Jury/Preliminary Hearing
         1. Grand Jury
            a.
            b. neither the defendant nor his/her lawyer is entitled to be present, except if and when she is called as a witness; waiveable
            c. The rules of evidence do not apply because no judge is present.
            d. The prosecutor is not required to disclose to the grand jury evidence in her custody that might exculpate the putative defendant.

e. jury only has to determine that there is probable cause for the case to move forward

2. states that don't have grand juries have to have a preliminary hearing (defendant's attorney can show up here because it is adversarial in nature; often the attorney does not put up a rebuttal case because the prosecutor only needs probable cause).
    a. The primary purpose is to determine whether there is probable cause to believe that a criminal offense has occurred and that the arrestee committed it.
    b. A discovery mechanism – defendant attorney can see the prosecution's case
    c. Defendant may waive.

ix. Information or Indictment will replace formal complaint – not on bar

x. Arraignment
    1. At the arraignment, at which time defense counsel is permitted to be present, the accused is provided with a copy of the indictment or information, after which she enters a plea to the offenses charged in it.
        a. Innocent is not a plea; "not guilty" is

xi. Pretrial Motions
    1. Various defenses, objections, and requests that often are raised prior to trial; such as:
        a. That the indictment or information is defective, in that it fails to allege an essential element of he crime charged or that it fails to give the defendant sufficient notice of the facts relating to the charge against her.
        b. That the venue of the prosecution is improper or inconvenient
        c. That the indictment or information joins offenses or parties in an improper or prejudicial manner
        d. That evidence in the possession of one of the parties should be disclosed to the opposing party
        e. That evidence should be suppressed because it was obtained in an unconstitutional manner
        f. That the prosecution is constitutionally barred, such as by the double jeopardy and/or speedy trial clauses of the Constitution.
    2. In some circumstances, if a defendant's pretrial motions are successful, the judge will dismiss the charges on her own or on the prosecutor's motion.

xii. Trial
    1. The right to a jury trial applies, at minimum, to any offense for which the maximum potential punishment is incarceration in excess of six months.
    2. A jury as small as six in number is constitutionally permitted.
    3. Laws permitting non-unanimous verdicts have been upheld as constitutional.
    4. "Impartial jury" – an individual juror is not impartial if her state of mind as to any individual involved in the trial, or as to the issues involved in the case, would substantially impair her performance as a juror in accordance with the law and the court's instructions.
    5. The jury should be composed of a persons constituting a fair cross-section of the community
    6. entitled to counsel (An indigent is entitled to the appointment of counsel in all felony prosecutions, as well as any misdemeanor trial in which she will be incarcerated if convicted.
    7. The defendant may call witnesses on her own behalf, and confront and cross-examine the witnesses who testify against her.
    8. Defendant not required to testify on her own behalf.

xiii. Sentencing

xiv. Appeal
    1. All jurisdictions statutorily permit a convicted defendant to appeal; not a constitutional right.
    2. every state provides a right of first appeal
    3. entitled to appointed counsel for that first appeal only
xv. Habeas Corpus
    1. After a defendant's appeals are exhausted, she may file a petition for a writ of habeas corpus in a federal district court, if she believes that her continued incarceration is in violation of the United States Constitution or of a federal law.
    2. collateral attack on a criminal conviction
    3. The purpose of a habeas petition is to convince the district (trial) court that it should compel the warden of the jail or prison holding the petitioner to bring her before the court so that it can determine whether she is being held in custody against the law.

II. Incorporation of the Bill of Rights

a. The provisions of the Bill of Rights that pertain to criminal procedure – primarily, the fourth, fifth, sixth, and eighth amendments – have no direct effect on the majority of criminal cases that arise in this country because the Bill of Rights originally applied only to the federal government and most criminal cases arose in the states.
b. The 14th amendment imposes limits on state action.
c. To what extent, if at all, does the 14th Amendment due process clause incorporate the Bill of Rights, so as to make the Bill restrictions on federal power applicable to the states?
    i. Why question is important:
        1. determines the extent to which people are protected from overreaching by agents of the state.
        2. If the due process clause incorporates the Bill of Rights in its entirety, the latter charter becomes a national code of criminal procedure.
        3. federalism – degree of uniformity among states
        4. exacerbates the rule of the judiciary in the enforcement of constitutional rights.
    ii. Theories:
        1. Total Incorporation
            a. The 14th Amendment in general, and the due process clause in particular, incorporates all of the rights included in the Bill of Rights.
            b. Advocated by Judge Hugo Black; never received support of the majority
        2. Fundamental Rights
            a. The 14th Amendment does not incorporate any of the provisions of the bill of rights.
            b. The 14th Amendment requires the states to honor fundamental rights which may overlap with the ones in the bill of rights but are not related to them.
        3. Total-Incorporation-Plus
            a. The due process clause incorporates the Bill of Rights in its entirety as well as all the fundamental rights that fall outside of the express language of the Constitution.
        4. Selective Incorporation
            a. Once a right is determined to be fundamental, every feature of the federal right applies to the states.
            b. Although inclusion of the right in the 14th Amendment is selective (only fundamental rights are protected by the due process clause), once it is identified as fundamental, the right perfectly mirrors the federal provision.

d. Duncan v. Louisiana

    i. Facts: Defendant accused of simple assault in Louisiana. He wanted a jury trial but was denied because Louisiana only allows jury trials for felonies.

ii. Issue: Whether right to a trial by jury guaranteed by the 14th Amendment.
iii. Rule: Right to trial by jury is fundamental and the 6th amendment right to a trial by jury applies to the states.
iv. Reasoning: 1.The right to a jury trial should apply to the states because there is a long history of a right to a jury trial in the United States. 2. Without a jury trial there will be oppression by the federal government; reluctance to entrust power over life and liberty to judges.
v. Concurrences: 1. Justice Black wanted all of the provisions of the Bill of Rights applicable to the state and that judges shouldn't be able to tinker with individual provisions. 2. Fortas doesn't want all of the provisions included, but is okay with the 6th Amendment being included.

III. Overview of the Fourth Amendment
a. Text - "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place toe searched, and the persons or things to be seized."
b. Purpose – What does the 4th Amendment seek to protect?
i. What broad overriding values inspired the framers of the 4th Amendment?
1. The more recent interpretation of the amendment is that the framers intended to protect people's legitimate expectations of privacy in their "persons, houses, papers, and effects."
2. The unwarranted entrance into an individual's home is the clearest violation of 4th Amendment values.
c. Standing – A defendant in a criminal prosecution may not raise a claim of a 4th Amendment violation unless she is the alleged victim of the unreasonable search or seizure.
d. Exclusionary Rule
i. Primary 4th Amendment remedy – provides that evidence seized by the police in violation of the 4th Amendment may not be introduced by the prosecution in a criminal trial of the victim of the unreasonable search or seizure.
ii. *Weeks v. United States*
1. Facts: Defendant was arrested. While he was being arrested the police went and searched his house without a warrant. Later that day a U.S. Marshal, a federal employee, also searched the house without a warrant.
2. Issue: Whether evidence seized from a search without a warrant is admissible in court.
3. Rule: In federal trials the Fourth Amendment bars the use of evidence unconstitutionally seized by federal law enforcement officers.
4. Reasoning: Marshal's search of the house was unconstitutional and evidence seized from his search cannot be admitted into trial. Unlawfully obtained evidence cannot be used against the accused in court. However, the evidence seized by the state is not excluded because they are state actors. The exclusionary rule is not found in the 4th amendment (judiciary embellishment)
iii. *Wolf v. Colorado*:
1. Issue: Is it a violation of the 14th Amendment when evidence introduced that would have violated it within the Federal Court (excluded if search done be federal officers, but not by federal officers)?
2. Rule: Security of one's privacy against arbitrary intrusion by the police – which is the core of the Fourth Amendment – is basic to a free society.
3. Reasoning/Holding: Held that 14th amendment due process clause requires the states to incorporate the 4th Amendment and states cannot have unlawful searches and seizures. (Other judges held that unreasonable searches and seizures violate the due process clause of the 14th Amendment). Rejection of the "silver platter"

doctrine. States were held to be subject to the substantive provisions of the Fourth Amendment. The exclusionary rule was held to be a matter of judicial implication. Court refused to extend the exclusionary rule to the states.

iv. *Mapp v. Ohio*
    1. Facts: Officers who claimed they were conducting an investigation of a bombing sought to enter D's house in order to find and question a suspect they believed to be hiding there. When they demanded entrance, D telephoned her attorney, and on his advice, refused to admit them without a search warrant. After keeping the house under surveillance for three hours and, apparently still without warrant, the officers returned to the house. When D did not come to the door immediately, they forcibly entered, damaging the door in the process. Once inside, the officers displayed a piece of paper they claimed was a search warrant. D grabbed it and "placed it in her bosom." The officers removed the warrant from her clothing after a struggle and they forced her upstairs where they searched her belongings. They searched the rest of the house. They didn't find any materials related to the bombing, but they did find "obscene materials" which they seized. D was convicted for their possession.
    2. Issue: Whether evidence obtained illegally by the state can be admitted in a state trial.
    3. Rule: The Fourth Amendment exclusionary rule applies in state criminal trials, just as it does in the federal system via *Weeks*.
    4. Reasoning: Same sanction of exclusion; to hold otherwise provides an incentive to conduct illegal searches and seizures. Significant because it provides not just for the incorporation of the 4th Amendment but also of the exclusionary rule. Also, introduces uniformity among the states. Court said that the states had started to adopt the exclusionary rule and other protections proved worthless or futile. Exclusionary rule is what deters the police from violating the 4th Amendment. Focus on the judicial integrity of the U.S. courts; using tainted evidence is lowering the esteem and integrity of the U.S. Courts.
    5. Dissent: Justice Harlan saying that they should have reasoned it under the 1st Amendment. Court overruled Wolf without the issue actually being briefed. (This sort of thing is exceedingly rare. This is the beginning of the Warren Court's modification of criminal procedure).

v. Rationale:
    1. To deter by removing the incentive to disregard the 4th Amendment.
        a. If we assume that threat of punishment deters many would-be criminals from violating penal laws, we may assume that police officers, too, will be deterred from violating constitutional rights if they know that the government cannot take advantage of the fruits of the illegal conduct by use of the evidence at a criminal trial.
        b. The prime purpose, if not the sole one.
    2. The imperative of judicial integrity.
        a. Not as widely depended upon anymore.

vi. The exclusionary rule is no longer considered an essential component of the Fourth Amendment, but is merely a remedy devised by the Justices to deter unconstitutional governmental misconduct.

vii. The scope of the exclusionary rule has been narrowed.

e. "Persons, Houses, Papers, And Effects"
    i. Police activity that does not involve a person, house, or effect – whether the police activity is reasonable or unreasonable, conducted with or without a warrant, and whether supported by probable cause, reasonable suspicion, or no credible evidence t all, is lawful under the Fourth Amendment.

ii. "Persons" includes:
    1. D's body, as a whole, such as when he is arrested;
    2. the exterior of D's body (including his clothing), as when he is patted down for weapons or contents of his clothing are searched;
    3. the interior of D's body, such as when blood is extracted to test for alcohol content.
iii. "Houses" includes:
    1. virtually all structures that people commonly use as a residence
    2. buildings attached to the residence, such as a garage
    3. buildings that are not physically connected to the house if they are used for intimate activities of the home.
    4. the cartilage of the home, that is, "the area to which extends the intimate activity associated with the "sanctity of a man's home and privacies of life."
    5. offices, stores, and other commercial buildings (some constitutional protection, but not as much as the home)
iv. "Papers and effects"
    1. papers - personal items such as letters, diaries, and business records
    2. effects – residual component of the constitutional phrase such as automobiles, luggage, and other containers, etc (less inclusive then the term "property")

IV. Fourth Amendment: What is a Search?

a. Constitutional Significance
    i. If the police activity is not a "search," the Fourth Amendment simply does not apply to the case.
    ii. The threshold question is: Does the Fourth Amendment apply?
        1. A court may answer the basic question affirmatively – the conduct is a search, and, therefore, is governed by the Fourth Amendment – and yet still determine that the search was reasonable and, thus, constitutionally permissible. But, if the court answers the is-it-a-search question in the negative, any claim that the police acted without warrant or probable does not matter.

b. Modern Analysis
    i. *Katz v. United States*
        1. Facts: D was the subject of warrantless surveillance of his conversations by federal officers, who attached an electronic listening device to the outside of a telephone booth from which he conducted conversations.
        2. Issue: Was the method of placing an electronic listening device outside of a phone booth a search?
        3. Rule: Harlan's concurrence – twofold requirement, 1. that a person have exhibited an actual (subjective) expectation of privacy and, 2. that the expectation be one that society is prepared to recognize as reasonable.
        4. Reasoning: From this point forward, Katz sets up a doctrine that the 4th amendment protects people, not places. Eliminates the idea of criminal trespass is necessary before the 4th amendment is implicated. Reasonableness is an objective standard. Stewart's Opinion: What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. Whereas what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. Because the telephone booth was made of glass, D's physical actions were knowingly exposed to the public, but what he sought to exclude when he entered the booth was the uninvited ear. Therefore, by shutting the door on the booth and paying the toll, D was surely entitled to assume that the words he uttered…would not be broadcast to the world. Harlan's Concurrence: "reasonable expectation of privacy…." Police conduct does not constitute a "search" if either prong of the test is lacking. D would not have had a

valid expectation if he had left the door to the booth open or if he knew that the booth was bugged.

5. Problems with Harlan's test – difficult to implement, difficult to prove, and once people know that the government is reading their mail, listening to their conversations, and generally intruding on their privacy, they will possess no subjective expectation of privacy. Non-government intrusions can undermine our right to be free from government intrusions. Set up a test for a case by case analysis of subsequent cases.
6. Dissent: Black doesn't like judges determining whether or not there is an expectation of privacy.

ii. Subjective prong – ". that a person have exhibited an actual (subjective) expectation of privacy"
   1. The Court has generally found that the Fourth Amendment claimant possessed an expectation of privacy, was willing to assume that she did, or simply moved on without discussion to the objective prong.

iii. Objective prong – "that the expectation be one that society is prepared to recognize as reasonable."
   1. The Court has applied the objective prong strictly
   2. Factors:
      a. The nature of the property inspected.
         i. The extent to which a person has a reasonable expectation of privacy is significantly tied to the place where the police activity occurred.
      b. The extent to which a person has taken measures to keep information, her property, or activities private is vital.
         i. Rule 1: A person cannot possess a reasonable expectation of privacy in that which she knowingly exposes to the public or is in open view.
         ii. Rule 2: One who voluntarily conveys information or property to another person assumes the risk that the latter individual is a government agent or will transmit the information or property to the government.
            1. *United States v. White*
               a. Facts: a police informant sets up a drug dealer. On some occasions the informant is wearing a wire and on others another officer is hiding in the closet and recording the conversations.
               b. Issue: Is the police's use of a wired informant a search within the meaning of the Fourth Amendment?
               c. Rule: A person does not have a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police.
               d. Reasoning: It is not a search because the defendant had no expectation of privacy when speaking to another person. Distinct from *Katz* because there is a "stabbed in the back" rule that says that a person is taking a chance when they talk to someone else. Whereas a person can control the extent to which she gives up her privacy in her home, she cannot

similarly control her privacy regarding her thoughts once she has disclosed them to another.

2. No "search" occurs if X, a police informant or undercover agent who is visibly present but is masquerading as D's friend, business associate, or colleague in crime, listens to and reports to the government D's statements to X or another person in X's presence.
3. The Court's tolerance of this investigative technique is likely founded on their pragmatic recognition of the fact that the use of "false friends" is essential to the detection of other inaccessible information about crime.
4. The fact that a false friend is "wired" with a transmitter or a tape recorder is irrelevant to the search analysis.

iii. The degree of intrusion experienced by the police activity is relevant.

1. For example, whether very low-altitude aerial surveillance of the backyard of a person's home by helicopter constitutes a "search" may depend on whether the helicopter causes noise and dust, thereby disrupting legitimate activities therein.
2. In the home, all details are intimate details.

V. The Problem of Open Fields, Curtilage, and Surveillance Technology

a. Open Fields

i. Entry into and exploration of so-called "open fields" does not amount to a search within the meaning of the Fourth Amendment.

ii. *Oliver v. United States*

1. Facts: Two cases in which officers without search warrants entered private property, ignored "No Trespassing" signs, walked around either a locked gate or a stone wall, and there they observed marijuana plants that were not visible from outside the property.
2. Issue: Do people have a legitimate expectation of privacy in activities occurring in open fields?
3. Rule: People do not have a legitimate expectation of privacy in activities occurring in open fields, even if the activity could not be observed from the ground except by trespassing in violation of civil or criminal law.
4. Reasoning: The Fourth Amendment reflects the constitutional framers' belief that certain enclaves such as a house should be free from governmental interference. In contract, open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. "No Trespassing" signs do not effectively bar intruders. Moreover, the same activities that police officers observe by trespassing can be observed lawfully by air. Therefore, the expectation of privacy in an open field is not reasonable.

b. Curtilage

i. Defined: Curtilage is the land immediately surrounding and associated with the home.

ii. Curtilage is entitled to Fourth Amendment protection, although not as much as is accorded to the interior of a home.

iii. *United States v. Dunn:*

1. Facts: D owned a ranch enclosed by a fence. Another fence surrounded D's ranch house. Approximately 50 yards beyond the latter fence were two barns, each enclosed by its own fence. A federal officer, who had received information

that D was producing illegal drugs on his property, climbed over D's perimeter fence and interior fence. The officer smelled an acidic odor commonly associated with drug production emanating from the barns. He climbed over the barn fences and, without entering the structures, peered in. He observed incriminating evidence in one barn.

2. Issue: Is this a search?
3. Rule: An expectation of privacy in an open field is never legitimate (reasonable); Factors: 1. the proximity of the area claimed to be curtilage to the home, 2. whether the area is included within an enclosure surrounding the home, 3. the nature of the uses to which the area is put, and 4. the steps taken by the resident to protect the area from observation by people passing by.
4. Reasoning: The Supreme Court held that it was not a search because the barn was 50 yards away from the house and a fence encircled the house and greenhouse. The interior, where the house and the greenhouse were located, was the curtilage. The Court did not believe that D took sufficient steps to prevent observation into the barn from the open-field vantage point.

c. Technological Information Gathering
   i. *Dow Chemical Co. v. United States*
      1. Facts: The EPA photographed Dow's 2000-acre outdoor industrial complex, comparable to an open field, from various altitudes using a precision aerial camera.
      2. Holding: The use of the camera was not a search.
      3. Rule: The rule is that technology that enhances vision does not necessarily constitute a search.
      4. Reasoning: The court did say that an electronic device used to penetrate walls or windows so as to hear and record confidential discussion…would raise the possibility of a search. Key: Is there a difference between enhancing to look at a business/office/industrial park and enhancing to look at a home?
   ii. When the police use modern technology to gather information, the Katz doctrine seemingly requires the court to consider the nature of the technology use.
   iii. The installation and use of a pen register by the telephone company, at the behest of the government, to record the telephone numbers dialed from a private residence is not a "search" within the meaning of the Fourth Amendment.
   iv. As long as the monitoring is limited to movements of persons in non-private areas, the government is free to conduct constant surveillance of citizens.
   v. As long as it is hypothetically conceivable to obtain information in a non-technologically-enhanced manner from a lawful vantage point, it is irrelevant that, instead, the government uses an electronic tracking device to obtain the same information.
   vi. Aerial Surveillance
      1. Non-sense-enhanced aerial surveillance by the government of activities occurring within the curtilage of a house does not constitute a search if the surveillance:
         a. Occurs from public navigable airspace;
         b. Is conducted in a physically nonintrusive manner; and
         c. Does not reveal intimate activities traditionally connected with the use of a home or curtilage.
      2. *California v. Ciraolo:*
         a. Facts: O, a police officer, received an anonymous tip that D was growing marijuana in his backyard. O attempted to observe D's yard from ground-level but was thwarted by a six-foot-high outer fence and a ten-foot-high inner fence. Therefore, O, obtained a private plane to fly over the backyard at an altitude of approximately 1000 feet, which was within

public navigable airspace according to F.A.A. regulations. From that vantage point, O observed marijuana plants in D's backyard.

b. Issue: Search?
c. Reasoning/holding: Although the area was within the curtilage of D's backyard, it did not constitute a search. Although the ten-foot-high fense demonstrated D's intent and desire to maintain privacy; it did not necessarily demonstrate his expectation of such privacy. Court speculated that D only had an expectation of privacy from all ground level observations but not all observations, including those from high above. The implication from this may be that one cannot satisfy the first prong of Katz unless the person has an expectation of privacy regarding all modes of surveillance possible under the circumstances. The second prong of the Katz test was not satisfied because police need not shield their eyes from information or activities knowingly exposed to them, even in the curtilage of a house.
d. Dissent: Powell does not care that the plane is in navagetible airspace because the 4th Amendment protects people not places.

3. *Florida v. Riley:*
   a. Facts: O, an officer in a police helicopter, observed marijuana plants growing in D's within-the-curtilage greenhouse, which was missing two roof panels. In order to observe the inside of the structure, O descended to an altitude of 400 feet, which would have been impermissible under F.A.A regulations if the flight had occurred in a fixed-wing aircraft, but was lawful for helicopter flights.
   b. Issue: Search?
   c. Reasoning/Holding: the police action was not a search. D knowingly exposed his greenhouse to the surveillance because any member of the public could legally have been flying over D's property in a helicopter at the altitude of 400 feet and could have observed the greenhouse. D offered no evidence that such flights were unheard of within the vicinity of his house. However, if a plane had flown that low it might have been an intrusion, therefore the mode of intrusion or the type of flying machine would have mattered. The result may have also been different had the helicopter somehow interfered with D's normal use of the greenhouse or other parts of the curtilage.

d. Tests for contraband
   i. A dog sniff, limited to exposure of luggage, which was located in a public place, to a trained canine, does not constitute a search.
   ii. Any chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy and is therefore not a search.
      1. In contrast, if a substance is not tested to determine if it is contraband, but rather to find out whether it contains evidence of a person's use of contraband, the test is a search.

e. Inspection of Garbage
   i. *California v. Greenwood:* A person has no reasonable expectation of privacy in garbage enclosed in a bag and left for collection outside the curtilage of her home. Reasoning: Because private persons might snoop, individuals have no constitutionally recognized reasonable expectation of privacy when and if the police – not private persons – in fact snoop.
   ii. Rules
      1. The Fourth Amendment does not protect information knowingly exposed to the public.

2. One cannot have a reasonable expectation of privacy in information voluntarily turned over to others.

f. Thermal Imagers: *Kyllo v. United States*
   i. Facts: A federal agent, suspicious that K was using high-intensity lamps in his home to grow marijuana, used a thermal imager to scan the triplex in which K lived. The agent conducted the imaging from his vehicle across the street from K's residence. The scanning showed that the roof of the garage and a side wall of K's home were substantially warmer than the rest of the building. Based on this information and other evidence, the agent obtained a warrant to search the residence.
   ii. Issue: Whether the use of a thermal-imaging device aimed at a private home from a public street to detect the relative amounts of heat within the home constitutes a "search" within the meaning of the Fourth Amendment.
   iii. Rule: 1. The use of sense enhancing technology, 2. to get information about the inside of the home, 3. that could not otherwise might be obtained without physical invasion of a private area, 4. at least where the technology is not in general use, is a search.
   iv. Reasoning/holding: People reasonably expect privacy in their homes. "In the home… all details are intimate details, because the entire area is held safe from prying government eyes." Can't leave the homeowner at mercy of advancing technology. Protection of privacy in home is most important. The rule is actually privacy reducing. As technology becomes more advanced, 4th Amendment protections will be completely diminished.
   v. Dissent: Goes after Scalia for not explaining what "general use" is. Scalia coming up with a problematic rule for later cases.
   vi. Are privacy rights distributed equally among all classes of people?

VI. Fourth Amendment: Probable Cause and the Use of Informants

a. Constitutional principles:
   i. The text of the Fourth Amendment itself provides that arrest and search warrants may only be issued if supported by probable cause.
   ii. All arrests require probable cause.
   iii. With rare exceptions, searches and seizures are reasonable if they are conducted with probable cause; absent special justification, however, searches and seizures conducted on less than probable cause are constitutionally unreasonable.

b. Definition: Probable cause exists when facts and circumstances within an officer's personal knowledge, and of which she has reasonably trustworthy information, are sufficient in themselves to warrant a person of reasonable caution in the belief that: (1) in the case of an arrest, an offense has been committed and the person to be arrested committed it; and (2) in the case of a search, a specifically described item subject to seizure will be found in the place to be searched.

c. Under what circumstances is information obtained from an informant sufficiently trustworthy to justify its consideration?
   i. *Spinelli v. United States:*
      1. Test:
         a. The basis-of the knowledge prong – how did the informant get the information?
            i. Satisfied if the informant explicitly states that she personally observed the reported facts.
            ii. If hearsay, the magistrate must ascertain how the informant got their information, and how reliable that informant is.
            iii. In some circumstances, however, the Court has allowed indirect proof of this prong, on the basis of what has been described as "self-verifying detail."
         b. The veracity prong – why should I [the magistrate] believe this person?

i. Evidence is required to demonstrate either that the informant is a credible person or, if that cannot be shown, that her information in the present case is reliable.
    1. Typically, an affiant proves the informant's veracity by providing the magistrate with the informant's "track record" or "batting average."
    2. reliability may be proven by declarations against penal interest.
2. A tipster's information that would not otherwise satisfy the two-pronged test may be considered by a magistrate if the police verify aspects of the informant's facts, as long as it can "be fairly said that the corroborated tip…is as trustworthy as a tip which would pass the two-prong test without independent corrboration.

ii. *Illinois v. Gates*
1. Facts: Police officers received an anonymous letter that accused a married couple of selling drugs at a specified address. The letter described in detail the couple's alleged modus operandi, including the fact that they usually brought drugs in Florida and brought them to Illinois by car. The letter stated that on a specific date the wife would drive to Florida, drop off the car and fly home, and the husband would fly down a few days later and drive back alone with a large quantity of drugs in the trunk. The police and federal agents verified facts alleged in the letter, including the Florida trip. The letter was wrong, however, in predicting that the wife would fly home immediately after dropping off the car; instead she remained and accompanied her husband on the trip north. As they began to drive home, the police sought and secured a warrant to search their car and home.
2. Issue: Did the police have probable cause?
3. Rule: A magistrate must conduct a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending the informant's tip.
4. Reasoning: Abandoned the two-pronged test. The warrant was supported by probable cause. The factors in the two-prong test remain highly relevant in determining the value of the informant's tip. They are no longer treated as separate, independent requirements. The strength of one prong can compensate for the weakness of the other.

VII. Fourth Amendment: Warrants

a. Principle of particular justification – the police must, whenever practicable, obtain advance judicial approval of searchers and seizures through the warrant procedure and that the scope of a search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.

b. Arrest
i. The Fourth Amendment does not prohibit the police from taking a person into custody without a warrant merely because the arrest offense is an exceedingly minor one, punishable only by a fine.

ii. General Rules:
1. All custodial arrests must be founded on probable cause.
2. An arrest not founded on probable cause constitutes an unreasonable seizure of the person, in violation of the Fourth Amendment.
3. As a constitutional matter, a police officer:
    a. may arrest a person in a public place without a warrant, even if it is practicable to secure one;
    b. may not arrest a person in his home without an arrest warrant, absent exigent circumstances or valid consent;

c. absent exigent circumstances or valid consent, may not arrest a person in another person's home without a search, and perhaps an arrest, warrant.

iii. Arrest in a Public Place
1. Vast majorities occur in public and an arrest in public does not require an arrest warrant.
2.
3. An arrest without a warrant, the police officer's determination of probable cause needs to be reviewed by the magistrate. Either by a warrant before arrest or a review after an arrest.
4. *Girstine* case determined a hearing must be held within 48 hours of the arrest.

iv. Arrest in the home (private)
1. *Peyton case* - The D was arrested in his home without a warrant. The court held that a warrant is required to enter and arrest a person in the home. There are exceptions
a. Exigency
i. Can enter home when chasing and D enters the home due to hot pursuit.
1. hot pursuit involves some sort of chase of the suspect, but it need not be an extended hue and cry in and about the public streets.
ii. Have probable reason to believe that if they do not enter immediately:
1. evidence will be destroyed,
2. the suspect will escape, or
3. harm will result to the police or others either inside or outside the dwelling
iii. If waiting for the warrant will cause the D to escape and there is probable cause, no warrant is needed.

v. Executing an Arrest
1. In the absence of a reasonable basis for believing that the suspect is inside the residence, the police may not justify entry of a home on the basis of an arrest warrant.
2. A police officer must ordinarily knock and announce before entering a home.
3. If you knock on the door and the suspect answers, and you do not have an arrest warrant, you can arrest the suspect as long as you do not cross the threshold.

c. Search Warrants
1. Two views of 4th Amendment – No one knows what the 4th Amendment means and we follow a third compromise view.
a. No warrant Requirement**:**
i. Writ of Assistance – General warrant (Historically). British warrant enabled to search the colonist homes without indicating what they were searching for. As a result, the 4th Amendment ensures the govt cannot use this tactic..
ii. No requirement that every search requires a warrant because it has two independent clauses.
1. First clause talks about the real test of whether the search is reasonable because there was no
2. The second clause states that if a warrant is issued, it must have probable cause to prevent the historical british general warrants.
b. Warrant requirement:
i. Textual claim – on any fair reading, this language appears to assume that searches and seizures will be conducted, at least sometimes, pursuant to warrants.

ii. Policy – the 4th Amendment is designed to prevent, not simply redress, unlawful police action; there is a constitutional preference for warrants

c. How the courts rule: Warrant preference rule - You must obtain a warrant if you are a police officer unless you can't. This is the general rule. In most cases you cannot obtain warrants.
   i. Policy reason: to prevent renegade officers from illegally searching.
   ii. If you are in a close case, if you have a warrant, the courts are more likely to rule you have probable if there is a search warrant.

2. The Warrant Application Process
   a. An investigating officer who seeks a warrant prepares an application for a search (or arrest) warrant; an affidavit, sworn oath or by affirmation, setting out the facts supporting the warrant, and the warrant itself. The officer then seeks approval of the documents from a supervisor or, in some jurisdictions, an assistant prosecutor. Once approved, the judge must get the approval of and signature of a judge.
   b. A warrant must be issued by a "neutral and detached magistrate"
3. Particularity Requirement
   a. The 4th Amendment provides that warrants must "particularly describe the place to be searched, and the persons or things to be seized."
      i. "Place to be Searched"
         1. A place to be searched must be described in the warrant in a manner sufficiently precise that the officer executing the warrant can identify it with reasonable effort.
      ii. "Persons or Things to be Seized"
         1. "Persons… to be seized" primarily relates to arrest warrants.
         2. The "things to be seized" should be described in search warrants with sufficient particularity that seizure of one thing under a warrant describing another cannot occur.
4. Executing a Search Warrant
   a. Means of Entry
      i. Knock and Announce Rule
         1. To protect against destruction
         2. To avoid an unnecessary invasion of privacy
         3. To avoid heightening the situation making it volatile (risk of violence)
         4. *Wilson v. Arkansas*: the knock and announce rule is a requirement of the 4th Amendment. Exceptions (not exhaustive):
            a. Hot pursuit cases
            b. Where officers have reason to believe that evidence would likely be destroyed if advance notice were given.
         5. *Richards v. Wisconsin*
            a. Facts: The lower court tried to create an exception that the knock and announce rule does not apply to drug cases.
            b. Rule: In order to satisfy one of the exceptions to the requirement, the police need only possess reasonable suspicion, rather than probable cause that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime, for example, by allowing the destruction of evidence.
            c. Reasoning/Holding: The Supreme Court held that this would lead to other exceptions and a slippery slope and therefore cannot create exceptions. The Sup Ct affirmed the lower

courts decision but on alternate grounds. The Sup Ct created an exception to the rule.

b. Note 4 page 206 – Police officers show up to a home they suspect has drugs. They knock on the door and ask for consent to search the house and he says no. One officer leaves to obtain a search warrant and the other stay with the suspect and state if he enters the home, they will follow. This is a seizure of the suspect without warrant. The Sup Ct held no 4th Amendment violation because the courts determined the officers acted reasonably. (**Search Warrant Preference at work).**

5. Rule: A warrant to search for contraband includes the limited authority to detain all occupants of the premises to be searched while the warrant is executed.
6. Rule: Police may constitutionally seize any item (even if it is not described in the warrant) of: 1. they see the item while searching a place which they have the authority to search; 2. the item is located in such an area; and 3. police have probable cause to believe the item is subject to seizure.
7. Once the articles particularly described in the warrant are discovered and seized, the search must cease.

d. Exigent Circumstances (Exceptions to the warrant requirement)
   i. Because an exigency is a situation that requires immediate action, it is reasonable for an officer in emergent circumstances to search without a warrant.
      1. *Warden v. Hayden*
         a. Facts: The police had probable cause to believe that D, a man involved in an armed robbery, had moments earlier entered a particular house. The police went to the address, knocked on the door, and were allowed to enter by a woman living in the house. The police searched the house and D was discovered feigning sleep in his bedroom, where he was arrested. At the same time, other officers came upon and seized items related to the crime in other parts of the house.
         b. Issue: Was a warrant needed?
         c. Rule: The exigencies of the situation made the course of action imperative.
         d. Reasoning/Holding: Police acted reasonably. They knocked and announced. No delay is required if endangerment of lives, etc. The court says that it was appropriate for the officers to be looking for either the individual or the weapons. S.C. upholds the search of the washing machine because they say that if the officer had been asked directly, he might have said he was looking for a weapon. This is revisionism, because the burden of proof should be on the government since they want an exception to the warrant requirement.
   ii. Intrusion into the Human Body: The police may not intrude into a person's body unless
      1. they are justified in requiring the individual to submit to the test; and
      2. the means and procedures employed are reasonable.
   iii. If there are exigent circumstances, no one has to consent.
      1. Can the police create their own exigencies?

e. Searches Incident to Lawful Arrests
   i. General Principles
      1. Rule: A police officer who makes a lawful full custodial arrest may conduct a contemporaneous warrantless search of:
         a. The arrestee's person;
         b. The area within the arrestee's immediate control; and
         c. If the arrest occurs in the home, "closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.

ii. The police may conduct a search of the person and the adjoining closets and spaces, even if there is no reason to believe that weapons, evidence, or dangerous persons will be discovered.
iii. A police officer may seize without a warrant any article found during the search, if she has probable cause to believe that it is criminal evidence related to this or another crime. The officer need not have probable cause to conduct the search, but she must have probable cause to seize the evidence found in the search.
iv. "Full Custodial"
    1. The rule applies to arrests in which the officer takes the suspect into "full custody," which includes transporting her to the police station for booking.
    2. What about traffic stops which are not technically arrests?
        a. *Knowles v. Iowa*: Office had authority to arrest someone but only issued a citation. Tried to search the car. Can't search without a warrant incident to the issuance of a citation.
    3. What about petty arrests?
        a. *Atwater v. City of Lago Vista*: A mother was driving her children home from school. They weren't wearing their seatbelts, a misdemeanor punishable by a small fine. The officer (who the woman had had another run-in with for the same problem before) could have issued a traffic citation, but instead he took her into custody which was also authorized by the statute. The officer searched the car. The Fourth Amendment does not prohibit the custodial arrest of a person for a minor "fine-only" offense. And, once such an arrest is made, the arresting officer is automatically authorized to search the driver and the area within the driver's immediate control.
v. Lawful Arrest: to be lawful the police must have probable cause and, in certain circumstances, a warrant to make an arrest.
vi. Contemporaneous: Must be fairly close to time of arrest; before expediency or danger disappears.
vii. Scope of the Search
    1. Search of the Person
        a. The right to search a person incident to lawful arrest includes the right to search the pockets of the arrestee's clothing, and to open containers found therein, as well as such containers immediately associated with the person, such as a purse or shoulder bag, as long as the containers are large enough to conceal a weapon or evidence of crime.
    2. Area Within the Immediate Control
        a. The area within the immediate control of an arrestee is the area into which the person might lunge for a weapon or for evidence to destroy.
            i. *Chimel v. California*
                1. Facts: The police, armed with an arrest warrant but without a search warrant, arrested D in his three-bedroom home for burglary. After the arrest, the officers searched the entire premises, including the attic, garage, and a small workshop, for evidence connected to the crime. Various items were seized. The police contended that the warrantless search should be permitted on the ground that it was incident to the lawful arrest.
                2. Issue: Whether a warrantless search can be justified as incident to arrest.
                3. Rule: A search incident to a **lawful** arrest, the police can search the person of the arrestee and the area within the

arrestee's immediate control, i.e. the area which the arrestee might gain possession of a weapon or destroy evidence, but they may not search the entire house without a warrant.

4. Reasoning/Holding: No justification for searching other areas without a warrant. The police don't want the arrestee to be able to reach a weapon or any evidence he could destroy. Not a bright-line rule. Ask "Whether in immediate "grab-space."
5. Dissent: Because they had probable cause and the search was reasonable, the police should be able search the place where they arrested him. White doesn't think there is a warrant requirement. Thinks police just have to act reasonably. More of a bright line rule, because White will always think it is reasonable to search the whole house.

b. Automobiles
   i. *New York v. Belton*
      1. Facts: Police officer stopped a speeding car. There were four men in the car. The officer asked to see the license and registration but found out that none of the people in the car owned the vehicle or was related to the owner. The cop also smelled marijuana. He told them to get out of the car. He found the marijuana and then searched the passenger compartment of the car. He also searched a jacket that he found on the back of the seat. Inside the jacket he found cocaine.
      2. Issue: What is the proper scope of search of the interior of a car when the police doesn't have a warrant but whose occupants were arrested?
      3. Rule: When a policeman has made a lawful custodial arrest, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. The police officer may also search the contents of any containers found in the passenger compartment.
      4. Reasoning/Holding: Jacket was within the area of the arrestee's immediate control. The test in *Chimel* is difficult because it is difficult to tell what is someone's immediate area. The police can search the entire area inside the car. Can't search inside the trunk.
      5. Dissent: The crucial question is not whether the arrestee could ever have reached the area that was searched, but whether he could have reached it at the time of the arrest and search. The majority is adopting the fiction that the suspect being arrested has immediate access to the entire passenger compartment of the car and that what is really happening is that the S.C. is allowing a warrantless search of an entire area for no good reason.
   ii. Rule: A police officer may, contemporaneous to the arrest of an occupant of an automobile, search the passenger compartment and all containers found therein, whether the containers are open or closed.

3. Traffic Stops

a. *Thornton v. United States*: Officer sees a guy driving a car and the guy seems sketchy. Officer runs tags and finds out that the car is not registered to him. The guy out drives the officer, parks it and starts to leave on foot. Officer catches up and the guy admits that he has drugs, so the officer searches the car. The S.C. expands the rule in Belton to apply not only to occupants of the car but also to recent occupants of a vehicle, because the recent occupant could be just as dangerous. (Justice Scalia dissents).
b. *United States v. Robinson*
    i. Facts: O, a D.C police officer, observed D driving his automobile on a public road. Based on prior information, O had probable cause to believe that D was driving with a revoked operator's permit. O ordered D to pull over, after which he informed D that he was under arrest for "operating after revocation" an offense that required D's custodial arrest, pursuant to police department regulations. Because D.C. police procedures required him to do so, O searched D. First, O patted down the outside of D's clothing. He felt an object in D's breast pocket that he could not identify, but which he pulled out. It was a crumpled up cigarette package inside of which were objects that did not feel like cigarettes. O opened the package and found 14 gelatin capsules that contained heroin.
    ii. Issue: Whether the police, as an incident to a lawful custodial arrest for a routine traffic violation, may search an arrestee although they have no reason to believe that weapons of criminal evidence will be found on him.
    iii. Rule: A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the 4th Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.
c. *Whren v. United States*
    i. Facts: Some plainclothes police officers were patrolling a high drug area of the city in an unmarked car. They decided to tail a truck whose passengers looked suspicious. The truck would up turning without a signal. Police stopped the truck and saw that there was cocaine in the hands of one of the occupants. The defendants want the court to adopt a test that says the question should be whether a reasonable officer, under these circumstances, would have pulled over the vehicle.
    ii. Issue: Whether the police, who stop a vehicle for a traffic violation, can search the car for another crime.
    iii. Rule: Ulterior motive/subjective intent of the officers does not invalidate objectively justifiable searches.
    iv. Reasoning/Holding: The court says it would be too difficult to decide the subjective intent of the police officers. The court dismisses the particular D.C. rule by saying that other districts have different rules and that in another district the car may have been marked and it would be okay. The subjective intent of the officer does not matter. This holding cuts off lots of litigation regarding whether or not an officer had a good reason for pulling someone over. The case empowers officers to engage in all sorts of pretextual behaviors in order to pull over people and search them.

4. Hypo: Police are sitting outside a suspect's house. Arrest defendant without a warrant. They search his person and area within immediate control. They also search his dining room and find a stolen stereo. Was the dining room within his immediate control? What about the drugs? All excluded, because the arrest was unlawful.
    a. The arrest must be lawful, otherwise, all the evidence incident to the arrest is excluded.
5. Inventory exception, the police do not need a warrant or probable cause to conduct an arrest inventory. Also, the police can open everything that is in the car. Justification – protect arrestee from theft of her valuables within the jail; to reduce risk of false claims of theft by the arrestee; and to ensure that contraband and dangerous instrumentalities that might have been missed by the police in the initial search incident to the arrest are not smuggled into the jail.

f. Searches of Cars and Containers
    i. Independent from the idea of a search incident to arrest.

Case	What	Where
Carroll	Car	Road
Chambers	Car	Station
Coolidge	Car	Station
Carney	Motorhome	Parked
Chadwick	Container almost in car	Parker
Sanders	Car/truck	Road
Ross	Car/trunk	Road
Acevedo	Container in trunk	Road

    ii. The automobile exception
        1. Rule: A police officer may conduct an immediate ("at the scene") warrantless search of an automobile that has probable cause to believe contains contraband, or fruits, instrumentalities, or evidence of a crime, if (1) he stops the car on the highway; or (2) the vehicle is readily capable of use on the highway, is found in a setting that objectively indicates that [the vehicle] is being used for transportation and is discovered stationary in a place not regularly used for residential purposes.
            a. There is no exigency requirement.
            b. *California v. Carney*
                i. Facts: The police received uncorroborated information that D was using his motor home as a site for exchanging drugs for sex. At the time, D was parked in a city lot, near a courthouse, where a warrant could have been secured. The police put the motor home under surveillance for one and one-quarter hours, during which time they saw a youth enter the vehicle, and later leave with pot. The youth confirmed that he received the drugs in exchange for sexual contacts by D. The police entered the motor home without a warrant or consent and seized the drugs inside.
                ii. Issue: Whether a vehicle capable of functioning as a home falls under the automobile exception.
                iii. Rule: Any type of automobile may be searched without a warrant, even those that could be used as homes.
                iv. Reasoning/Holding: The court says that people have a lesser expectation of privacy in their automobiles. This is because automobiles are highly regulated by the government.
                v. Dissent: The motorhome falls between an automobile and a home so the tie should go to getting a warrant.

2. Rule: A warrantless search of an automobile that would be valid if it were conducted at the scene is also permitted if it takes place shortly thereafter away from the scene.
    a. A delay of a year to search an impounded vehicle without a warrant is unreasonable.
    b. *Chambers*: Police stop Mr. Chambers on the road. They have probable cause to believe that he was involved in a robbery. They decide to invoke the automobile exception. They impounded the car and towed it to the police station. They searched the car there. Does the automobile exception apply? No, the S.C. says that the police are permitted to search the car without a warrant at the station because its dangerous on the street. **Rule: Police officers with probable cause to search an automobile at the scene where it was stopped may constitutionally do so later at the station house without first obtaining a warrant.** To protect the officer's safety they are entitled to move the car to the station and search it there. The police don't have to prove that the evidence would be tampered with, etc. The dissent says that it is much worse to search then to seize it. Wants warrant before search. Limitation – the search of the car at the police station has to be somewhat contemporaneous with the arrest.
    c. *Coolidge*: Officers are investigating Mr. Coolidge for murder. He cooperates. The officers arrest him. They seize his automobile. They have probable cause to believe that there is evidence in the automobile but they do not have a warrant. The police towed it to the police station, and thereafter searched it three times without a valid warrant – two days after it was seized, nearly a year later, and fourteen months after the original search. Did the police wait to long? Yes. The plurality held that the warrantless search of D's car was unconstitutional. **Rule: The search of the automobile needs to be somewhat contemporaneous with the arrest.** "The word "automobile is not a talisman in whose presence the 4th Amendment fades away and disappears."
    d. *Florida v. Meyers*: S.C. upholds warrantless search of a car that was towed to the station and searched 8 hours after the arrest.
    e. *Johns*: S.C. upholds a search of a car that takes place three days after the seizure.
3. Probable Cause:
    a. The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found.
    b. Once the police discover the criminal evidence for which they are searching, the search must cease, absent new information that would justify a new search.
    c. The police cannot search any portion of the vehicle that could not contain the object of the search.
    d. Originated in 1925, *Carroll v. United States*: Police had probable cause that Carroll was carrying liquor (illegal during prohibition). At that time police could not arrest someone without a warrant in public – no search incident to arrest option. Ripped up upholstery of car and found lots of bottles of liquor. Challenge to search. **Rule - When an officer has probable cause to believe that there is evidence in the car the police can search the car without a warrant.** Why? Car is mobile.

iii. The automobile exception may apply when the suspects are close to the car.
iv. Containers

1. What is a container?
    a. A container is any object capable of holding another object.
2. Rule: Containers – even one belonging to a passenger of the automobile, who is not suspected of criminal activity – may be searched without a warrant during an otherwise lawful "automobile exception" search.
    a. And, if the container may be searched at the scene, it may also be seized and searched without a warrant shortly thereafter, at the police station.
    b. The existence of probable cause to search the car serves to justify the warrantless container search, even though the officer conducting the search lacks specific probable cause as to that particular container.
    c. The police may have probable cause to believe that a particular container holding criminal evidence will be found in a car. In such circumstances, the police may conduct a warrantless search of the car for the container and then open the container, also without a warrant.
3. *United States v. Chadwick*
    a. Facts: RR. Officials noticed two people loading a suspicious trunk onto a train bound for Boston; suspected marijuana or had so relayed information to Boston. In Boston, a dog alerted agents that there was marijuana in the trunk. D joined the pot handlers and they started to put the trunk in the trunk of his car. At this point they were arrested. The trunk was not searched until an hour and a half they taken it into the police station. They didn't have a warrant. The government's position is that the there is not warrant requirement except for the house.
    b. Issue: Whether the 4th Amendment only protects searches of home and not outside closed containers. Does the search fall under the automobile exception? Was the search reasonable?
    c. Rule: People have a greater expectation of privacy in containers than in their automobiles.
    d. Reasoning/Holding: The court held that warrantless seizure of D's footlocker was permissible, but that the warrantless search of it ninety minutes later was unconstitutional, as there was not exigency. The trunk was double locked so obviously the Ds expected privacy. There was no exigency, therefore not reasonable. Because people put their personal stuff in luggage, they have a greater expectation of privacy. Luggage was not mobile when it was searched. This case does not hold anything pertaining to the automobile exception. This case is not a precedent for the idea that a trunk sitting in a trunk is an exception. When the police unexpectedly encounter a container that they believe holds criminal evidence, and assuming that no other warrant exception apples, the police may seize it without a warrant. However, they may not open it until they convince a magistrate that they have probable cause to search it.
4. *Arkansas v. Sanders:* Police had probable cause that there would be someone arriving at the airport with a suitcase filled with marijuana. The suspect put the suitcase in a taxicab and the police stopped the taxicab after it drove away. They searched the luggage. Whether the police could search the car for the luggage and the luggage itself without a warrant? They cannot. But because the police have probable cause to believe that the suitcase might have drugs in it, they can seize the suitcase and remove it. Then they can ask for warrant. The idea is that there is a difference between a car and the containers inside of it. There is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places.

5. *Ross:* Suspects selling pot from a car. The facts stated that they were selling drugs from the trunk of the car. The difference between Sanders and Ross, is that in Sanders the police had probable cause to search the suitcase. In Ross the police had probable cause to search the car. So the police could search anywhere the drugs could be. **Rule: When the police have probable cause to search a car without a warrant under the Carroll-Chambers-Carney line of cases, they may also search any container found during the car search, if it is large enough to hold the evidence for which they are looking.**
6. *California v. Acevedo*
    a. Facts: The police observed D place a small paper bag in the trunk of a vehicle and drive away. The officers had probable cause to believe that the bag contained drugs; they had no other reason to believe that the car contained contraband.
    b. Issue: Whether necessary to obtain a warrant to search a container that they have probable cause about in absence of probable case to search the entire car.
    c. Rule: If the police are in circumstances where they can search without a warrant, they can search a car and any container in the car without a warrant.
    d. Reasoning/Holding: Overrules Sanders. The old rule created an incentive for police to broaden otherwise limited searches. Old rule offered minimal protections. The police had probable cause to search only the trunk to look for the paper bag.
        i. This case creates an anomaly: If a person walks along a street holding a briefcase that the police have probable cause to believe contains evidence of a crime, the police may seize, but not search, without a warrant. However, once the person puts the container in an automobile, the police may search for the container and open it without a warrant.
7. *Wyoming v. Houghton:* Police search an automobile under the automobile exception. They find a container that clearly belongs to the passenger. Can they search it? Yes. **Rule: Police officers with probable cause to search a car may inspect any passengers' belongings found in the car that are capable of concealing the object of the search.** Reasons: lower expectation of privacy and the possibility that the passenger may be a co-conspirator.

g. "Plain View" (and Touch) Doctrine
    i. Rule: An object of an incriminating nature may be seized without a warrant if it is in "plain view" of a police officer lawfully present at the scene.
    ii. Elements:
        1. An article is in "plain view" and subject to a warrantless seizure by a police officer, if:
            a. She observes it from a lawful vantage point;
                i. Discovery during the execution of a valid search warrant
                ii. The object may come into view during an in-home arrest pursuant to an arrest warrant
                iii. Criminal evidence might be discovered by an officer during a search justified under an exception to the warrant requirement.
                iv. An officer's view of an object may arise from an activity that does not constitute a search and, therefore, falls outside the scope of the 4th Amendment.
            b. She has a right of physical access to it; and

i. The police officer must have a lawful right of access to the object itself.

c. Its nature as an object subject to seizure is immediately apparent when she observes it.

i. "immediately apparent" means that the officer must have probable cause to seize the article in plain view.

2. *Horton v. California*

a. Facts: P robbed treasurer of coin club. Police got a search warrant but it only authorized a search for the proceeds, not the weapons. Police discovered weapons in plain view and seized them, but they did not find stolen property. The police officer intended to search for and find other evidence. P

b. Issue: Whether the police officer could seize items in plain view without a warrant. Whether the discovery must have been inadvertent.

c. Rule: Plain view exception – 1.the officer has to be lawfully there, 2. the item must be in plain view and 3. it has to be obvious from looking at the item that it is incriminating.

d. Reasoning/Holding: The discovery need not be inadvertent because safe guards to limit searches already exist. Scope of the search not enlarged by the omission of the weapons in the warrant. Doesn't matter that the police officer did know that he might find weapons but did not get a warrant to find them. The subjective intent of the officer is immaterial.

iii. Rationale: Functions as a justification for the police conducting a warrantless seizure of the evidence in plain view.

iv. *Arizona v. Hicks*

1. Facts: The police entered D's apartment without a search warrant because a bullet had been fired through D's floor into the apartment below it, wounding a man. The officers entered "to search for the shooter, for other victims, and for weapons." While inside, O, one of the officers, observed two sets of expensive stereo components that seemed out of place in D's apartment. O reasonably suspected, but lack probable cause to believe, that they were stolen. Therefore, he either turned around or upside down one piece of the equipment in order to read and record the serial number. O reported the number to headquarters. Which confirmed that it had been taken in a robbery. O seized the item. Later, he got a warrant and got the rest of the equipment.

2. Issue: Whether a new warrantless search was justified.

3. Rule: The plain view exception is not really an exception to searching, because it does not excuse any type of further search. It permits the police to make warrantless searches, not warrantless seizures.

4. Reasoning/Holding: It was not obvious that the equipment was incriminating. The officer did not have probable case. He had a reasonable suspicion. The act of moving the equipment was another "search" because it exposed O to matters not previously visible to him; on these facts, D had a reasonable expectation of privacy in the bottom of the equipment.

5. Dissent: Justice O'Connor says the search was just cursory inspection. Wants to admit the evidence because its silly to suppress the evidence because of the trivial movement. Wants a test of reasonable suspicion which enables one to investigate a little further…but still need probable cause for a full-blown search or seizure

v. *Class*: An officer stops defendant for speeding and sees D with a cracked windshield. He orders D out of the car, moves some papers on the dashboard to look at VIN number, and they find a handgun under the drivers seat. Probable cause? No probable cause, but the gun is admissible because moving the papers is not a search because people do not have a

reasonable expectation of privacy in their VIN number. Since its not a search, don't even have to determine if there is probable cause. So ask if gun is in plain view. It was and they were lawfully there, it was in plain view, and it was incriminating.

vi. Expansion
    1. Rule: What an officer observes from a lawful vantage point is not a search, because a person cannot maintain a reasonable expectation of privacy regarding anything visible to the naked eye from that position.
    2. Rule: Neither can a person have a reasonable expectation of privacy regarding her oral communications if they can be heard by someone nor can she legitimately expect that an officer will not use her sense of smell to detect incriminating evidence from a lawful position.

vii. "Plain Touch" Doctrine
    1. *Minnesota v. Dickerson*: If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.
    2. Rule: The police may seize contraband detected solely through an officer's sense of touch if, comparable to plain view, the officer had a right to touch the object in question and, upon tactile observation, its identity as contraband was immediately apparent.

h. Consent
    i. Last major exception to the warrant requirement; it is also an exception to probable cause
    ii. The officer often asks for consent even when they do not have probable cause
    iii. Rule: Validly obtained consent justifies an officer in conducting a warrantless search, with or without probable cause. If the officer discovers evidence during a valid consent search, she may seize it without warrant pursuant to the plain view doctrine.
    iv. Justification? A consent search is a reasonable search, because no cognizable harm of privacy or dignity occurs from a search that a person freely authorizes the government to conduct.
    v. Validity
        1. Voluntariness
            a. Rule: Consent is legally ineffective unless the person granting consent does so voluntarily, rather than as a result of duress or coercion, express or implied.
            b. Burden of proof is on the prosecutor.
            c. Voluntariness is determined by a totality-of-the-circumstances test; some factors:
                i. A show of force by the police, such as a display of guns, that would suggest to the person that she is not free to refuse to consent;
                ii. The presence of a large number of officers
                iii. Repetitive requests for consent after an initial refusal, and
                iv. Evidence relating to the consenting person's age, race, sex, level of education, emotional state, or mental condition, that suggests that her will was overborne by the officer's conduct.
        2. Claim of Authority by the Police
            a. Rule: if an officer asserts authority to conduct a search on the basis of a warrant, whether that warrant is valid, invalid, or does not exist, any consent thereafter granted is invalid
        3. Police Deception

a. Rule: Consent is not vitiated by the fact that, but for the misrepresentation or nondisclosure of a police officer's identity, the person would not have granted consent to the undercover officer to enter the individual's premises.
b. Verbal trickery can amount to coercion. However, if the person being asked is irrationally exuberant about it, it is not coercion. If officers threaten to get a warrant and do actually have probable cause the evidence will be admissible, if the do not have probable cause it will be viewed as coercion.

4. Awareness of 4th Amendment Rights
   a. *Schneckloth v. Bustamonte*
      i. Facts: The police stopped a car in which X and D were passengers, because a headlight was burned out. After the driver failed to produce his driver's license and only X could provide id, an officer asked for permission to search the car. X, the brother of the absent vehicle owner, consented. During the search, the police discovered evidence that connected D to a crime.
      ii. Issue: When is consent voluntarily given?
      iii. Rule(s):
         1. The question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, in a question of fact to be determined from the totality of all the circumstances.
         2. A person's awareness – or lack thereof – of a right to refuse consent is simply one factor to be taken into account in determining the voluntariness of consent given.
      iv. Reasoning/Holding: The burden of proof falls on the government. Gov. need not establish that D knew he didn't have to consent. Consent may be only valid means of finding evidence. Search with consent is less in convenient for the suspect. The police cannot coerce to obtain consent. The police don't have to advise the D that he/she has a right to refuse. The waiver of consent need not be done by a knowledgeable person. There is a community interest in encouraging consent. Reasons why S.C. declines to go down the Miranda road: Consent is convenient and there is a fundamentally different scenario with searching for tangible evidence and interrogating someone or allowing them to have access to counsel. There was no evidence of coercion.
5. The only way to waive right to counsel is to do it voluntarily and knowingly.

vi. Scope of Search
   1. Rule: A warrantless consent search is invalid if an officer exceeds the scope of the consent granted.
      a. *Florida v. Jimeno*:
         i. Facts: O stopped D's car on the highway in order to issue a traffic citation. Because he had reason to suspect that D was carrying narcotics in his car, O requested permission to search the car for narcotics. D consented. During the search, O opened a folded paper bag, in which he discovered a kilogram of cocaine.
         ii. Rule: the standard for measuring the scope of the suspect's consent is objective reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?

iii. Reasoning: The subjective belief of the D and the cop are irrelevant. A consent search is invalid, even if the consent was voluntary, if the police exceed the scope of the consent granted. Here the cop did not exceed the scope of the consent granted. Evidence can suggest that a reasonable person might expect the cop to search the bag because he had told the D that he was looking for drugs.

vii. Third Party Consent
1. *United States v. Matlock*
   a. Facts: D was arrested in the front yard of a home in which he shared a room with X. The officers received consent from X to search the room. D's consent was not requested.
   b. Issue: Whether the girlfriend possessed common authority over the house/room so that consent was valid
   c. Rule: Consent to a search from one who possesses common authority over premises or effects is valid as against the absent non-consenting person with whom the authority is shared.
   d. Test: Each person with common authority over property maintains her own right to consent to a search, and because of that, any person who shares property with another assumes the risk that such consent will be granted.
   e. Reasoning: Girlfriend and D represented themselves as married and shared the room. It can be assumed that they both had rights over the property. Someone assumes the risk if a reasonable person would believe that their co-occupier might let other people in the house, etc.
2. The burden of proof is on the government.

viii. Apparent Authority
1. There is a difference between the ability to get into a room and the authority to get into a room.
2. Rule: A warrantless entry of a residence is valid when it is based on the consent of a person whom the police, at the time of entry, reasonably (but incorrectly) believe has common authority over the premises.
3. *Illinois v. Rodriguez*
   a. Facts: D assaulted Fischer at his apartment. Fischer went with the police to D's apartment, unlocked the door and allowed the police in. There were indications that F had lived there. The police did not have an arrest or search warrant. Trial court said F had no authority to consent. Fisher had moved out, but had spent some nights there and had taken the key without D's permission.
   b. Issue: Whether the officers can enter without warrant when they reasonably believe that the person has common authority.
   c. Rule: The police may search without a warrant, probable cause, or consent if they reasonably believe that the person giving them access has the power to give consent.
   d. Reasoning: The police need not be factually correct about the reasonableness of their assumption. If there is indicia that the consenter has the authority to give consent, the cops may reasonably believe that to be so.
4. The consent of an older child may allow the police to look even further than a younger child.
5. Not based on property rights, based on authority over the property.
6. These are totality of the circumstances cases. No bright line rules.

ix. Hypos (pg. 328 note 5):
    1. A. O obtained consent to search D's luggage at a train station. Inside the luggage, he found a can labeled "tamales in gravy." O shook the can and it seemed to contain a dry substance, like salt. O opened the can and found a bag of meth.
        a. Result? Suppressed, consent never extends to opening locked things or breaking them to gain access.
    2. B. X consented to a drug search of a home that he and K shared. During the search in which X and K were present, O found and opened K's purse, which was sitting in the bathroom.
        a. Result? Suppressed, no common authority over a purse.
    3. C. O stopped P for speeding. After issuing a warning ticket, O requested consent to search a suitcase in the car. When P did not respond, O asked "Well, do you think we could take a look at your suitcase there? I don't want to necessarily look in it, but – not do I want to read any letters necessarily, but maybe we could just take a look." When P agreed, O observed that it appeared very heavy, and said to P "let's just unzip it." P partially unzipped it. O: "Unzip it more, you just got to squeeze the prongs there and it will open up." P finally unzipped it. O discovered drugs inside.
        a. Result? Admissible, there was coercion

x. Rules of Consent
    1. When police ask for consent to search it usually but not always means that they do not have probable cause.
    2. Consent must be given voluntarily, not coerced.
    3. The government bears the burden of proving that consent is consensual.
    4. While consent must be voluntary, it does not have to be knowing.
    5. Police cannot lie about having a warrant in order to get the suspect to consent.
    6. Consent can be given by a third party if that party has common authority, the party has to have common authority and the guy they are searching has to have assumed the risk.
    7. Even if the person consenting does not have common authority over the property, the consent may still be valid if a reasonable officer would have believed that that person had authority over the property.
    8. The scope of the consent is not determined by the subjective intent of the officer or the subject – irrelevant.
    9. The scope of the consent is determined objectively.
    10. Barring extremely unusual circumstances, if the police need to break into a container then the consent does not extend to that container.
    11. Consent can be withdrawn or reduced during the search.
    12. The consent cannot be revoked after contraband found.
    13. Never ever consent to let the police look in anything if you don't have to.

i. The Terry Doctrine
    i. An entirely different sphere of the 4th Amendment.
    ii. *Terry v. Ohio*
        1. Facts: O, a 39-yeaar police veteran, became "thoroughly suspicious" when he observed two men walking back and forth repeatedly in front of a store, peering in. O testified that he suspected the men were "casing a job." O also observed the two men talk to a third individual. O approached the three suspects, identified himself as a police officer, asked their names, and when he received only a mumbled reply from one, he grabbed D, spun him around, and patted down the outside of his clothing. O felt a pistol in the breast pocket of D's overcoat, pulled it out and arrested him for carrying a concealed weapon. At the time of the pat-downs, O lacked probable cause to arrest the suspects or to search them.

2. Issue: Is this type of search permissible without probable cause or a warrant?
3. Rule: Where a police officer observes unusual conduct which leads him reasonably to conclude in the light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is reasonable under the 4th Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.
4. Reasoning/Holding: No, there is no probable cause for the seizure and search of D. But it is a lesser search and seizure, a "stop" and "frisk." The court creates another standard, the reasonable suspicion standard, and it is below probable cause. The reason for this new standard is to help effective crime prevention and detection and there is interest in the safety of the officer. The pat down is just to look for weapons, not anything else. Just because you can do a "terry stop" doesn't mean you can do a "terry frisk."

iii. Hypos:
1. pg 353 note 11: Based on personal observation, officer O reasonably suspects that W is dealing drugs. He frisks W and feels what appears to be a small, plastic "Tic Tac" box. During the four or five of 50 previous pat-downs in drug investigations, O had felt similar plastic boxes, none of which contained mints. Therefore, O puts his hand inside of W's pocket and pulls out the Tic Tac box. It contains narcotics. Admissible?
    a. Result?– not admissible because not a weapon or plainly incriminating by touching it; W was seized ("terry stop") and searched ("terry frisk"); If you find something on a person that is not a weapon, the officer has to keep going but if its apparent that the thing is actually contraband, he can take it using the plain touch exception. Plain touch exception an officer conducting a "terry frisk" and he touches it and its character is plainly incriminating, he can seize it. A tick tac box is not plainly incriminating.
2. Note 12: O lawfully pats down M, whom O suspects (but lacks probable cause to believe) was involved in a recent shooting. O feels a box, about half the size of a cigarette package, in M's coat. O shakes it and hears what he recognizes as bullets "clanking together." O pulls out the box. Are the contends (bullets) admissible in M's subsequent prosecution for shooting?
    a. No, because not a weapon or plainly incriminating; seized? Yes searched? Yes; was the search reasonable? Yes; Seizure of the bullets permissible? No, because he didn't know that they were bullets until he shook the box. It has to be a brief patdown.
3. Police see men moving boxes out of house to a truck. The boxes look like they contain electronic equipment. Its late at night, the guys are wearing moving equipment.
    a. Suspicious? Yes. They can engage in a "terry stop?" Yes. "Terry frisk?" Yes, its late at night and they seem to be engaging in dangerous activity.
4. Police know that crime has been committed. They know that suspect fled the scene with the license plate XYZ (1st three letters). They see a car like that, do they have probable cause? No. Reasonable suspicion to stop the car? Yes.

iv. Terry v. Ohio significantly diminishes the right to privacy that is guaranteed by the 4th Amendment. Shows that some searches and some seizures are more intrusive than

others. A lesser standard for complying with the 4th Amendment. Creates a situation for racial imbalance in the justice system.

v. *United States v. Mendenhall*
    1. Facts: The DEA suspected D to be a drug courier because she fit a drug courier profile. The officers approached her and asked to see her license and tickets. The name on the airline ticket did not match the name on the license. They ask the D to accompany them to their office and she agrees. At the office they ask if they can search her purse and tell her she doesn't have to consent. She consents. Then they ask her if she will agree to being strip searched and she consents. They find that she is concealing heroin.
    2. Rule: 1. The question whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances and is a matter which the government has the burden of proving.
    3. *R*easoning/Holding: The government admits that they did not have probable cause. The plurality says there has not been a seizure when she was on the concourse when they walked up to D and there was not a seizure when they moved her to the office. A reasonable person would have been free to leave. The concurrence says that when they took her drivers license and her ticket it was a close question as to whether a reasonable person would feel free to walk away. He assumes that it was a seizure and so is worried about reasonable suspicion. He thinks there was reasonable suspicion because of the officer's experience and the drug courier profile. The dissent says that the government believes that it cannot prove reasonable suspicion, that's why they changed their story. Says the intrusion was an arrest. Reasonable suspicion is very confusing and not at all clear.
    4. *United States v. Draper*: A bus driver makes a regular stop and he gets off. When he does five police officers get on the bus. Two go to the back of the bus, one goes to the front, the others interview two passengers. The police ask to search a passenger's bag. The passenger is wearing baggy clothes. The police ask to pat him down, he consents, and cocaine is found on him. Then they ask the guy seated next to him if they can pat him down and they find drugs on him. Is there a seizure with the layout of the police? No, a reasonable person would have believed they were free to leave or not cooperate because the officers had left the aisle open, they didn't display any weapons, and the officer was calm. **Rule: Consent has to be given voluntarily but no knowingly.**

vi. Seizure
    1. *California v. Rodari D.*
        a. Facts: Plainclothes officers patrolling in an unmarked car witnessed youths standing around a red car. The kids see the cops and run. Officers gave chase by foot and car. During the chase the D disposes of something and then the police tackle him to the ground.
        b. Issue: When did the seizure occur, when the cops rounded the corner or right before the crack was thrown out?
        c. Rule: The perquisite for a seizure – force or showing of authority that results in restraint of movement, if the suspect does not heed that authority there is no seizure.
        d. Reasoning/Holding: The cops had no reasonable suspicion right before they tackled him. The court says the seizure occurred upon tackle. There is no seizure if officer commands D to stop and D continues to flee. When dealing with questions of authority how to figure out if seizure? Look at

totality of circumstances and ask whether a reasonable person would have felt free to leave.

2. *Florida v. Bostick:* Officers start patrolling for drugs on public busses. They get on board the bus while its stopped. They don't have probable cause or reasonable suspicion for anyone on the bus. Dressed in uniform, carrying guns, they walk up to a particular individual and ask for consent to search. Is there a seizure? No, a reasonable person in that predicament would have felt free to leave or to decline to cooperate. **Rule(s): 1. Mere questioning by a police officer is not a seizure by itself. 2. Declining to consent to the search or leaving the bus does not create reasonable suspicion.**

vii. Reasonable suspicion
   1. All that is required to justify a Terry-level search or seizure is some minimal level of objective justification.
   2. Essentially, the police may not act on the basis of an inchoate and unparticularized suspicion or hunch.
   3. Suspicion is reasonable if the officer can point to some specific and articulable facts that, along with reasonable inferences from those facts, justify the intrusion.
   4. Hearsay: When it is and is not sufficient
      a. *Alabama v. White*
         i. Facts: The police received a telephone call from an anonymous informant who stated that D would be leaving a specified apartment at a specified time in a brown Plymouth station wagon with the right taillight broken and would drive to a specified cocaine, in possession of an ounce of cocaine in a brown attaché case. The offers went to the apartment, where they observed an automobile fitting the informant's description, parked in front of the apartment building. They spotted the woman, empty handed, enter the car and drive in the direction of the motel. Before the car reached its destination, however, the officers stopped the vehicle and ordered the driver, D, out of the car. A search based on consent resulted in the seizure of marijuana, found in an attaché case in the car
         ii. Issue: Whether there was reasonable suspicion to make the stop.
         iii. Rule: There was predictive behavior.
         iv. Reasoning/Holding: There was no probable cause. The tip by itself was not enough but the cop confirmed a lot of the tip's contents so he had reasonable suspicion. Under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigory stop of D's car.
      b. *Florida v. J.L.*: anonymous tip about D wearing a gun. Cops saw 3 black males hanging out and one that fit the description of the tip. They frisked him and found a gun. The court says the cops had no reasonable suspicion because the tip did lacked predictive information. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.
   5. Drug-Courier Profiles
      a. An officer's observations may properly be supplemented by consideration of the modes or patterns of operation of certain kinds of lawbreakers.
      b. The mere fact that a suspect's behavior and/or appearance conforms to a drug-courier profile does not, without more, constitute reasonable suspicion.

6. Flight in "High-Crime Areas"
    a. *Illinois v. Wardlow*: Officers are patrolling an area where heavy drug dealing occurs. An officer sees D standing near a building holding a bag. The D sees the officer and takes off. Up to the moment when D takes off the police have no grounds to seize him. The officer chases him, corners him (terry stop), and frisks him (terry frisk). The officer finds a weapon in a bag. D is a felon and not allowed to have a weapon. Whether there was reasonable suspicion to stop D. **Rule: Unprovoked flight upon noticing the police in a high crime area provides the reasonable suspicion for a terry stop.** (High crime area? Fairly conclusive; to be defined by other cases)

viii. Distinguishing a "Terry Stop" From an Arrest
1. Seizure Consensual Encounter ←→ Terry Stop ←→ Arrest
(no seizure) (limited seizure) (flow blown seizure)
    a. Problem - There are different levels of police encounters; just because you encounter a police officer does not mean a seizure has taken place. There is a continuum (shown above).
2. Length of Detention
    a. Justifiability of a seizure on less than probable cause is predicated in part on the brevity of the detention.
3. Forcible Movement of the Suspect
    a. If the police move a suspect to another site for further investigation, a court may treat the seizure as tantamount to an arrest, requiring probable cause. This is especially likely to occur if the criminal investigation could have taken place where the detention arose.
    b. Rule: Whenever a police officer lawfully stops a vehicle on the road, even for a minor traffic violation, it is reasonable for the officer to order the driver out of the car, even if he does this as a matter of routine for purposes of safety.
    c. Rule: An officer, making a valid traffic stop, may as a matter of course order passengers out of the car pending completion of the detention.
4. Existence of Less Intrusive Means
    a. *Florida v. Royer*: Guy is at the airport that the police suspect of being a drug courier. They ask to see his id and ticket. They don't match so they take him to a DEA room. Another officer goes to the airline and takes his luggage and take it into the room. They ask for consent to search the luggage. Royer consents. Has Royer been seized? Yes, a reasonable person would think he has been seized because they have his ticket and luggage. The officers could have accomplished the same goal though far less intrusive means. Rule: **Police have to use the least intrusive means necessary.** Would it have been reasonable to use less intrusive means.
    b. *United Stats v. Place*: Officers at Miami airport and see D buy a ticket to NYC. They ask to see his id and ticket and it checks out. They go check his luggage and find out that the tags on his luggage have listed on them a fake address. The DEA waits until he gets off the plane in NYC. They ask if they can search his luggage and D does not consent. They can make a "Terry Stop" on the luggage because they have reasonable suspicion. They take the luggage to Kennedy airport and have a drug sniffing dog sniff the luggage. They had probable cause and no warrant. Eventually they get a warrant and they find cocaine. D moves to suppress. Whether the cops can hold Ds bag for that long. Nope. **Rule(s): 1. The Terry stop is now extended to things other than a person. 2. While it is okay to**

temporarily detain items, because the cops have reasonable suspicion, the length of detention for a Terry stop has to be brief.

ix. Grounds for "Terry Stops"
    1. A brief seizure is reasonable in view of the government's interest in crime prevention.

x. Weapons Searches: Of Persons
    1. The right to conduct a weapons search of a detained suspect is immediate and automatic if the basis for the seizure is that the officer believes a violent crime is afoot.
    2. Method - Pat-Down (Frisk)
        a. A pat-down is not always a prerequisite to a valid frisk, i.e. when the suspect suddenly moves his hand into a pocket, etc.
        b. If an officer feels no object during a pat-down or he feels an object that does not appear to be a weapon, no further search is justifiable under the Terry principle.

xi. Weapons Searches: of Automobiles
    1. *Michigan v. Lawn*: A police officer on patrol sees a speeding car run off the road and into a ditch. The D gets out of the car, leaves the door open, and the officer goes up to him and asks for his license and registration. D walks back to his car to go get them. The officer sees a large knife on the front floor of the car – reasonable suspicion. The officer pats down D. The officer "pats" down the car. He looks everywhere in the passenger compartment that a weapon can be located. He finds marijuana. The marijuana was admissible, because the drugs are in plain view and their character are immediately incriminating. **Rule: When an officer has reasonable suspicion that a suspect is armed and dangerous and might get access to weapons, the officer gets to search the passenger compartment of the car to look for weapons and he can search wherever the weapons might be found.** The cops have to point to facts that suggest it.

xii. Protective Sweeps of Residences
    1. *Maryland v. Bouie*: Police have an arrest warrant for D. D committed some type of robbery wearing a red jumpsuit. They have reason to believe that D is not alone and that his companion could be dangerous. Six officers go to serve the warrant and fan out around the house. In the basement, in plain view, a cop finds a red jumpsuit. They take the jumpsuit. **Rule: The 4th Amendment permits a limited protective sweep where the officer has a reasonable belief that an area harbors a person that could be dangerous. That limited sweep allows the officer to make a cursory search of the area. (i.e. can't open boxes, etc.)**

xiii. Terry v. Ohio Rules:
    1. Terry stops and frisks are still seizures and searches under the 4th Amendment.
    2. To conduct a Terry stop the officer has to have reasonable suspicion that criminal activity is afoot.
    3. To make a Terry stop, there has to be physical force or a show of authority that results in the restraint of movement.
    4. The harder cases for the Terry stop purposes are the ones with the show of authority; the test is whether a reasonable person under the totality of the circumstances feels free to leave.
    5. Just because the police have show authority doesn't mean it's a seizure, the suspect must actually stop.
    6. Even if police have reasonable suspicion to make a Terry stop, the stop can still be unconstitutional if it is unreasonable long.

7. In a high crime neighborhood, unprovoked running by someone who sees the police creates reasonable suspicion of criminal activity and grounds for a Terry stop.
8. To conduct a Terry frisk the officer needs a reasonable belief that the suspect is armed and dangerous.
9. In the ordinary case, a Terry frisk is limited to a pat down of the outer clothing.
10. During a lawful stop of a vehicle, if the officer has reason to believe his safety or the safety of others is in jeopardy he can conduct a Terry frisk of the passenger compartment of the vehicle and he can search wherever that weapon might be found.
11. In conducting an arrest in the home, the officers can conduct a protective sweep to ensure the safety of the officers if the officers have reasonable suspicion that someone could be hiding out and could cause harm; officer allowed to make a cursory, visual, protective sweep of the house.

j. Sobriety Checkpoints
   i. *Michigan Department of State Police v. Stitz*
      1. Facts: Michigan state police devised guidelines for conducting sobriety checkpoints. In the only implementation of the state's procedures, 126 vehicles were stopped, and the drivers were briefly examined for signs of intoxication. On average, the detention took 25 seconds. Two drivers who appeared to be intoxicated were required to move out of traffic flow, to another point where a second officer could check their licenses and conduct sobriety tests. One was arrested. Another motorist, who attempted to break through the checkpoint, was also arrested.
      2. Issue: Whether being stopped at a checkpoint violates of the 4th Amendment?
      3. Rule: The test involved balancing the state's interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual's privacy caused by the checkpoints.
      4. Reasoning/Holding: It is a seizure, but there is probable cause. There is no individualized suspicion. The checkpoints do not violate the 4th Amendment. The court upholds the checkpoint because it is reasonable even though there is no probable cause or reasonable suspicion. No individualized suspicion is needed. Stevens dissenting says that the checkpoints are not okay because they are not permanent. He says that random checkpoints are not okay.
   ii. Other rules:
      1. Whether the checkpoint is constitutional depends on who organizes it. The court wants them to be planned, structured, and supervised.
      2. All of the vehicles must be stopped or there must be a clear pattern of how they stop the vehicles.
      3. The initial stop can only be momentary. They need reasonable suspicion for further questioning.
      4. Police departments have to give advance notice that they are going to have a checkpoint.
      5. Border Checkpoints – if fixed and not moving can be done without individualized suspicion.
      6. The police cannot set up random checkpoints for drugs or ordinary criminal activity.
      7. Random checkpoints for informational purposes are not unconstitutional.
   iii. Problem page 441 #7
      1. A Missouri police department set up a narcotics roadblock, but with a twist. One evening, they put warning signs on the highway: "DRUG ENFORCEMENT

CHECKPOINT ONE MILE AHEAD" and "POLICE DRUG DOGS WORKING." In fact, however, the checkpoint was set up immediately following the signs, at an exit selected because it did not provide gas or food services. The only lawful purpose for getting off at that exit was to go to a local high school, a local church, or one of several residences. In this case, the defendant "suddenly veered off onto the off ramp." The police at the checkpoint stopped him. The defendant appeared nervous, had glazed and bloodshot eyes, and smelled of alcohol. The defendant consented to a vehicle search, which turned up large quantities of drugs.

a. Drugs admissible? Yes, because the fact that he veered off the exit so suddenly created reasonable suspicion that there was criminal activity afoot.

k. Remedies
   i. The Standing Problem
      1. Rule: A person who makes a motion to suppress evidence that the government intends to use against him at trial must show that he was a victim of a search or seizure as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.
      2. Fourth Amendment rights are personal.
      3. Conceptually "standing" is a threshold issue: a person seeking to have evidence excluded at his trial must first demonstrate that he has standing to contest the search and seizure.
      4. *Rakas v. Illinois*
         a. Facts: police officers stopped an automobile that purportedly met the description of the car used in a robbery that had occurred moments earlier. The four occupants, including its owner who had been driving, were ordered out, after which the police searched the passenger compartment. Rifle shells were found in the locked glove compartment and a sawed-off rifle was found in the passenger seat. D, a passenger, moved to suppress the rifle and the shells found in the car, apparently on the ground that the police lacked adequate cause for the search.
         b. Issue: Did D have standing?
         c. Rule: Whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.
         d. Reasoning: D failed to prove that he had any legitimate expectation of privacy in the areas searched.
      5. Impact of Rakas: A Closer Look
         a. A person may not challenge a search of another person's residence merely on the ground that he was legitimately on the premises at the time of the intrusion.
         b. A non-resident should have standing to contest a search if he was the sole occupant of the premises, with the permission of the resident.
         c. *Minnesota v. Olson*: D, an overnight guest in his girlfriend's home, could challenge the police entry of the premises, notwithstanding the fact that D was never alone in the home, did not have a key, and lacked dominion and control over the premises. **Rule: social guests can have standing**.
         d. *Rawlings v. Kentucky*: D placed a jar and vials containing narcotics in X's purse shortly before the police entered a home in which D and X were guests. After getting a warrant because they smelled pot, the police ordered X to open her purse. She did and D admitted ownership. Rule: A person may not successfully challenge a search area in which he has no

expectation of privacy even though he has a possessory or ownership interest in the property seized during the search. Reasoning: Basically D did not have a right to exclude others from the purse, he had never had access to the purse before, etc.

6. Standing Rules:
    a. If you are the one whose property is searched, you are going to have standing.
    b. However if you have given up full custody and control of it, you will not have standing
    c. If it is your property some how, your family will have standing.
    d. If you are an overnight guest, you have a reasonable expectation of privacy in the place where you are staying.
    e. Social guests ordinarily will have standing.
    f. Business transaction, especially illegal ones – no standing
        i. Mixture? Close call
    g. Standing;
        i. Can Challenge:
            1. Illegal warrant
            2. search through personal stuff
        ii. Cannot Challenge:
            1. Places where you don't typically have access to, not personal
    h. The standing analysis should be kept separate from the merits analysis
        i. Not everyone will necessarily have standing
    i. The burden proof is on the defendant
        i. by filing a motion to suppress
    j. what defendant says at the suppression hearing will not be used against him in the prosecution of the case. (unless he/she perjures herself/himself)

ii. Exclusionary Rule
    1. Rule: Evidence gathered in violation of the Fourth Amendment is inadmissible in a criminal trial.
    2. Not used in
        a. grand jury
        b. preliminary hearings
        c. revoking parole or probation
        d. A prosecutor may introduce evidence obtained from a defendant in violation of the 4th Amendment for the limited purpose of impeaching direct testimony or answers to legitimate questions put to her during cross-examination.
    3. Not a Constitutional rule but it is binding on the states.
    4. Good Faith Exception:
        a. Rule: Evidence obtained pursuant to a search warrant later declared to be invalid may be introduced at a defendant's criminal trial in the prosecutor's case-in-chief, if a reasonably well-trained officer would have believed that the warrant was valid.
        b. When the good faith rule does not apply
            i. Does not apply if the magistrate who issued the warrant relied on information supplied by an affiant who knew that the statements in the document were false and who recklessly disregarded the truth.
            ii. The issuing magistrate's behavior is so lacking in neutrality that a reasonable officer would have realized that the magistrate was not functioning in an impartial, judicial manner.

iii. An officer may not rely on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

iii. Rules Standing and Exclusion:
1. Judicially created doctrine
2. Purpose to deter the police
    a. To maintain the integrity of the judicial system
3. The court has reduced the use of the exclusionary rule
    a. Doesn't apply in civil, parole, etc
4. The officer reasonably relies on the warrant and it turns out to be defective; the exclusionary rule does not apply
5. Measured objectively; would an objective officer would have relied on that warrant.
6. Exception will not apply when:
    a. In cases were the magistrate relied on false information
    b. Were the judge just "rubber stamped" it
    c. if the materials used to obtain it are so thin and bare boned
    d. if the warrant is facially deceptive
7. As a general matter, the exception is not that significant; gives benefit of doubt to judges in close cases

iv. The Fruit of the Poisonous Tree
1. The Fourth Amendment exclusionary rule extends not only to direct products of governmental illegality but also to secondary evidence that is fruit of the poisonous tree.
2. In General
    a. The tree is the unlawful action; the fruit is the evidence
    b. Think of it as a chain.
    c. Evidence that is seized unlawfully is going to be excluded.
        i. Can't use it in the warrant application or at trial.
    d. *Silverthorne Lumber Company v. United* States: If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.
    e. Three circumstances when usually found:
        i. Unlawful search and seizure
        ii. Illegal interrogation
        iii. Illegal lineup or other type of identification procedure
    f. Distinguish from standing:
        i. Hypo: Find a paper at X's house, search illegally, go to Y's house, search it illegally and they find incriminating evidence
            1. X and Y have standing
        ii. Hypo: Police search X's house lawfully, they don't find anything except a paper with Y's address; They go to Y's house and search illegally
            1. Y has standing, X does not (the police searched his home lawfully)
            2. If X has suffered a violation, he can carry the chain forward, but if he doesn't suffer a violation then he has no standing and cannot carry the chain forward
3. Attenuation
    a. *Wong Sun v. United States*

i. Facts: The police arrested HW after investigating him for 6 weeks. They found heroin in his possession. He becomes an informant and he tells the officers that he got the heroin from BT. Feds went to BT's house, one first said that he wanted to drop of laundry, but BT says that its too early, so the agent flashes his badge whereupon BT runs away and the feds break through the door and chase him to the bedroom. There they arrest him and he gives them incriminating statements about himself and someone else. (the police did not have probable cause; they acted illegally). BT tells them that he bought drugs from J. The agents went to J's house and went in. They find drugs at J's house. They arrest J. At the station the police question them and get that WS is the supplier. They find WS' house and the wife lets them in. She did not consent though. They search his house and don't find anything. All three are released on their own reconnaissance. Three days later all three are interrogated separately. They confess, but they don't sign the statements they make. Informant refuses to testify.
ii. Issue: Which pieces of evidence get admitted?
iii. Rule: Is there and independent, intervening event that makes the evidence so attenuated as to dissipate taint. (The correct question is whether, granting establishment of the primary illegality, the evidence to which instant objection is made had been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.)
iv. Reasoning: The statements made by BT are not admitted because the police had unlawfully entered his home (FPT doctrine). The narcotics taken from Yee are excluded because they came from the chain that first included the illegal entry of BT's home. BT has standing because the whole chain started with the illegal search of his house. BT's unsigned statement was inadmissible on state evidentiary grounds (not relevant for this class). WS' statement is admissible because the time between the time he made it and when he was arrested was too attenuated, because he had left for three days before he made the statement. The heroin found at Y's house is admissible against WS' because he has not standing to challenge it because he has no expectation of privacy at Y's house.

b. Attenuation exception – an independent, intervening event.
i. Factors:
1. temporal proximity – the shorter time lapse between the initial illegality and the acquisition of the challenged evidence, the more likely that the court will conclude that the evidence is tainted.
2. intervening evens – the more factors that intervene between the initial illegality and the seize of the challenged evidence, the more likely that the evidence will be admitted
    a. intervening act of free will very often will remove the taint of an earlier illegality.
3. flagrancy of violation – derivative evidence is less likely to be free from tain if the initial illegality was flagrant rather than accidental
4. The nature of the derivative evidence – verbal evidence is more likely to be admissible than physical evidence.

c. *Brown v. Illinois*: Arrested at his apartment without probable cause. He was read his Miranda rights. While in custody he made incriminating statements. Do Miranda warnings automatically untaint an illegally derived confession? Nope, resolved on a case by case basis. The court does not want to dilute the Miranda doctrine. Attenuation is fact specific; no bright-line rule.
d. Policy: As things become more and more attenuated the police are deterred less. If there is no deterrence to be had, the court is less likely to apply the exclusionary rule.
e. *New York v. Harris*: Officers enter H's house with probable cause but without a warrant. They read him his Miranda rights. He confessed. Then they interrogate him at the station and he signs it. Is the second statement a fruit of the poisonous tree? Nope, the police had probable cause and they didn't get the written statement until H was at the station; The court is concerned with the deterrence; no suppression of evidence
f. Hypo: Problem 5 at pg 502 – Officer O unlawfully arrested S, a passenger in a vehicle stopped on the road, without probable cause. Because O was male and S was female, O did not conduct a full search of S. At the police station, however, female officer F searched S and discovered four small bags of suspected illegal drugs on the arrestee. F momentarily put the bags on a nearby counter top. When F became distracted, S grabbed the suspected contraband, ran to the bathroom, and flushed most of the evidence down the toilet. Based on these acts, the police charged S with destruction of the evidence. The government sought to introduce: 1. the drugs that S did not successfully flush down the toilet; and 2. the observations by the officers present of S's efforts to destroy the evidence.
    i. Admissible? Yes, attenuated because there is an intervening even -> the time period, fairly close to the unlawful event; an intervening event, the officer taking the drugs, the defendant trying to get rid of the drugs; police conduct flagrant violation of law? Doesn't look like it here; not foreseeable that she would try to get rid of the evidence. Police unlawful to be deterred in prosecutions for obstruction of evidence.

4. Independent Source Exception
    a. Evidence that is not causally linked to governmental illegality is admissible pursuant to this exception.
    b. *Murray v. United States*
        i. Facts: Based on an informant tip, Feds had Ds under survellience. Ds drove two vehicles into a warehouse; Feds saw a long, dark container in the warehouse. Ds turned the trusts to other drivers who were stopped. Marijuana was found. Feds forced entry into the warehouse and found more pot, and then they got a warrant. They did not rely on the first entry to get the warrant.
        ii. Issue: What is the scope of the independent source doctrine?
        iii. Rule: Independent source doctrine: If the police get the information unlawfully, and then they get the same information lawfully, the information has been gotten by an independent source and is admissible.
        iv. Reasoning/Holding: The court does not want to put the police and society in a worse position as if they had never conducted the unlawful activity. The dissent says that this creates an incentive for the police to search illegally first. The dissent is saying they can't

trust the police in this situation at all. The majority remands the case to see if the source is lawful and independent.

5. Inevitable Discovery Exception
    a. *Nix v. Williams:* Arrested for killing a little girl. The officers give him a Christian burial speech; lamenting on how the kid would not have a proper Christian burial. They found the child's body because N shows them where she was buried. This is the fruit of the poisonous tree because they are questioning him in violation of Miranda. However, at the same time that he shows them where the girl is, the police are searching two and a half miles away. This is an inevitable discovery because the police would have eventually discovered the body. Rule: **If the government can show by a preponderance of the evidence that they definitely would have found the evidence without the illegal police conduct, it is admissible.** The police do not have to have bad faith, because society should not be put in a worse position because of the illegal conduct. The burden is on the government.
    b. Scenarios most likely seen? The inventory exception (policy to inventory the car, etc)
        i. Easy case: Gentlemen gives up information but at same time a warrant is being applied for.
        ii. Hard: When the confession comes at a time when the warrant is not being applied for.
6. Rules/Analysis:
    a. The general rule is that evidence that is seized following illegal police activity is fruit of the poisonous tree and is not admissible.
    b. In the fruit of the poisonous tree scenario, look for an unlawful search and seizure or an unlawful interrogation with evidence going down the chain.
    c. Exception: Attenuation – Occurs when something has broken the chain connecting the police illegality to the unlawfully seized evidence. Happens when the chain is long and the linkages in the chain have to shown by sophisticated and complicated arguments.
        i. The reason that underlying the attenuation exception is that when the seized evidence is very far removed from the police conduct suppressing it is not going to serve deterrence purposes.
        ii. Simply reading a defendant his Miranda rights after an unlawful arrest is not going to break the chain.
        iii. The fruit of the poisonous tree doctrine is much more concerned with evidence that results from lack of probable cause rather than evidence that results where there is probable cause but no warrant.
        iv. The things that you should look for in accessing attenuation:
            1. How close in time are we
            2. Are there any easily identifiable intervening events
            3. How flagrant is the police misconduct
    d. Exception: Independent Source – if the police have acquired the evidence by perfectly legitimate means, the fact that they also got it unlawfully does not prohibit it from being admissible at trial.
    e. Exception: Inevitable Discovery – Exists if the government can show that they definitely would have found the evidence without the police misconduct.
    f. The government bears the burden of proving the independent source doctrine and the inevitable discovery doctrine by a preponderance of the evidence.

VIII. Confessions: The Voluntariness Requirement

a. Voluntary Confessions

i. In the old days, all confessions were admitted.

1. *Brown v. Mississippi*: The S.C. reverses a criminal conviction in which a lot of the evidence was based on the confession of the defendant who was being tortured when he confessed. Rule: **Can't use a confession gotten by torturing the defendant**.
    a. Can't use a confession gotten by threatening the defendant.
    b. Certain interrogation statements are just off the table.
2. The purpose of forbidding confessions based on certain police misconduct is to deter police misconduct
3. Confessions must be voluntary. They must be the product of a person's free will.
4. *Spano v. New York*
    a. Facts: D was an Italian immigrant with limited education, etc. Decedent stole D's money. D followed him and they fought. D lost and took off to his house where he got a gun and went to a candy store to look for the decedent. When he found the decedent he shot him dead. A worker at the candy store was the only witness. After D was indicted he called his friend who was training to be a police officer. He explained what happened to his friend and his friend told his superiors. After a week on his own, he got a lawyer and turned himself in. The lawyer advised him not to speak. During questioning D refused to answer and was told he could not speak to his attorney. They questioned him for 8 hours, they transported him to another police station and then they brought in his friend. They told his friend to lie that he was in trouble because of what D had told him. Eventually D caves and confesses.
    b. Issue: Whether D's confession was voluntary?
    c. Reasoning/Holding: D's confession was not voluntary. The court used the totality of the circumstances test.
5. *Colorado v. Connelly*
    a. Facts: A person suffering from chronic schizophrenia, in a psychotic state and responding to hallucinations (he heard the voice of God order him to confess or commit suicide), approached a police officer on the street and confessed to a murder. The perplexed officer ascertained that D was not drunk or on drugs, but was told by D that he had been a patient at several mental hospitals. After O informed D of his rights, D answered questions about the crime.
    b. Issue: Whether the confession of a mentally unstable man was voluntary?
    c. Rule: Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.
    d. Reasoning/Holding: Court says there needs to be state action in order to violate someone's rights. Suppressing D's statement would not serve a deterrence goal. The dissent says that there was state action. When we assess voluntariness the court is not really concerned with circumstances where there is no state action.
5. For due process purposes, the court is not concerned whether or not a confession is reliable or "free will." The court is concerned about state action, police misconduct.
    a. Reliability is a matter for the jury to decide.
6. What to look for in assessing voluntariness:
    a. Actual or threatened police brutality

b. Length of interrogation, situation in which he was interrogated (places, people, time of day, etc)
c. Look to see if there were any direct or implied promises in exchange for the confession.

IX. Miranda

a. Miranda

i. *Miranda v. Arizona*

1. Facts: Involved four cases consolidated for appeal. Common facts: 1. each of the suspects had been taken into custody (in three, but arrest, in one, before formal arrest); 2. they were questioned in an interrogation room; 3. the questioning occurred in a police-dominated environment in which each suspect was alone with questioners; and the suspects were never informed of their privilege against compulsory self-incrimination.
2. Issue: Whether a person in custody should be advised of certain rights before being interrogated.
3. Rule: When an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege of self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right to silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.
4. Reasoning/Holding: Individuals have a constitutional right to remain silence and a right to a lawyer. The court is that we have an adversarial system of justice. The rights remain throughout the interrogation. The individual may waive the rights. The prosecution has the burden of proving that the individual was apprised of his/her Miranda rights. According to the prosecution this is a heavy burden. If the individual was read his Miranda rights, the confession will be suppressed. The court does not have to figure out if the confession was given voluntarily. This is a bright line rule. All of the statements will be suppressed. The constitutional basis of the Miranda rights is the 5th Amendment prohibition against self-incrimination.

ii. If Miranda rights are invoked, interrogations must cease immediately.

iii. For Miranda to apply at all, the suspect must be

1. In custody and

a. *Oregon v. Mathiason*

i. Facts: D was a parolee suspected of burglary. At the request of the police, D agreed to come to the police station, where he was questioned in absence of Miranda warnings, in an office with the door closed. The police falsely told D that they had evidence implicating him in the crime
ii. Issue: Was D in custody?
iii. Rule: 1. Police do not have to give Miranda warnings to everyone that they question. 2. Not everyone who is questioned in a police station is in custody.
iv. Reasoning/Holding: D was not in custody because he went to the police station voluntarily and he was told that he was not under arrest. D was let go.

b. A prisoner who is being interrogated about a different crime is in custody for purposes of Miranda.
c. Page 587 Problem #4: A prostitute is found murdered and police interview her former high school boyfriend, D, on three separate occasions. He was told each time that he was not under arrest; each time he voluntarily appeared at the police station. The third interview lasted 11 hours. His car keys were taken from him to perform a consensual search of his car and never returned. Roughly ten hours into the interview D asked if he could leave and return the next day to continue and the police said, "No, you're here now. Why don't we go ahead and get this all wrapped up." An hour later, he confessed. Only after the confession was reduced to writing did the police give him Miranda warnings.
    i. In custody? They took his keys.
    ii. Rule: **Just because a police encounter starts voluntarily does not mean that the suspect will not be in custody at the end of the encounter.**
d. *Berkermer v. McCarty*
    i. Facts: A police officer noticed a car weaving down the street. He stopped the car and asked the guy to get out of the car. He knew he was going to take the D in. He ticketed him and gave him a field sobriety test. D confessed to using drugs and was placed under arrest. He was not read his Miranda rights.
    ii. Issue: There should be a lesser standard for misdemeanor arrests and the Miranda rights should not have to be read.
    iii. Rule: A person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in Miranda, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested.
    iv. Reasoning: The court refuses to draw a distinction for misdemeanor cases. Too hard to draw a distinction. The rule is clear. The D was not in custody during the traffic stop, but he was at the police station. There is a difference between a 4th Amendment seizure and being in custody for Miranda purposes. For there to be Miranda custody an individual has to be either under arrest or in a situation that looks a whole lot like it. Interrogation is a bigger deal than a Terry stop. The officer's subjective thoughts are not relevant. Not every traffic stop will turn into a Miranda event.
e. What to look for to figure out if someone is in custody:
    i. Where does the incident occur?
        1. Police interrogation in the home is generally not custodial
        2. how long the incident lasts
        3. how many police officers are present
        4. look at what the officers say and their demeanor
        5. look for physical restraint
        6. is the individual being questioned as a suspect or a witness?
        7. How did the individual get to where the interrogation is being conducted?
        8. Was he told that he was free to leave?
            a. If he is specifically told that he is free to leave, the government has a good argument that he is not in custody

9. Was the interrogation conducted while the individual was alone? Where friends or family present?

f. Page 593, problem 2: Consider the Berkemer fact patter with the following change: before the officer administers the sobriety test, Rick says, "My house is right over there. My mother is expecting me home. Can I go tell her what's happening? The officer says, "No." Custody?
   i. Not in custody, more likely a Terry Stop; seized pursuant to a Terry Stop
   ii. Doesn't look like he has been put in an arrest type situation.
   iii. Rule: **A person is not in custody for purposes of Miranda merely because his freedom of movement has been curtailed by the police, i.e. that he has been seized in a Fourth Amendment Terry stop.**

g. Page 594, problem 6: D solicits X, an undercover police officer, to kill D's wife. D's plan was to be at home, having a pool party, at the time his wife is killed at another location. Six police cars arrive during the pool party to arrest D, but because of the trees surrounding his house, none of the cars is visible to anyone at the party. A single officer (with arrest warrant in back pocket) goes to the pool area and asks to speak with D (other officers are hiding all over D's property). O tells D that someone just shot his wife. Feigning shock and dismay, D answers the questions the O asks (without giving Miranda warnings). The exchange takes place in front of D's closest friends. After the questioning, O pulls out an arrest warrant and arrests D.
   i. Miranda violation? No, doesn't look like he's in custody because he is at his house, there are a whole lot of people around, during the conversation with the officer there is nothing to suggest that he is under arrest.

h. As a general rule, questioning at your home is not custodial. Exceptions:
   i. When four officers broke into a guy's bedroom at night and started asking questions.

2. Interrogated by the police
   a. *Rhode Island v. Innis*
      i. Facts: D was arrested for murder in which the weapon used in the crime had not yet been discovered. D was placed in a police car with three officers. En route to the station, one of the officers said to a colleague that a school for handicapped children was in the vicinity, and that "God forbid that one of the children might find a weapon with shells and they might hurt themselves." After the officer added that " would be too bad if a little girl would pick up the gun, maybe kill herself," D interrupted and offered to show the police where he had abandoned the weapon. These events occurred after Miranda warnings had been given, but because D had previously requested a lawyer, the police were required to cease interrogation until D talked to his attorney.
      ii. Issue: Whether D was interrogated while traveling to the station.
      iii. Rule: The term "interrogation" under Miranda refers not only to express questioning, but also to 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.

iv. Reasoning: Not an interrogation. There are two types of interrogation: express and the functional equivalent. The functional equivalent interrogation is whether a reasonable person would know that the conversation would elicit a response. There is no functional equivalent because the officers were talking among themselves and any reasonable officer would not have thought that it would have elicited an incriminating response.

iv. Waiver of Miranda Rights
1. *North Carolina v. Butler*
   a. Facts: D advised of his Miranda rights and he read them. He refused to sign a waiver but did speak to the agents and made inculpatory statements.
   b. Issue: Whether D knowingly and voluntarily waived his Miranda rights.
   c. Rule: The burden of the proof is on the government to prove that the suspect validly waived his Miranda rights, but in at least some cases waiver can be clearly inferred from the actions of words of the person interrogated after the Miranda warnings are given.
2. Rule: A defendant may waive effectuation of his rights provided that the waiver is made voluntarily, knowingly, and intelligently.
3. Voluntarily – product of a free and deliberate choice rather than intimidation, coercion, or deception.
   a. The court has held that the internal psychological pressures that arise from having a "guilty secret" do not invalidate a subsequent decision to confess.
   b. Courts will allow officers to ask follow up questions without the Miranda rule
   c. The real rule: The court will allow the follow up statements only to clarify, if they want further statements they should issue a Miranda warning.
   d. morgan v burbine: a guy was in lockup and a lawyer comes by to help him. the police send the lawyer away and promise him that they wont question him. but the police question him anyways. Rule: **events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right**. reasoning: the right is personal. a lawyer cannot invoke it on behalf on a client. the police don't necessarily have to tell the suspect that the lawyer has been by for Miranda purposes
4. Knowing and Intelligent
   a. *Edwards v. Arizona*:
      i. facts: d arrested at his home. d read his rights and agreed to be questioned. d denied involvement and asked to make a deal. then he was provided with an attorneys number and the questioning ended. the next morning he was questioned again and he implicated himself in the crime.
      ii. issue: whether d who invoked his right to counsel on day; validly waived it on day two by not reinvoking.
      iii. rule: when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights. the accused is not subject to further interrogation by the authorities unless the accused himself initiates further communication, exchanges, or conversations with the police.

iv. reasoning: the authorities cannot reinterrogate an accused in custody if he has clearly asserted his right to counsel. if d had initiated the meeting his statements would have been admissible.

b. Michigan v Mosley:
   i. Facts: d was questioned by a detective and the interrogation ended when d told them he didn't want to speak. invoked right to silence, then another officer comes who is investigating a different crime. he reads d his Miranda rights and d speaks.
   ii. Rule: when a defendant invokes his right to silence that does not bar future questioning forever the police can come back and reinitiate questioning at a later time as long as they leave enough space in between. if you invoke the right to counsel, the police cannot later reinitiate questioning until after the suspect has seen a lawyer or has initiated the conversation himself. if the suspect invokes his right to remain silent, if the suspect speaks to another cop who reads him his Miranda rights there is a waiver.

c. page 620, prb 3a: Police arrested B for a misdemeanor after B admitted minor involvement in an offense. At that point, B requested counsel, and the police terminated the conversation. Later, when B was being transferred from the police station to the jail, B asked, "Well, what is going to happen to me now?" The officer responded, " You do not have to talk to me. You requested an attorney, and I don't want you talking to me unless you so desire because anything you say – because – since you have requested an attorney, you know, it has to be your own free will." B said he understood. During the following conversation, the officer suggested B might "help himself" by taking a polygraph examination. B agreed, took the test, was told that the test revealed he was not telling the truth, and then confessed. What are the issues under Edwards, and how would you resolve them?
   i. question of initiation: does the suspects question amount to initiation: the court held that it did constitute reinitiation of the conversation: the standard is pretty low for reinitiation

v. Right to Counsel
   1. Rule: When a suspect invokes his right under Miranda to consult with an attorney prior to interrogation, the 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.
   2. Exception: If a suspect ambiguously or equivocally assets his Miranda right to counsel, as D did, the police may ignore the remark and continue the interrogation.
   3. Rule: The right to counsel under Miranda, not the 6th Amendment, only apples if a suspect in custody expresses his wish for the particular sort of lawyerly assistance that is the subject of Miranda. It requires, at a minimum, some statement that can reasonably be construed to be an expression of desire for the assistance of an attorney in dealing with custodial interrogation.

vi. Fruit of the Poisonous tree
   1. what if the Miranda violation is the poisonous tree?
      a. As a general matter, the Miranda doctrine can never be a poisonous tree.
      b. The violation is not serious enough to suppress information that comes after it.

2. Oregon v Elstad: suspect is not read his Miranda rights. He's interrogated. He makes a partial confession then he is read his Miranda rights and he confesses again. **The supreme court says that a Miranda violation can never be a poisonous tree and therefore the evidence cannot be suppressed.**
3. Missouri v Seibert: The police department had a policy that they will interrogate first and then after they had the confession they would read the defendant his Miranda rights and then get the suspect to confession again. the court held that the second confession was inadmissible. Rule: **if the officers purposely avoid giving the Miranda warnings rather than just making a mistake then there is a Miranda violation and the evidence will be suppressed**
4. poisonous tree doctrine:
    a. does apply to involuntary confessions. an involuntary confession is gotten by trickery or beating
    b. if police violate the Miranda doctrine by not reading someone their rights, there is not fruit of the poisonous tree doctrine
    c. if the police have a Miranda violation before the first confession and then they are in compliance after the second confession, the confession will be admissible unless it was gotten in bad faith.

vii. Exceptions
1. Public Safety
    a. *New York v. Quarles*
        i. Facts: A woman informed two officers shortly after midnight that she had been reaped, that her assailant was armed and that he had fled into a nearby all-night grocery store with a weapon. One of the officers entered the store and spotted a man, D, fitting the description of the assailant. D fled to the rear of the store, with the O in pursuit. The officer, now accompanied by three other officers, took D into custody and handcuffed him. When the officer discovered that D had an empty should holster, he asked D (without issuing Miranda warnings) where the gun was. D nodded in the direction of some empty cartons and said "the gun is over there." The officers retrieved the weapon.
        ii. Rule: There is a public safety exception to the requirement that Miranda be given before a suspect's answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved, but on "immediate necessity."
    b. There must be an objectively reasonable need to protect the police or the public from an immediate danger; there must be an exigency requiring immediate action by officers beyond the normal need expeditiously to solve a serious crime.
    c. non-testimonial statements
        i. *Schmerber v. California:* removing a guy's blood against his will to test for alcohol does not violate the 5th Amendment because the blood is not testimonial.
        ii. Routine booking questions
        iii. Statements by the police that are not likely to elicit an incriminating response.
    d. Covert custodial interrogation
        i. *Illinois v. Perkins:* The court put an undercover officer in Perkin's cell. Perkins confessed. No Miranda rights were given. The court ruled that Miranda does not apply to undercover officers that are

jail plants, because the individual doesn't know he is talking to the police and cannot be coerced.

e. If a lawyer is present in the room, the police do not have read the individual her Miranda rights.

viii. Form:

1. The court has not required the exact words from the Miranda decision. Police departments can change things a little but not too much. They have to get pretty close.

ix. Textual support? Issues?

1. Should the doctrine apply at all in the investigatory stage?
2. How does the Miranda decision fall anywhere inside the 5th Amendment?

x. *Dickerson v. United States:* Are all the Miranda rules required by the Constitution or can Congress just overrule them? The Miranda rules are required by the 5th Amendment. There is no way that the test the government wanted was equally effective as the Miranda rules.

xi. Rules:

1. For cases where the person has been interrogated while in custody any statement that he makes will be inadmissible if he has not been read his Miranda rights.
2. The right to remain silent, to be told that anything you say will be used against you, the right to access to a lawyer before and during question and also the right to a lawyer if you're poor.
3. A defendant must affirmatively waive his Miranda rights. Silence is not enough.
4. The government bears a heavy burden of proving that the defendant was waived his/her Miranda rights.
    a. The government can accomplish that through the sworn testimony of the officer without anything else.
5. If a defendant invokes his right to remain silent or his right to an attorney, all questioning must cease immediately.
6. The prosecutor cannot comment to the jury on the fact that the defendant has invoked his Miranda rights.
7. Police only have to give the Miranda warning to people who are in custody.
8. Just because a police encounter starts voluntarily does not mean the individual will not be in custody by the end of it.
9. A person is in custody for Miranda purposes if a reasonable person would think that his freedom of movement is so limited its just like you've been arrested.
10. The test for a 4th Amendment seizure is different than the test for determining custody for Miranda. Less has to happen for you to be seized for 4th Amendment than to be in custody for 5th Amendment purposes.
11. Not all questioning or statements by the police while the defendant is in custody amount to interrogation. Need express questioning or something that is reasonably likely to elicit an incriminating response.
12. No Miranda warnings are required for voluntary statements.
13. No Miranda warnings are required for non testimonial statements.
14. No Miranda warnings are required for booking questions.
15. No Miranda warnings are required when police use an undercover cop in a jail; and any undercover cop for that matter.
16. The Miranda warnings don't have to be read exactly as they are set out but they have to be pretty close.
17. Miranda can only be invoked by the suspect. The Miranda right is personal.
18. the police do not have an obligation to tell someone that their lawyer is looking for them.

19. although silence by itself is not enough to show waiver, you can infer waiver from the actions or conduct of the suspect.
20. when the defendant invokes his right to counsel, police can never demonstrate a valid waiver by showing the defendant continued to answer questions, the only way is if the defendant reinitiates contact.
21. when a defendant invokes his right to counsel, police, even different police officers, cannot interrogate the defendant about different crimes until after he has been given a lawyer: the court has rejected an offense specific approach.
22. when a defendant invokes his right to silence, the police can later come back and try to start questioning him again. all they have to do is reread the suspect his Miranda rights.
23. the defendant must unambiguously request a lawyer in order for questioning to cease. officers have no obligation to ask clarifying questions if the request is ambiguous

X. 6th Amendment Right to Counsel: Messiah Doctrine

a. The doctrine is about sixth amendment interrogation. The person in custody moves from being a suspect to an accused (a defendant in the criminal justice system), leaving the fifth amendment right to counsel and going to the sixth amendment right to counsel
b. Messiah v United States: D and his coconspirators are indicted for drug violations; retains a lawyer and he pleads not guilty and gets out on bail; his coconspirator turns on him and agrees to record their conversations. d makes incriminating statements. Issue: can they use the incriminating statements against him at trial? Rule: no, **when a defendant is represented by counsel he cannot be interrogated, even surreptiously, unless his counsel is notified.**
c. What happens if the guy has been indicted but has yet to retain a lawyer?
    i. The officers can seek a waiver.
d. there would be a difference if someone was just put in there to listen because that person is not interrogating. The informant has to try to deliberately elicit an incriminating remark.
e. The dividing line is when formal charges are filed.
f. In virtually every case the police do not question the suspect after indictment; so the police stall on getting the indictment so they can interrogate the guy.
    i. Messiah creates an incentive for the police to stall

XI. 6th Amendment Right to Counsel: Lineups

a. Right to Counsel
    i. A person has a 6th Amendment constitutional right to counsel at any corporeal identification procedure conducted after, but not before, she has been indicted or equivalent adversary judicial proceedings have commenced against her.
        1. Basically, an accused has a constitutional right to counsel at all "post-indictment" lineups.
    ii. The police are under no obligation to tell the witness that the no one is in the lineup who is the actual perpetrator.
    iii. *United State v. Wade*
        1. Facts: Bank was robbed. D indicted for conspiring to rob the bank and for being an accomplice to the robbery. D was arrested and appointed an attorney. He was id'd in a line up 15 days later and at trial. D's lawyer moved to exclude evidence because he had not been present.
        2. Issue: Whether courtroom ids should be excluded because they were conducted without presence of counsel.
        3. Rule: Counsel's presence is requisite to conducting a lineup. 2. if the government can show by clear and convincing evidence that the lineup has not resulted from taint, and the observations resulted from the witnesses experience at the crime, then the id is admissible.

4. Reasoning: there is no 5th Amendment violation to be put in the lineup in the first place because its non-testimonial. Counsel does have to be given to person at a lineup. Confrontation of accused by victim or witnesses are very dangerous; may make trial unfair. One factor in the unreliability is the suggestibility of the witness. Lineups may be unfair and thus unreliable. It is hard to figure out what goes on at a lineup; difficult to recreate. The accused is deprived of the right of cross-examination. If there is no lawyer at the lineup, the remedy is that the witness cannot talk about the lineup while he or she is on the witness stand. The bottom line reality is that even if counsel is denied at the lineup, most courts will find that the government has shown clear and convincing evidence of no taint, and will admit the identification.

iv. *Kirby v. Illinois*: A guy is arrested and put in the lineup before he is indicted. Rule: **The right to counsel attaches at the beginning of adversarial proceedings**. The practical effect is that the police will usually conduct the lineup before the adversarial proceedings. The *Kirby* decision narrows *Wade* because the right to counsel only applies to defendants, not suspects.

v. *United State v. Ash*: **The right to counsel does not attach to noncorporeal identifications.** The reason for that is because showing a mug book, etc is not really like confrontation.

b. Due Process of Law

i. Rule: The due process clause requires the exclusion at trial of evidence of a pretrial identification of the defendant if, based on the totality of the circumstances, the procedure used to obtain the evidence was
   1. unnecessarily suggestive; and
   2. conducive to mistaken identification

ii. This rule applies regardless of whether the identification was corporeal or non-corporeal, occurred before or after formal charges, and whether or not counsel was present.

iii. *Stovall v. Denno*
   1. Facts: A doctor was stabbed by D. The doctor's wife followed D to the kitchen and tried to stop him and she was stabbed 11 times. After undergoing surgery at the hospital, the wife was asked to id D as her assailant who had been take to her hospital room.
   2. Issue: Is the lineup so unnecessarily suggestive that it violates due process?
   3. Rule: A claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it. 2. The due process clause protects against identifications so unnecessarily suggestive as to give rise to the substantial likelihood of irreparable misidentification.
   4. Reasoning: The lineup was suggestive, but not unreasonably so. The defendant bears the burden to show that the lineup is not just suggestive but unnecessarily suggestive. Her possible impending death was an extenuating circumstance.

iv. *Manson v. Brathwaite*
   1. Facts: The police officer was an undercover narcotics agent; he went to purchase drugs from a suspected drug dealer; the guy opens the door; the police officer eyes him for a few seconds. He goes back to the station and describes the guy to another officer. A couple of days later that officer puts a photo on his desk and the police officer ids him as the drug dealer.
   2. Issue: in this circumstance, is using a single photograph unnecessarily suggestive and a violation of due process?
   3. Rule: The factors of reliability include: 1. opportunity of the witness to view the criminal at the time of the crime; 2. the witness' degree of attention; 3. the accuracy of his prior description of the criminal;4. the level of certainty demonstrated at the confrontation; 5. the time between the crime and the

confrontation. All these weighed against the corrupting effect of the suggestive identification.

4. Reasoning: It was unnecessarily suggestive. Reliability is the linchpin. The court says that the police officer's identification met all the factors and was not unduly prejudiced by the corrupting effect of the suggestive identification. The bottom line is that although the photo id was bad procedure, that does not outweigh other factors in the test. Questions about whether there are violations of due process are assessed under a totality of circumstances approach.

v. analysis:
   1. is the line up so unnecessarily suggestive, burden of proof on the defendant
   2. can the government prove that even if it was unnecessarily subjective we can be confident under a totality of the circumstances test that it was reliable.

vi. Page 745; problem # 2: A Western Union office was robbed by two men. The sole witness was Joseph David, the late-night manager of the office. A day after the robbery, a suspect turned himself into the police for the robbery and implicated Foster. F was arrested and immediately placed in a lineup with three other men. F was 6 feet tall; the other men were approximately 6 inches shorter. F (and nobody else) wore a leather jacket similar to one manager D had seen underneath the coveralls worn by the robber. D told the police he thought F was the robber, but said he could not positively identify him. D asked to speak to F, so the arrestee was brought into an office and told to sit across from D. D again indicated that he was uncertain. Ten days later the police arranged a second lineup. 5 men were in the lineup, including F. This time, all of the men were of similar height. D reported that he was convinced that F was the robber. Later, charges were brought against F. At trial, D testified to the id of F in two lineups and id'd him again in the courtroom. Admissible?
   1. There is no right to counsel problem because he has not yet been indicted. (first thing to look for)
   2. Due process violation? Yes, the lineup seemed to single him out particularly.
   3. The Supreme Court held in this case that the line up violates due process.

vii. Courts have upheld lineups with as few as 3 people in them.

viii. Sometimes judges can give an instruction that jury is unreliable, but the judge is not obligated to do that.

ix. Some courts permit the expert testimony about the unreliability of eyewitness testimony, but the judge is not obligated to let it in.

x. There is no due process prohibition in being forced to be in two lineups.

xi. Problems with this eyewitness:
   1. Psychological research shows that people tend to forget.
   2. There is a big problem with cross-racial identification
   3. Lineups or photo books are done in a manner that suggests that the suspect has to be in the lineup.
   4. Once a witness has identified someone, they become psychologically committed to that person. Once someone has picked someone, that person is extremely unlikely to backtrack
   5. Researchers argue that eyewitness testimony is more unreliable than other types of evidence.

xii. Rules:
   1. If there have been formal judicial proceedings instituted, then that person has a right to a lawyer.
   2. If the police violate that right, it will result in per se exclusion of any testimony about that lineup or identification.
   3. If the police fail to provide a lawyer at the lineup when the defendant has already been indicted there is not a per se exclusion of in court testimony; the court

applies a sort of independent source doctrine and puts a high burden of proof on the government to show that the identification is based on the crime scene; the government almost always wins.

4. Just because you have a right to counsel at the lineup does mean that you have the right not to participate in the lineup.
5. The right to counsel does not apply to non-corporeal identification procedures.
6. The right to counsel does not apply to identification procedures that are before formal proceedings.
7. The defendant can waive his right to counsel at the lineup.

XII. Pre-trial Detention

a. Bail decisions are done in an assembly line fashion. In most circumstances will rely on the recommendation of the prosecutor. But can ask after been appointed a lawyer for the judge to revisit the decision. The reason for this decision is to prevent the flight of the suspect.
b. Problems:
    i. Not so much fun
    ii. Harder to prepare for trial.
c. problems with letting people out:
    i. flight
    ii. destroy or tamper with evidence or witnesses or both
    iii. 10% of people commit a felony while out on bail; 6% commit a misdemeanor; 22% fail to show up.
d. types:
    i. release on your own recognizance (25% are released this way)
    ii. supervised release
    iii. unsecured bond
    iv. deposit bond
    v. full bond
e. What do judges consider to determine whether to release
    i. Seriousness of the offense
    ii. Strength of case
    iii. Prior criminal history; failure to show up for other court dates
f. Bail Reform Act
    i. Presumption that a suspect will be released on own recognizance
    ii. Bail will be reasonable
    iii. Preventive detention.
    iv. Bail is set to fit the person's means.
g. Preventative Detention
    i. *United States v. Salerno*
        1. Facts: mob captain charged. He puts up a bunch of character witnesses. The judge decides to engage in preventative detention.
        2. Rule: if the government can show that no release conditions will reasonably assure the safety of other people and the community, the government can retain the person before trial even though the person is not guilty of anything.
        3. Reasoning: What about the idea of innocent until proven guilty? This detention is not punishment. It is regulatory. There are other circumstances when people can be retained despite not being proven guilty of anything, such as flight risks. Narrowly tailored. Crucial to the court's decision is that a judge is really making this decision under a lot of consideration and there are only narrow number of cases (murder, etc) where this can be accomplished. There is also a full adversary hearing. Show by clear and convincing evidence that the defendant poses a danger. The decision is immediately appealable. Violation of the 8th amendment?

The 8th amendment does not apply because we do not have excessive bail we have no bail. (The excessive bail clause does not apply to the states).

4. Dissent: finds that it violates substantive due process and excessive bail.

h. used against about a third of criminal defendants

XIII. Case Screening

a. Constitutional Limits on Discretion in Charging

i. *United States v. Armstrong*

1. Facts: Ds indicted for possession with intent to distribute crack. Ds were a part of a crack distribution ring. Ds filed a motion for discovery; they allege they were prosecuted because they were black; supported by an affidavit and a small study. They also presented an affidavit that said a drug intake counselor had told one of the lawyers that there were an equal number of Caucasian users and dealers to minority users and dealer. The DEA presented a study that indicted that drug rings were mostly black. The district court order the discovery, but the prosecutors refused so the case was dismissed. The Appeals court reversed.
2. Issue: What evidence constitutes some evidence tending to show the existence of a discriminatory effect and discriminatory intent.
3. Rule(s): 1. A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the chard for reasons forbidden by the Constitution. 2. The claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory effect and that it was motivated by a discriminatory purpose. 3. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.
4. Reasoning: The equal protection clause is in the 5th Amendment due process clause; takes the 14th amendment and applies it to the federal government. It is very narrow. The court adopts a presumption that what the prosecution is doing is perfectly appropriate. The threshold showing required to compel discovery was some evidence tending to show the existence of the essential elements of the defense discriminatory effect and discriminatory intent. The court says that the statistics show some
”races” are more prone to commit certain types of crimes than others. The court doesn’t want to compel discovery because it is very burdensome and because it will show the prosecution’s strategy to the public. This case suggests that defendant who has the right empirical evidence may be able to bring a successful claim of discriminatory prosecution.
5. Dissent: Wants to say something about the discrepancy of the punishments.

ii. Impermissible reasons: race, religion, national origin, sexual orientation, etc

iii. Prosecutors have enormous discretion not to prosecute or to seek a lower charge.

1. If the prosecutor decides not to prosecute that is his choice and there is nothing anyone can do about it.
2. A defendant’s chances for a successful encounter in the criminal justice system come from prosecutorial discretion.

iv. *Blackledge v. Perry*

1. Facts: D was convicted of assault with a deadly weapon, a misdemeanor, in a court with jurisdiction over misdemeanor prosecutions only. D exercised his right under state law to a trial de novo in superior court. Prior to the second trial, the prosecutor sought and obtained a new indictment charging D with assault with a deadly weapon with the intent to kill, a felony.

2. Issue: Whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the Pearce case.
3. Rule: a defendant should be free from the apprehension of retaliation for exercising a constitutional or statutory right.
4. Reasoning: Here there is a serious appearance of vindictiveness. It looks bad. D shouldn't fear retaliation for appealing. The court decides that for the most part if a prosecutor wants to increase the charges after the first trial and make them more serious, he or she has to have a very good reason for it and that reason cannot have a vindictive tinge to it. For the most part increasing the charge after the trial is not permitted. The scenario does not come up that often.

v. *Thigpen v. Roberts:* The first prosecutor gets a misdemeanor conviction. The defendant successfully appeals and gets the conviction thrown out. The second prosecutor gets him convicted for a felony. The court holds that the second conviction has to be thrown out because it looks like it was vindictive. Vindictiveness was presumed.
vi. Rule: There is only a rebuttable presumption of vindictiveness.
vii. *Bordenpercher v. Hayes:* Charged with forging a check; the prosecutor offered him a 5 year deal; D decides to go to trial and the prosecutor charges him as a repeat offender; D convicted and got life in prison. Whether the plea bargaining process is vindictive? Rule: **The prosecutor has inherent power to increase or decrease charges before trial.** Reasoning: plea bargaining are favored.
viii. In cases of pretrial prosecutorial discretion, unless the prosecutor announces that he/she is acting vindictively the act of increasing the charges before trial will be okay.

b. Judicial Screening of Cases: The Preliminary Hearing
i. The primary purpose of a preliminary hearing is to determine whether there is probable cause to believe that a criminal offense has occurred and that the arrestee committed it.
ii. *Coleman v. Alabama*
1. Facts: D was convicted of assault with intent to murder.
2. Issue: Whether Ds had a right to counsel during the preliminary hearing.
3. Rule: The test for whether counsel is appointed is whether it is a critical stage of the prosecution.
4. Reasoning: The counsel needs to be there to help the defendant. The lawyer can help examine witness and cross-examine them, can interrogate the State's witnesses, can discover the case effectively, and can argue effectively.

iii. The prosecutor almost always wins at the preliminary hearing stage and if he loses he can try again.
iv. Best not to waive because it is a good discovery tool. Most do so anyways. Most likely its because appointed counsel don't have time and because they don't want to piss off the prosecutor.
v. Public defenders work on a retainer. The preliminary hearing should be factored into the cost.
vi. If there is a preliminary hearing, there is no grand jury hearing and vise versa.

c. Grand Jury Screening
i. In indictment jurisdictions, a person may not be brought to trial for a serious offense unless she is indicted by a grand jury or waives her right to a grand jury hearing.
1. Texas is an indictment state.

ii. The grand jury is supposed to be a screening function
iii. Procedure
1. Judge empanels a grand jury
2. Convened for a while and the group meets once a week with the federal prosecutor
3. The majority empanelled must agree that the prosecution should go forward.

4. Technically supposed to be secret; witnesses can discuss They vote and if they indict they return a true bill. If the disagree they return a no bill.

iv. *United States v. Williams*
   1. Facts: D was indicted by a federal grand jury of defrauding a bank. The prosecutor did not present all the exculpatory evidence available to him.
   2. Issue: Whether the courts have the power to prescribe standards for prosecutorial conduct in a grand jury proceeding.
   3. Rule: Any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceeding.
   4. Reasoning: The grand jury is not a part of any branch of the government; it is independent. Rule would alter grand jury's traditional role. Grand jury is not an adversarial process. The grand jurists would be free to ignore the exculpatory evidence.
   5. Dissent: if a prosecutor is personally aware of substantial evidence that negates the guilt of the suspect, the prosecutor should have to present it.

v. The grand jury's job is to pluck out the occasional bad case that the prosecutor presents; it is not to give the defendant a fair chance.

vi. An indictment returned by a legally empanelled grand jury will always be valid.

vii. the grand jury cannot call on witnesses to violate testimonial privileges (attorney-client, etc)

viii. The grand jury
   1. as a shield – supposed to protect from unlawful prosecution
   2. as a sword – use as an investigative tool; have the power to subpoena people and documents; have the power to give out immunity (if offered immunity, the witness must testify because there is no self-incrimination),
      a. subpoena power (as a practical matter, it is the prosecutor who is calling the witnesses, etc)
      b. if the fifth amendment privilege is asserted, a change makes the call as to whether the privilege is relevant
      c. if the judge decides that there is a fifth amendment privilege for the testimony desired, the grand jury can't call you
      d. two types of immunity:
         i. Transactional – protects all bases
         ii. Use – anything that you say today cannot be used against you however if you say words that lead to tangible piece of evidence, that can be used against you; coequal to the privilege of self-incrimination; a prosecutor can flat out immunize someone
      e. If given immunity and the witness decides not to testify, you can be held in civil contempt until you decide to testify
      f. Civil contempt
         i. Purpose is not to punish, but to pressure
         ii. The witness has the keys to his or her own jail. They can unlock them whenever they want to.
         iii. Don't get a lawyer, no right to a hearing; adversary process does not attach
         iv. Can be locked up for 18 months – the life of the grand jury
         v. At a certain point, a judge will find that no amount of pressure will make the person testify and will release the person
         vi. But the prosecutor can convene another grand jury and make the person stay in jail

vii. If the person is freed the prosecutor can turn around and charge the person with criminal contempt; an adversarial process.
viii. The right to self-incrimination is personal

d. Rules
   i. Prosecutors have almost unlimited discretion to charge or not to charge
   ii. The reason that we have a preliminary hearing or a grand jury hearing is to assess whether there is enough probable cause to move the case forward.
   iii. The preliminary hearing/grand jury are supposed to serve as a check on the prosecutor's power to charge but in practical reality they have very little power over the prosecutor
   iv. Prosecutorial discretion violates the equal protection clause only if the defendant can show specific examples of other groups of people who are not being prosecuted for the same crime; the defendant has to show a discriminatory purpose and a discriminatory intent.
   v. If a prosecutor has decided that she would like to increase charges after the defendant has filed for an appeal, there is a strong presumption that she is acting vindictively and therefore unconstitutional.
   vi. However, if a prosecutor decides to change the charges before trial, the defendant can only show prosecutorial misconduct if there is a clear statement from the prosecutor of impermissible motives.
   vii. Although the grand jury and the preliminary hearing are intended to serve the same purpose, that is to screen charges for probable cause, the defendants only have a right to counsel at the preliminary hearing.
   viii. The reason that there is a right to counsel at the preliminary hearing is that the court has decided that it is a critical state of the prosecution.
   ix. Prosecutors are not obligated to present exculpatory evidence at the grand jury stage.
   x. An indictment that is returned by a legally empanelled and unbiased grand jury will almost never be thrown out.
   xi. A second indictment does not supersede the first one, it may be thrown out if the judge does it or if the prosecutor does.
   xii. Defendant cannot be forced to testify in front of the grand jury if his statements will incriminate him.
   xiii. Prosecutors get around the 5th amendment problem by granting immunity: transactional immunity and use immunity.
   xiv. If you still refuse to testify, a judge can hold you in civil contempt

XIV. Discovery
   a. Civil discovery broader than criminal discovery; far less formal discovery in the criminal discovery process than in the civil discovery process
      i. concern about tampering with witnesses; killing witnesses; the criminal defendant cannot be trusted
   b. informal discovery
      i. Open file system – even though the prosecution is not required to turn over a lot of documents, it will do it anyways.
      ii. The strategic reason for this is to force a plea; create an incentive plead guilty
      iii. The second reason is to avoid a motion on appeal that the prosecution did not turn over everything they were constitutionally required to do
   c. Due process clause offers three protections: life, liberty, and property.
   d. Statutory rules
      i. Rule 16. Discovery and Inspection
         1. Under rule 16(a),
            a. the defendant gets discovery of his own confession that is the result of his own interrogation
            b. the defendant is not entitled to discovery of codefendant's interrogations

c. do not get statements made to undercover cops or other people.
d. Prosecutor has to turn over the expert witnesses, tests, experiments, etc.
e. Recorded testimonies of witnesses in front of grand jury do not have to be produced.
f. No witness lists are required.
g. Not all the written or recorded or summarized statements of all persons have to be produced.

ii. Rule 16 does not anywhere give one the right to get a copy of a statement testified to by a witness; Congress gave the right through the Jenck's Act – the defendant can get a copy of the statement after the witness has testified at trial but before the witness has been cross-examined

iii. Rule 16 is narrow; the defendant does not get access to lots of different types of information.

e. Constitutional Discovery

i. *Brady v. Maryland:* **Holds if the defendant requests evidence favorable to himself and the prosecution fails to provide him with evidence that is material to either guilt or punishment, there will be a due process violation regardless of whether the prosecutor acted in bad faith.**
1. It does not have to be just exculpatory evidence
2. if its evidence that would impeach a witness, that is favorable evidence to the defendant.

ii. Subsequent to Brady, the S.C. has held that the witness doesn't have to ask for the evidence at all; the prosecutor has a duty to turn over evidence that looks to be favorable and material regardless of whether the defendant asks for it.

iii. Remedy for a Brady violation; ask
1. Did the withheld evidence create a reasonable doubt that did not otherwise exist?
a. If so the remedy is a new trial.
2. For jurisdictions that don't have an open file policy, there are lots of appeals about whether there has been a Brady violation.

iv. *United States v. Bagley*
1. Facts: D indicted for drug and firearm violations; requested names of government witnesses and whether they had been offered a deal. The witness had gotten a deal. They were supposed to get paid for a successful testimony. They were mainly supposed to testify about the firearms violation. The D was convicted of the drug violation.
2. Issue: Whether the evidence of the pay for deal was favorable to the D and material.
3. Rule: Withholding evidence is only a constitutional violation if deprives the defendant of a fair trial. 2. The court says that the evidence is material if there is a probability that if it was disclosed the result would have been different.
4. Reasoning/Holding: The evidence was favorable, but not material. Although the prosecutor did mislead the defendant's attorney, the court said that the case would not have come differently because the D was already acquitted of the firearms charge.
5. Dissent: Shouldn't consider the outcome of the trial; believes making bright line rule of Brady less potent.

v. *Arizona v. Youngblood*
1. Facts: A young boy was sexually assaulted. He was taken to the hospital and the doctors used a sexual assault kit to take samples and specimens from the child. They also took his clothes. The samples from the kit were refrigerated and frozen, but the clothes weren't. The tests turn out to be inconclusive. The government does not rely on the clothing for its case in chief.

2. Issue: Whether the government's faith is relevant when it fails to conserve material evidence.
3. Rule: Unless a criminal defendant can show bad faith on the part of the police, failure to preserve useful evidence does not constitute a denial of due process of law.
4. Reasoning: The police did not act in bad faith, so the failure to preserve is not a denial of due process of law. Police actions were negligent but they did not act in bad faith. All the evidence was disclosed, it was just not all preserved accurately.
5. Dissent: Should make the police preserve physical evidence that they know reasonably has the potential, if tested, to exculpate the defendant.

vi. *Williams v. Florida*

1. Facts: D gave the prosecution the name and address of his alibi as required by Florida law. The notice of alibi requirement means that a certain number of days before trial, the defendant has to submit information about the alibi and then the prosecution will give any information about that people they have who may be able to impeach the alibi. If the rule is violated, then the judge can sanction by disallowing the alibi to testify or may give a narrower sentence. At trial, the alibi testified that D had been at her apartment with his wife. The wife testified the same. The prosecutor tried to rebut the alibi's testimony by offering contradictory evidence, such as that the police officer investigating the case had given the alibi directions.
2. Issue: Whether the rule deprived D of due process; self-incrimination.
3. Rule: The privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witness.
4. Reasoning: The rule does not violate due process. It is not a Fifth Amendment violation, because it is not compulsion. The rule didn't affect D's decision to call an alibi. Due process does not demand that the D get to hear the State's case before announcing the nature of his defense.
5. Dissent: thinks this is a marker to compelling self-incrimination

f. Who do the discovery rules favor?

i. Something's suggest favorability toward the defendant
ii. there are certain things that seem to favor the government
iii. the rules go both ways

XV. Joinder and Severance

a. Rule 8. Joinder of Offenses or Defendants

i. can only join to defendants if they are accused of their crimes are based on the same act or transaction
ii. as a general rule, prosecutors favor lots of joinder and defendants do not like it
iii. its hard to sever once the prosecutor has joined them, if their joinder meets the test in this rule
iv. Exception: Generally if one of defendants confesses, then you cannot admit that against other defendants at trial.

b. State v. Reldan

i. Facts: D charged with 2 separate murders. Both occurred around the same time and in a similar manner. He wants to separate them into two trials. D is saying that the jury may infer guilt from the second crime.
ii. Issue: Whether the court should order 2 separate trials for each count.
iii. Rule: Must show prejudice; There are four ways the D can show prejudice: may be forced to testify about the second crime, the jury may infer guilt, the jury could cumulate the evidence of the two crimes and convict him, and creation of a feeling of hostility.
iv. Reasoning/Holding: The court does not order severance because the evidence would be admissible any ways because he used the same modus operandi. The burden is on the

defendant to show that on a joint trial, on different counts, it would be prejudicial. Whether something is prejudicial is a fact bound test and it will be up to the judge to decide.

c. The court allows the severance because of the idea that there will be jury instructions.

XVI. The Right to a Speedy Trial

a. Barker v. Wingo

i. Facts: Elderly couple was beaten to death and Ds were arrested and indicted. The trial for Manning was set a month earlier than that of Barker. 16 continuances were filed for Barker's trial and ultimately, Barker's trial was postponed for about 5 years because they could not convict Manning. Barker first moved to dismiss for the first time about four years after he was indicted. He moved again right before his trial.

ii. Issue: Whether the demand waiver rule applies.

iii. Rule: The court accepts a balancing test, in which the conduct of both the prosecution and the defendant are weighed. The factors include length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

iv. Reasoning: The biggest concern is that we don't want to wait to long so that the defendant can't defend himself. Constitutional rights are important so the court is going to impose a high standard for waiver. The court says that the length of delay is a triggering mechanism and the delay must be presumptively prejudicial. The failure to assert the right works against the defendant. Prejudice depends on the interests such as to prevent oppressive pretrial incarceration, to minimize anxiety and concern of the accused; and to limit the possibility that the defense will be impairs. The factors are not rigid or necessary. The length of the delay in this case was extraordinary and there was only one good reason for the delay, but the defendant didn't ask for a speedy trial for years and the prejudices were minimal because he was only in jail for 10 months over 5 years. The test means that the defendant does not need to show prejudice and even if he does, he is not entitled to win. The court is ultimately not willing to reward the defendant's gamble. The burden is really on the court and the prosecutors to push a case forward for a speedy trial.

b. The remedy for the violation of the speedy trial is to dismiss the case with prejudice.

c. The speedy trial right kicks in the moment the accused is indicted, etc.

d. There are state statutory provisions and federal ones

e. There is a federal speedy trial act.

i. Have to be arrested within 30 days of indictment

ii. Tried within 70 days

iii. But there exceptions that extend the time limits

iv. In practicality, it works a lot like the Constitutional rule.

f. There is no constitutional guarantee of a speedy appellate process.

XVII. The Right to Counsel

a. At a minimum the 6th Amendment entitles an accused in a federal prosecution to employ a lawyer to assist in her defense at trial. Since 1963, the right to counsel has been deemed a fundamental right of criminal justice; therefore, an accused in a state prosecution has a similar 14th Amendment right to retain an attorney to represent her during trial.

b. Powell v. Alabama

i. Facts: Nine teenage black youths were prosecuted for alleged rape of two white girls in an Alabama community that, due to the race of the parties, was explosive with rage and vengeance. The youths, described by the court as ignorant and illiterate and residents of another state, were indicted, arraigned and brought to trial in less than two weeks after the capital offenses supposedly occurred. Until the days of trial no lawyer had been named or definitely designated to represent the Ds. On the day of trial, two lawyers, one of whom was from out of state and unfamiliar with local law, offered to represent the youths. Once appointed, however, the lawyers were denied a continuance so they could

adequately prepare their defense. 8 of the defendants were convicted and sentenced to death.

ii. Issue: Were the men denied a right to trial? Was this denial a violation of the due process?

iii. Rule: In a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

iv. Reasoning: The conviction was reversed. The court used the due process clause of the 14th Amendment to say that in some cases, special ones, a lawyer is required. The court's holding is extremely narrow.

c. *Betts v. Brady*

i. Facts: D indicted for robbery and he informed the court that he was too poor to afford counsel, but the court denied the motion.

ii. Issue: Does the 14th Amendment incorporate the right to counsel?

iii. Reasoning: The court holds that not every state defendant is entitled to a lawyer. It is only required under special circumstances. Betts is not entitled to a lawyer. There are no special circumstances in this case.

d. *Gideon v. Wainwright*

i. Facts: Gideon was charged with breaking and entering with intent to commit a misdemeanor. This was a felony under Florida law. He was poor so he asked the court to appoint a lawyer and this was denied. Gideon defended himself and he was convicted. The Supreme Court appointed him a lawyer.

ii. Issue: Should this Court's holding in Betts v. Brady be reconsidered?

iii. Rule: **All state criminal defendants who are indicted of a felony are entitled to appointed counsel if they cannot afford one.**

iv. Reasoning: Made obligatory upon the states by the 14th amendment; the 6th amendment is one of these fundamental rights; makes the 6th amendment a fundamental right. We live in an adversary system, so it makes sense to require defense counsel. Its pretty important. Limited to felony.

e. To comply with Gideon, most jurisdictions either establish a public defender system, a contract-attorney program, or an assigned-counsel program. Some jurisdictions have a combination of these programs.

f. *Argersinger*: Rule -**An indigent is entitled to the appointment of counsel if she actually, not merely potentially, will be jailed (even for one day) if she is convicted.**

g. *Scott v. Illinois*

i. Facts: D convicted of shoplifting. The statute allowed for jail time, but he was only fined $50.

ii. Issue: Whether appointment of counsel is required for every crime that may carry a jail sentence.

iii. Rule: There is no constitutional right to an appointed lawyer if you do not get any incarceration time.

iv. Reasoning: You are guaranteed a right to a jury if you are charged with a crime that carries a punishment of more than 6 months. If you face possible jail time of more than 6 months, you are not guaranteed a right to a lawyer unless you actually get prison time. The dissent would not have a result-based rule; would require a lawyer if there is the possibility of jail time. The court does not want to extend the right to counsel to all misdemeanor offenses because it's expensive.

h. If you are sentenced to a suspended sentence you do get a right to an appointed counsel.

i. On Appeal

i. Not a part of the 6th Amendment; subject to the standards of the 14th Amendment equal protection and due process clauses.
ii. Every state grants the defendant a right to first appeal.
iii. In addition to the right to the lawyer on appeal, there is the right to a free trial transcript.
iv. *Douglas v. California*
    1. Facts: Ds tried and convicted; they wanted an appointed counsel for the first appeal.
    2. Issue: Whether they get appointed counsel for the first appeal.
    3. Rule: An indigent defendant has a right to appointed counsel on the first appeal of right.
    4. Reasoning: The court couches the right to a lawyer on appeal as an equal protection violation. Because the rich guy can afford a lawyer on appeal and the poor guy can't, the poor guy should get a lawyer appointed by the state. This is not really an equal protection case. It is a due process case.
v. *Ross v. Moffitt*
    1. Facts: Same question as Douglas, except for discretionary appeal.
    2. Issue: Whether a D is entitled to appointed counsel at every discretionary appeal.
    3. Rule: The 14th Amendment does not require the appointment of counsel to assist indigent appellants in discretionary state appeals and for applications for review in the U.S. Supreme Court.
    4. Reasoning: Nope, because the D has already gotten a fair shake and he is better situated, material-wise, during the discretionary appeal. Also the appeals courts at this point don't have to hear the case. They can choose to. Counsel at discretionary appeals is marginally more helpful.

j. There is no right to a lawyer in a habeas corpus proceedings; parole revocations there is a fact bound test;
k. Choice of Counsel
    i. get competent counsel
    ii. hard to get rid of the appointed lawyer, must be able to point to something that is seriously wrong with the representation.
l. The S.C. has held that a defendant can have a right to an expert witness, depends on the situation.

XIV. The Right to Decide Whether To Have Counsel

a. Faretta v. California
    i. Facts: D charged with grad theft; appointed a lawyer but wanted to represent himself. D was allowed initially to represent himself, but the judge said he might change his mind. Judge set-up a separate hearing to see if D was able to defend himself and decided that D could not.
    ii. Issue: Whether a state may compel a D to take a lawyer.
    iii. Rule: The 6th Amendment does not provide merely that a defense shall be made for the accused; it grants the accused personally the right to make his defense. 2. The accused must knowingly and intelligently forgo those relinquished benefits. 3. He should be made aware of the dangers and disadvantages of self-representation.
    iv. Reasoning: Pro Se defense is implied in the 6th Amendment. The right to make a defense is personal. If D does not want counsel, an appointment of one may not be very helpful. The D need not have technical legal knowledge. Factors: age, mental health, education, and experience with the criminal justice process.
    a) Dissent: The dissent doesn't buy the majority's historical argument. The founders could have put the right in the Constitution if they wanted to. Would prefer if people would not proceed pro se because it is a mess; they want to make the trial the "main event."
b. The court is not obligated to inform the defendant that he/she has a right to proceed pro se.
c. There are circumstances where the judge can reject the request to proceed pro se:

i. On the eve of trial
ii. If the defendant is obstructing things and causing problems
iii. If the defendant is somehow incompetent and incapable of defending him/herself.

d. sometimes judge will assign standby counsel to help the defendant navigate the procedural rules and, in rare circumstances at trial, to interject to help out the defendant.
   i. hybrid counsel - the idea that the lawyer and the defendant will act as co-counsel; courts have usually held this to be impermissible.

e. The Right To Effective Assistance of Counsel
   i. Two Prong Test:
      i. A defendant must prove that her counsel's performance was constitutionally deficient, by which it is meant that the errors were so serious that counsel was not functioning as the counsel guaranteed by the 6th Amendment.
         a. A convicted defendant must identify with precision the acts or omissions that she claims were constitutionally unreasonable.
         b. The court evaluating the claim must consider the issue from the lawyer's perspective at the time of the act or omission; highly deferential scrutiny.
         c. Strategic decisions are virtually unchallengable.

      2. A defendant must show that such errors prejudiced her.

   ii. Strickland v. Washington
      i. Facts: Habeas corpus case. These complaints stemmed from the sentencing phase of the trial. P planned and committed 3 groups of crimes, including murder, torture, etc. He confessed to the third of the criminal episodes after his accomplices were arrested. His lawyer actively pursued pretrial motions and discovery, but soon became despondent after his client kept doing stuff against his advice such as confessing to the first two criminal acts and waiving his right to a jury trial. The P said he did it because his was emotionally unstable. The lawyer neither sought out a character witness for the P nor psychological problems. He successfully moved to exclude P's criminal record. The lawyer argued against the death penalty, but the P was sentenced to death anyways. The P says that the lawyer should have done a better job at investigating character witnesses and should have gotten evidence on psychiatric problems.
      ii. Issue: Whether the attorney's assistance was ineffective.
      iii. Rule(s): 1. The Court has recognized that the right to counsel is the right to the effective assistance of counsel. 2. The benchmark for judging any claim of ineffectiveness must be whether the counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a result. Test: 1. the defendant must show that the counsel's performance was deficient (this requires showing that counsel made errors so serious that the counsel was not functioning as the "counsel" guaranteed the defendant by the 6th Amendment). 2. The defendant must show that the deficient performance prejudiced the defense (This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable). 3. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. 4. Prejudice: The defendant must show that there is a reasonable probability that, but for, counsel's unprofessional errors (poor performance), the result of the proceeding would have been different.
      iv. Reasoning: The defendant loses because the attorney's decision was strategic and there is not prejudice because the affidavits D wanted would not have outweighed D's murder of three people. The defendant is entitled to a fair trial. The proper standard for attorney performance is whether the performance fell below an objective standard of reasonableness. The counsel owes a duty of loyalty, to

advocate the defendant's cause, to consult with the defendant on important decisions, to keep defendant informed of important developments in the course of the prosecution, to bring to bear such skill and knowledge as will rend the trial a reliable adversarial testing process. Scrutiny must be deferential; there is a presumption that the lawyer acted reasonably. Also look at the totality of the circumstances. There is an additional duty to make a reasonable investigation. Prejudice can be from a conflict of interest, but the defendant must affirmatively prove prejudice. The defendant must also show adverse effect. Basically, the lawyer here made a strategic choice. The prongs don't have to be gone through in order; if one is found, the analysis can end. The burden is on the defendant and it is a high burden.

v. Dissent: The dissent thinks the test is too low. Doesn't like the hindsight provision. Would like only to have a performance prong; not a prejudice prong.

iii. In practice, courts are really looking for complete, gross incompetence.

iv. the same standard, ineffective assistance of counsel, also applies to retained lawyers, not just appointed lawyers.

v. Ineffective assistance of counsel claim are almost always brought has habeas corpus claims.

vi. When prejudice is presumed:

i. When counsel is totally absent

ii. If counsel is physically present but isn't actually doing anything

iii. When have a competent lawyer who is trying, but could not ever actually handle the trial; not enough (i.e circumstances like Powell v. Alabama)

vii. Conflict of interest cases – if your lawyer has a conflict of interest, it can be ineffective assistance of counsel.

i. Federal judges are supposed to inquire anytime there is joint representation

ii. Sometimes the right to conflict free representation can be waived.

iii. If the defendant's lawyer makes the conflict aware to the judge at trial and the judge does nothing about it, then it is presumed.

iv. If not, the lawyer has to prove

a. An actual conflict

b. And that the conflict affected his lawyer's performace

v. Not a very robust doctrine

f. Rules: (not entire list)

i. The court can permit a defendant to proceed pro se if it first determines that he has knowingly and intelligently waived his right to counsel.

ii. Whether the defendant gets to proceed pro se is a totality of the circumstances analysis – age, education, mental health, and experience in the criminal justice system.

iii. The court has discretion to reject the defendant's attempt to precede pro se if the objection is the defendant asks for it too (above)

iv. The defendant does not get to raise an ineffective assistance of counsel claim after he is convicted if the defendant represented himself.

v. If the lawyer makes a strategic decision, that cannot be second guessed unless it is completely ridiculous.

XV. Plea Bargaining

a. Three types of pleas

i. guilty

ii. not guilty

i. default mechanism

iii. no contest, nolo contondre

b. Appears in the U.S in the mid-1800s. why

i. jury trials became more complicated
ii. more lawyers
iii. more crimes -> more prosecutorial discretion
iv. criminal procedure rules

c. Defendant gets out of the plea bargain:
   i. limit to charges - particular charges to be dropped, or will promise not to indict on any additional offenses
   ii. prosecutor will agree to recommend to the judge a particular sentence
   iii. prosecutor agrees to keep his mouth shut
d. Players – prosecutor and the defense lawyer
   i. the judge can't put pressure on the parties to settle.
   ii. The judge is asked to enforce the deal.
      i. Usually the judge will abide by the deal, but he does not have to.
         a. The defendant can't back out of the deal if the judge doesn't abide by it
      ii. In rare circumstances the judge can prevent the prosecutor to dismiss certain charges
e. Benefits
   i. speeds up the process
   ii. makes system more accurate
   iii. helps the poor defendants by equalizing ability of counsel.
f. Problems with it
   i. provides an incentive for the innocent to plead guilty
   ii. strong incentive to chose plea bargaining over a trial
   iii. results in too much leniency or too little
g. Elements of a valid guilty plea
   i. voluntary
   ii. knowing
   iii. intelligent (doesn't necessarily have to be a good idea; just informed)
h. Brady v. United States
   i. Facts: D charged with kidnapping; at first he pled not guilty. Later after finding out that his codefendant was going to testify against him, he changed his plea to guilty. D claimed the statute coerced his plea. The death penalty part of that statute was invalidated after D pled guilty.
   ii. Issue: Whether every plea of guilty entered due to the invalidated part of the statute must be overturned.
   iii. Rule: The prosecutor cannot get a plea deal based on actual or threatened harm. 2. A prosecutor can promise/threaten the D with something to gain something and it is not unconstitutional.
   iv. Reasoning: The court says that D pled guilty because his codefendant turned on him, not because of the statute. Even if the statute caused D to plead guilty, it did not "coerce" him. A prosecutor can get a plea deal with a good incentive structure. The court says that D pled intelligently because he had competent counsel, he was not himself incompetent, and he seemed to make a strategic choice. Whether it was intelligent is judged at the time the decision is made. This case is significant because it is the first time that the court recognizes that these deals are not unconstitutional. The incentive structure is perfectly legitimate.
i. Page 1007, #3: J. Pollard unlawfully delivered national defense information to a foreign government and, as a consequence, was arrested on espionage charges. His wife, A, was arrested as an accessory. While the Ps were in jail, A became seriously ill. Notwithstanding her condition, the Government refused to enter into a plea agreement with her unless her husband also pled guilty. Ultimately, J agreed to plead guilty. In exchange the G promised not to charge him with additional crimes, entered into a plea agreement with A, and agreed to inform the judge

that J had provided information of considerable value to the G's damage assessment analysis. Coerced guilty plea?

i. Plea wiring – linking two people together and saying to one that they are going to "stick it" to the other person unless the first person pleads guilty. Is this so coercive as to make the plea involuntary? Nope. This is coercive, but for the most part the government can do whatever it wants. Prosecutors have enormous discretion. (Restrictions usually are physical harm, bribery, etc.)

j. Henderson v. Morgan

i. Facts: The D was classified as retarded. D accused of killing a woman who he had worked for as a laborer. They had argued and D had decided to run away; killed her while attempting to college his wages. D's lawyers tried to have charge reduced to manslaughter but prosecutor disagreed. He ended up pleading guilty to second degree murder. D's lawyer did not tell him that intent was an element of second degree murder.

ii. Issue: Whether the D had received real notice of the true nature of the charge he pled guilty to.

iii. Rule: The defendant must receive real notice of the true nature of the charge against him; needs to know elements in order for plea to be voluntary.

iv. Reasoning: The charge of second-degree murder was never formally made. He never acknowledged intent. The trial judge found as a fact that the element of intent was not explained to D. The court throws out the conviction because it decides that when he pled guilty he was waiving a lot of constitutional rights. After this case the judge will be clear about the charges and the results.

k. The judge does not have to advise the D of indirect consequences.

l. *United States v. Ruiz*: fast-track plea bargaining; whether the waiver of the right to receive from prosecutors exculpatory impeachment material? The Constitution does not require pre-guilty plea disclosure of impeachment information. The government does not have to disclose its entire case before the D pleads guilty. The D doesn't have to know the full picture.

i. The defense lawyer does not have to volunteer inculpatory evidence to the prosecutor during the plea negotiation.

m. "Factual Basis" For the Plea

i. North Carolina .v Alford

i. Facts: D indicted for 1st degree murder; his attorney questioned all but one of the witnesses D said would exculpate him. The witnesses were not giving any evidence of innocence, so D's lawyer recommended that D plead guilty to 2nd degree murder and he did. D took the stand and said that even though he was pleading guilty he was innocent.

ii. Issue: Whether a guilty plea can be accepted when it is accompanied by a statement of innocence?

iii. Rule: An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

iv. Reasoning: The court can accept the plea. A judge can't replace a D's plea with a valid defense. A trial court can impose a prison sentence in response to a no contest plea, and in effect this D was pleading no contest. Also, here the plea could be seen as intelligent because there was a lot of evidence that D committed the crime. D made a strategic choice because the state had a strong case for 1st degree murder; there was a factual basis. His pleas of innocence were over come by the government's factual basis, he was thus intelligent.

v. As a constitutional matter a plea to be voluntary, intelligent, and knowing. Not only are we concerned with whether or not something is constitutionally valid we are also concerned with the local rules and states have rules governing guilty plea. (Must assess both)

ii. Federal Rule CP 11 – more in depth; requires more than the Constitution
iii. Alfred plea – I plead guilty but I really didn't do it.

n. Breaking The Deal
   i. Santobello v. New York
      i. Facts: D was indicted on gambling charges and entered a plea of guilty; D made a deal with the prosecutor and pled to a lesser charge; the prosecutor agreed that he wouldn't recommend a sentence. During the sentencing a new prosecutor recommended the maximum sentence. Judge said he didn't care about DA's suggestion and impose maximum sentence.
      ii. Issue: Does it matter that the prosecutor reneged on his promise?
      iii. Rule: If the plea was induced by promises, the essence of those promises must in some way be made known. 2. When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise must be fulfilled.
      iv. Reasoning: It does matter. Remedies: specific performance or allow the defendant to withdraw from the plea. The breach of the promise was material. Why is the court deciding this court? It's unfair and it has an effect on someone's constitutional rights.
   ii. If the government makes a lot of extra promises, the government does not have to fulfill those that did not induce the defendant to plead guilty.
   iii. If the judge starts asking the Prosecutor factual questions or if the defendant starts lying, etc the prosecutor can speak up; always look at the bare faced words of the contract.
   iv. *Mabry v. Johnson*: Whether the acceptance of a prosecutor's 1st offer created a constitutional right to have that bargain specifically enforced. Rule – **It is only when consensual character of the plea is called into question that the validity of a guilty plea may be impaired.** Concerned with guilty pleas, not state contract law. Why no specific performance of 1st offer? Unlike the standard contract case, if the D and the prosecutor have a deal, the D is free to back out of the deal up until the moment he pleads guilty. So can't fairly hold government to the deal; so parties can change their minds until they show up and the judge accepts the plea. Exception: If the D relies on the prosecutor's offer to his detriment, then the prosecutor will be held to that plea deal.
   v. United States v. Brechner
      i. Facts: D offered to plead guilty to four counts of tax evasion in exchange for government not prosecuting his family or corporation. Trying to get his sentence lowered, D offered information about bribes he'd paid to a bank official. D and the prosecutor executed a cooperation agreement in exchange for a downward sentencing departure. However the agreement had a clause which said D had to be truthful. He ultimately was not truthful so the prosecutors did not suggest the downward sentence.
      ii. Issue: Whether D was entitled to the downward sentence.
      iii. Rule: A cooperating defendant's truthfulness about his own past conduct is highly relevant to the quality of his cooperation.
      iv. Reasoning: D was not entitled. He lied, so he is not entitled to the agreement. Although the lies were not significant, they constituted a breach of the deal. There is no doctrine of substantial performance.
   vi. Once someone has pled guilty it is very hard to appeal because they have waived their appellate rights. They have to file a habeas and show:
      i. That the procedure wasn't good, ;
      ii. Plea was not voluntary; somehow coerced; or
      iii. Ineffective assistance of counsel related to the plea

a. Doctrine: have to show that lawyer's performance was deficient and show prejudice
    i. But for those errors by the lawyer, there is a reasonable probability that you would have gone to trial rather than plead guilty; not have entered the deal

vii. If a defendant offers to plead guilty that is not admissible and if the defendant gets into plea negotiations with the DA what is said during those negotiations is also usually not admissible. (this should be gotten in writing)

XVI. The Trial Process

a. Duncan v. Louisiana

i. Facts: D convicted of a simple battery that was punishable by two years and a $300 fine. He was not allowed a jury trial because it was considered a petty crime. He actually just got 60 days in jail and fine of $150.

ii. Issue: Whether D had a right to a jury trial.

iii. Rule: The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the 14th Amendment, and must therefore be respected by the States.

iv. Reasoning: In the jury trial context, we are interested in the possibility of jail time. Long standing right to jury trial to prevent overzealous prosecution and because the jury is there to protect the accused and to convict/punish the wrong doers. To determine what a "petty crime" is the Court looks at the Federal system. Some misdemeanors are serious enough that they are no long "petty."

v. Dissent: Defer to the state to determine what is petty. This deference to the states has died in criminal procedure.

b. Rules

i. If the defendant faces more than six months incarceration, even if he does not actually get that sentence, he was a right to a jury trial.

ii. If the sentence is exactly six months, in most cases, there is no right to a jury trial.
    i. Exception: the guy faces six months and also other severe penalties.

iii. If a defendant is charged in a single proceeding with multiple counts of a petty offense, she is not entitled to a jury trial even if the aggregate maximum prison term exceeds six months.

iv. The jury decides issues of guilt; sentencing issues are decided by the judge.

v. You have no constitutional right to a bench trial before a judge, so under the Federal Rules, the defendant's decision to waive the jury trial by itself is not enough. They also need the approval of the prosecutor and sometimes, the approval of the court.
    i. Prosecutorial interest; if the prosecutor refuses to waive the right to a jury trial the defendant is still getting the constitutional rights entitled to him; he has lost nothing that is guaranteed to him.

vi. The court has decided that there is constitutional right to a 12 person jury in federal court, but not in the states.
    i. A majority of the members of the court believe that when the 6th Amendment was incorporated, all of the "baggage" was incorporated too; so in the 6th Amendment context the right to a jury is binding on the state but all that baggage is not necessarily binding on the states.

vii. In non-capital cases, states are free to reduce the size of the jury to as low as six.
    i. The court draws the line at 6 because it prohibits oppression by too little jury members, etc.
    ii. A jury of 5 is too small, because the error rate goes up.

viii. In federal court a jury has to be unanimous; but not in state courts.

i. Apodaca v. Oregon – 14th Amendment due process clause does not incorporate this feature of jury trials to the states. Powell disagrees and because it was a plurality and he concurred in judgment but not in the other's point that jury trials should work the same in federal and state courts.

ix. Splits in state court – 11-1, 10-2, an 9-3 are constitutional; 8-4 is not; has to be unanimous if it's a 6 member jury.
   i. Guiding principle – the S.C. has said so.

c. Jury Selection
   i. Three Stages
      i. Master list
         a. Compiled based on a number of sources like the voter's roles, public utilities, etc.
      ii. Venire
         a. Jury pool on any given day
         b. Ways to get out of jury service
            i. Disqualification
            ii. Exemptions
            iii. Excuses (infirmity, financial hardship, etc
   ii. Taylor v. Louisiana
      i. Facts: D moved to quash the jury because there were no women on it; claimed violation of Constitutional right. Only 10% of the women eligible for jury duty were on the "wheel." The Louisiana Constitution had an opt-in provision for women to be allowed in the jury pool.
      ii. Issue: Whether a jury must be drawn from a fair cross-section of society.
      iii. Rule: The right to an impartial jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial at the selection, venire, stage.
      iv. Reasoning: It must. The court says the D has standing because there is no rule that he must be a member of the group that is being excluded (this is not an equal protection case). Under the 6th Amendment, all defendants have standing to challenge a fair cross section violation. Juries themselves need not exactly mirror the population of the community. The fair-cross-section applies to the big social groups, race and gender. It must be distinct enough.
   iii. *Duren v. Missouri*: **In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.**
   iv. Voir Dire
      i. To give the lawyers a chance to question the potential juries.
      ii. The purpose, on paper, is to select an impartial jury.
         a. In the real world, the purpose is to selected a biased jury in favor of you and to start selling your case to them.
      iii. How much voir dire a lawyer gets depends on the jurisdiction; the judge has enormous discretion.
      iv. Ham v. South Carolina
         a. Facts: D was convicted for possession of pot; he had no criminal record and was active in the civil rights community; he claimed police or

someone framed him. D's lawyer asked the judge to ask questions during voir dire that would elicit info about racial bias; the judge declined.
    b. Issue: Should the judge have asked the jurors about their racial bias and used questions offered by D, including those regarding bias against people with a beard.
    c. Rule: Essential demands of fairness required the trial judge under the circumstances of that case to interrogate the venireman with respect to racial prejudice. 2. The trial judge is not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner.
    d. Reasoning: Because this is a case that could be potentially racially charged, a question on racial bias question should have been asked. D's rights were not violated when the judge did not ask about the beard; too speculative to point to prejudice. Goes back to judge's broad discretion; the racial bias question is the exception, not the rule.
  v. *Ristiano v. Ross*: totality of the circumstances test; voir dire as to racial prejudice is necessary in particular cases, those involving some aspect of racial issues, but not every one.
  vi. A defendant accused of an interracial capital crime is constitutionally entitled, upon request, to have prospective jurors informed of the victim's race and questioned on the matter of racial bias.
v. "For Cause" Challenges
  i. Questions asked:
    a. The prospect of challenging jurors for cause, and
    b. peremptorily
  ii. *United States v. Salamone*
    a. Facts: D was on trial for firearms violations; during voir dire the judge dismissed 6 potential jurors and alternates "for case" because they were members of the NRA; other jurors and alternates owned guns. D was convicted.
    b. Issue: Whether the court acted properly in disqualifying all potential jurors who were affiliated with the NRA.
    c. Rule: Need to show that the individual jurors were biased to dismiss them for cause.
    d. Reasoning: Exclusion is for individuals, not for groups. Government's position was illogical and extreme.
  iii. A juror must be excluded for cause in two circumstances:
    a. she is statutorily unqualified to serve or
    b. she is biased.
  iv. Whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Basically have to strike those would not vote for the death penalty in any circumstances for cause.
  v. For sentencing purposes, a prospective juror whose opposition to capital punishment would prevent her from imposing the death penalty regardless of the evidence may properly excluded for cause.
  vi. On voir dire, a trial court must, at the defendant's request, inquire into the venireperson's views on capital punishment and, pursuant to the 6th Amendment guarantee of an impartial jury, exclude for cause any prospective juror who would vote for the death penalty without regard to mitigating evidence presented at the capital sentencing hearing.
  vii. Challenges for cause are unlimited.

viii. Death penalty cases – exclude people who would not impose the death penalty and people who automatically would.

vi. Preemptory Challenges
  i. A preemptory challenge is the ability of a lawyer to get rid of a perspective juror that they don't like; there is no good reason.
  ii. There is no constitutional right to a preemptory challenge.
  iii. *Swing v. Alabama*: Prosecutor uses all of his preemptory challenges to remove all the black perspective jurors. Equal protection claim in this case? No; What about if there is a pattern? Yes, but its not very generous because, although there was a pattern in that jurisdiction, they didn't know why there was a pattern. Announced a minimal amount of equal protection; a right with no remedy.
  iv. *Batson v. Kentucky*
    a. Facts: D was indicted for burglary and receiving stolen goods; during voir dire the prosecution struck all the black people; the defense moved to discharge the jury on the basis that striking all the black jurors violated D's constitutional rights to a jury drawn from a fair cross section of the community.
    b. Issue: Whether the defendant has to show that the prosecution engaged in a continuous pattern of preemptively striking blacks.
    c. Rule: The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially to consider the State's case against a black defendant. Purposeful discrimination – 1. the defendant must show that he is a member of a cognizable racial group, and that the prosecutor has exercised preemptory challenges to remove from the venire members of the defendant's race. 2. the defendant is entitled to rely on the fact, as to which there can be no dispute, that preemptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." 3. the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude venireman from the jury on account of their race.
    d. Reasoning: No, that part of Swing is overruled. The fair cross section requirement applies to the jury pool, so doesn't apply here. There is still a presumption that the prosecution is behaving reasonably. Basically it's a totality of the circumstances test and once the defendant makes a prima facie showing the burden shifts to the state to come forward with a neutral explanation for challenging black jurors. The reason just has to be neutral, not plausible. For the final step, the defendant has the burden of persuasion; here basically the judge weighs.
    e. Concurrence: Wants to eliminate preemptory challenges entirely because anyone can concoct a neutral explanation. Doesn't eliminate racial discrimination; it disguises it and makes it harder to prove.
  v. Rule: **A criminal defendant may object to race-based preemptory challenges whether or not he and excluded jurors share the same race.**
  vi. *Purkett v. Elem*: The prosecutor struck a couple of potential jurors on ostensibly neutral grounds. **Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.**
    a. Extends the Batson rule to Gender/Sex.
  vii. Georgia v. McCollum: **Baton doctrine extended to apply to the defense; the defense cannot make racially discriminatory preemptory challenges**.

viii. Page 1118; Problem 9: During jury selection in a prosecution of a defendant accused of murdering a man whom he believed was having an affair with his estranged wife, the prosecutor asked each venireperson whether or not he or she agreed with the verdict in the Simpson murder trial. The prosecutor thereafter struck all members of the venire who indicated that the verdict in that case was fair. (4 African-Americans and two whites). Batson violation?
    a. There is no Batson violation, because there is a neutral reason.

ix. Challenges to jury:
    a. Jury wasn't impartial
    b. Jury was not selected from a fair cross section of the community
    c. Equal protection violation with respect to this particular jury

XVII. Right of Confrontation

a. Right to Be Confronted with Prosecution Witnesses

i. Maryland v. Craig

i. Facts: D indicted for sexual abuse of a child who had attended the school she operated. The state wanted the victim to testify by way of one-way closed circuit t.v. Victim questioned in a separate room and couldn't see D, but she was cross-examined by his lawyer. An expert for the State said this was a way to ensure the kid would not suffer serious emotional disturbance and would communicate effectively.

ii. Issue: Whether the Confrontation Clause of the 6th Amendment prohibits the use of one-way close circuit tv in lieu of actual fact-to-face confrontation.

iii. Rule: The right guaranteed by the Confrontation Clause includes not only a "personal examination," but also 1. insures that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility for perjury; 2. forces the witness to submit to cross-examination, and 3. permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility. There is a preference for face-to-face confrontation, but there will be an exception if there is a good public policy reason and reliability ensured.

iv. Reasoning: It does not. The CC does not guarantee an absolute right to a face-to-face meeting. The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The trial court did make individualized findings that the witnesses need protections so must decide whether exceptions to CC apply. Concerned that only reliable witnesses confront the defendant.

v. Dissent: Wants literal interpretation of the text. Doesn't care about public policy.

ii. Other rights

i. Public trial (not absolute, can be limited when necessary)

ii. Present during trial (but not the right to attend every single part, like in chamber meeting etc)
    a. Disorderly defendant?
        i. Cite the unruly defendant for contempt
        ii. Remove the defendant from the court room until he can conduct himself in a dignified fashion
        iii. The court can bind and gag the defendant
            1. Stun belt

iii. Right to Require The State to Produce Witnesses at Trial

i. old law - confrontation clause doesn't always necessitate live testimony, exceptions
    a. prior testimony from a dead witness
    b. *Ohio v. Roberts:* Witness not cross-examined at the preliminary trial but D had the opportunity to do so. Rule: **The transcript of the preliminary hearing where the defendant had the opportunity to cross-examine the witness is admissible.** Reasoning: moving toward reliability; if the court can find a hearsay exception, the testimony will be let in because they have an indicia of reliability.
    c. *White v. Illinois:* statements fell into one of the hearsay exceptions, so the statements were admitted even if the child did not appear in court; moving away from actual, sworn testimony
    d. *Idaho v. Wright:* similar to White, except in this case the kid was 2.5 years old; not sufficiently reliable
    e. Reliability becomes a substitute from cross-examination and confrontation.

ii. The confrontation clause says that you have a right to confront your accusers; doesn't say anything about allowing statements in if the hearsay will be reliable. The reliability cases would encourage prosecutors to rely on hearsay rather than live testimony.

iii. *Crawford v. Washington*
    a. Facts: D allegedly stabbed a man after he had tried to rape his wife. D's wife told a slightly different story than her husband regarding the fight that led to the stabbing. At trial, D's wife didn't testify because of marital privilege; the state invoked the statements against penal interest exception to introduce the recorded statement. D invoked confrontation clause. The trial court admitted the statement because it determined that it was trustworthy. The appeals reversed. The state supreme court reinstated the conviction because it bore guarantees of trustworthiness.
    b. Issue: Whether the Roberts test (hearsay statements or statements with guarantees of trustworthiness) strays too far from the original intent of the Confrontation Clause and should be different.
    c. Rule: Where testimonial evidence is at issue the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.
    d. Reasoning: yes. The CC clause was meant to stem ex parte examinations. It should not depend on the law of evidence. Some hearsay statements that are reliable may nevertheless violate the CC. Testimony is a solemn declaration or affirmation made for the purpose of establishing or proving some fact. Types of testimonial evidence – at minimum prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. The confrontation clause is a procedural guarantee. What is not testimonial – business records, medical records, etc. This case separates the link between hearsay and reliability. Practically it takes off the table statements made to the police, etc. The wife's statement was testimonial, she was unavailable, and there was no opportunity to cross-examine so admitting the written statement violates the confrontation clause.

iv. Right to Have a Co-Defendant's Confession Excluded
    i. The Bruton Problem – two or more defendants who are being tried at the same time; one has confessed, but the other has not, the prosecution wants to admit the confession; the problem is that the jury is going to associate the confession with

both, but the non-confessing defendant cannot attack the confession because the confessor will not testify.

ii. In most aspects, we are willing to assume that the jury will go ahead and follow the jury instruction, but not when there is a Bruton problem.

iii. Rule: **When there is a Bruton problem, a limiting instruction is not enough.**
   a. The purpose of the Bruton rule is to avoid spillover from defendant one to defendant two.

iv. *Cruz v. New York*
   a. Facts: After N's brother was killed the police interviewed him and he told them that a year earlier he had been visited by two friends, brothers, who confessed that they had killed a gas station attendant while attempting to rob it. One brother said that the other had killed the attendant. The police questioned B and he confessed to killing the defendant in order to prove that he did not kill N's brother. The confession was videotaped. The brothers were tried jointly and the prosecution introduced B's confession. The prosecution warned the jury not to use the confession against E, the other brother. The brothers were convicted and the appeals court affirmed.
   b. Issue: Whether the Confrontation Clause might sometimes require departure from the general rule that jury instructions suffice to exclude improper testimony.
   c. Rule: Where a non-testifying co-defendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Claus bars its admission at their joint trial, even if the defendant's own confession is admitted against him and even if the jury is instructed to ignore the co-defendant's confession.
   d. Reasoning: The rule is different for cases like this. There were two confessions, E's to N and B's to the police. There is no confrontation clause violation when they introduced the video against B. However, there is a violation when it is admitted against E, because B did not have the opportunity to cross-examine E since he did not testify. The videotape would prejudice E because he is claiming that he didn't confess and saying that N is making it up because N thinks E killed his brother. So the videotape would kill E's defense because it would collaborate his confession.

v. *Gray v. Maryland*
   a. Facts: One of the Ds confessed to beating a lady to death and implicated two others. One of the Ds died in the interim and two of the others were tried. The trial court allowed D's confession in but order the other D's name redacted. The name was redacted and in place they put "deleted." The prosecution nevertheless implied that the other D's name was in the confession.
   b. Issue: Whether a redaction which replaces a name with a word or symbol and clearly implies the existence of another person violates the Confrontation Clause.
   c. Rule: The Confrontation Clause is not violated by the admission of a non-testifying co-defendant's confession with a proper limited instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence. 2. Redactions that simply replace a name with an obvious black space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble

Bruton's unredacted statements that, in our view, the law must require the same result.

d. Reasoning: It does. This is a Bruton problem. A jury will often realize that the confession refers specifically to the defendant. The obvious deletion may well call the jurors' attention specially to the removed name. The obvious deletion functions the same way grammactically, because they are directly accusatory. Dependent on the kind of inference.
e. Dissent: Bruton was meant to be a narrow decision which just forbid facially incriminating confessions and here nothing is facially incriminating.

v. Other rules
  i. Prosecutors
    a. Bound by ethical rules
    b. Rule: If the witness provides perjured (false, misleading) evidence and the prosecutor knows it, the prosecutor has to correct it. Otherwise it is grounds for appeal
    c. Materiality – critical to the case
  ii. The right to compulsory process
    a. Rule: **Defendants have a right to compulsory process for calling witnesses in his or her favor.**
    b. The defendant is given access to the subpoena power.
    c. If the defendant is indigent, the court will pay the fees for the defendant.
    d. If the people have no personal knowledge or their testimony is cumulative, then the court can deny the indigent defendant funding for the subpoena.
    e. *Webb v. Texas*: the defendant's witness gets on the stand and the judge repeatedly warns the witness about perjury. Rule: **Neither the court nor the prosecutor cannot inhibit the witness' testimony by threatening perjury charges**. Basically can't shakedown the witness or threaten.
    f. A lawyer should not call a person to the witness stand who they know is going to invoke the 5th Amendment.
  iii. The right of the defendant to testify
    a. Rule: **There is a constitutional right to testify.**
    b. It is the flip-side of the 5th Amendment.
  iv. Right to 5th Amendment Privilege against self-incrimination
    a. not limited to defendants, it is also applicable to witnesses,
    b. not limited to criminal cases (can invoke in civil cases, in Congress, etc)
    c. if you start down the path of testifying on a subject and make a statement, you can't then refuse to testify about the subject; anything that is reasonably related to that subject is fair game;
    d. *Griffin v. California*: D invoked his 5th Amendment right; court allows him but tells the jury that they can take the defendant's failure to testify as indicative that to the truth of the other side. Rule: **There can be no negative comment on the fact that the defendant did not testify by the prosecutor or by the judge.**
    e. *Griffin* instructions:
      i. Whenever the defendant asks for the instruction saying draw no prejudice from my failure to testify, the judge has to grant it.
      ii. Can the judge give the instruction even if the defendant does not want it? Yes, it is perfectly acceptable for the Court to do it.
    f. Why would the defendant not testify?
      i. Both defendant and defense lawyer know the defendant is guilty; can't put him on if he is going to lie

ii. Would be a terrible witness
iii. Opens the door to other problems; impeachment evidence in the form of a prior criminal convictions, etc
iv. If the defendant testifies, he may open himself up to the admission of things that would otherwise be suppressed (i.e. statements taken in violation of the Miranda rights).

g. *Portondo v. Abegard(?)*: Defendant testifies last. The prosecutor tells the jury that they shouldn't believe him because the defendant was able to sculpt his testimony to suit the witness testimony. Is this type of statement okay? Yes, because the prosecutor is commenting on the D's credibility.
h. The 5th amendment protects the right to remain silent and the right not to have this used against you.

v. Opening statements
   a. The prosecutor goes first
   b. Defense lawyer goes second

vi. Closing statements
   a. Prosecutor goes first
   b. Defense goes next
   c. Prosecutor can rebut

vii. Before closing arguments are the jury instructions
   a. One of the main issues for appeal
   b. The p and d submit their proposed jury instructions to the judge and the judge will pick out the one she likes and read them to the jury.
   c. Sometimes judges are unwilling to deviate from the practices in their jurisdictions; so judges like to go with instructions that have been affirmed on appeal

viii. Jury retires
   a. In theory, the jury should not have spoken among themselves before adjourning to deliberate
   b. The jurors get to bring the charging document, the jury instructions, and maybe some of the evidence
   c. Jurors do not get to bring law books and bibles; only reversible if the jurors actually poured over the books, etc

ix. Hung/deadlocked jury?
   a. Jury tells judge
   b. *Allen* charge – The judge pushes them to consider whether they are appropriately considering reasonable doubt, etc
      i. Appeals on this issue are only successful if the judge tells the jurors that they *must* come to a decision

x. Verdict
   a. The losing side will ask for the jury to be polled; requires each jury to affirm how they voted.
   b. The jury can reach inconsistent results.
   c. If the jury votes guilty, the judge cannot issue a directed verdict of acquittal; but not vice versa

xi. Post-Conviction doubts of jurors
   a. There is no remedy
   b. Will not change the outcome

xii. Newly Discovered evidence
   a. That shows the D to be innocent?
      i. Varies depending on the state

ii. All states have a period of time where new evidence can be considered
iii. In Texas it is 30 days

b. *Herrera*: Death row; killing two people; claimed that there was new evidence and that the crime had been committed by someone else who was dead. Rule: **A claim of newly discovered evidence, by itself, is not grounds for a new trial.** (7 members of the court said that it would not violate the constitution even if he were actually innocent, because he had a fair trial, his only avenue is to seek clemency)
c. Sometimes the prosecutor will agree to a new trial.
d. Why? Courts value finality.

XVIII. Double Jeopardy

a. "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limp."
   i. as a textual matter, the double jeopardy clause prevents double trial for death penalty cases and cases involves corporal punishment
   ii. today it applies to all crimes
   iii. interpreting the rights of states to limit prosecution a second time
   iv. does not apply to civil cases
b. Scenarios: 1. Prohibits a second prosecution for the same offense following an acquittal. 2. It also prevents a second prosecution for the same offense after conviction. 3. It also forbids multiple punishments for the same offense. The double jeopardy forbids strategically motivated mistrials.
c. Elements/Analysis:
   i. Never get to invoke unless you have been placed in jeopardy the first time. Ask: Has jeopardy attached?
   ii. Looking for a prior proceeding; the facts
   iii. Do we have a same offense?
d. Rationale:
   i. need for finality
   ii. concern about oppressive prosecution
   iii. protect the defendant from too great of an ordeal, too much embarrassment, anxiety, etc
e. The state gets one bite of the apple.
f. Formal Acquittal
   i. Fong Foo v. United States
      i. Facts: Midway through the trial the judge acquitted the Ds. The judge did do because the D.A.'s improper conduct and the lack of credible witnesses.
      ii. Issue: Whether the D can be tried again for the same matter?
      iii. Rule: If you have an acquittal by either the jury or the judge and they were in error as to the law, can't retry again. Exception: bribery.
      iv. Reasoning: No. As a general matter, a judge can direct an acquittal but in this case it wasn't proper because it was for the jury to decide. The trial terminated after entry of final judgment.
      v. Dissent: would have let the guy be retried.
   ii. Rule: **The label of dismissal is unimportant, noting that a defendant is acquitted only when the ruling of the judge, whatever its label, actually represents a resolution (in the defendant's favor), correct or not, of some or all of the factual elements of the offense charged.**
   iii. Rule: **An acquittal means nothing more can be done.**
   iv. Rule: **If a defendant offered a plea of former conviction and the prosecutor showed that the conviction had been reversed and thus no longer existed, there would be no conviction to bar a second trial.**
      i. The successful appear erases the first conviction.

ii. So not starting a second time, starting from scratch.
iii. Why? Matter of policy, want to let appeals reverse for mistakes, etc.
iv. Exception: **Defendants can try to appeal that there was an error of law at the trial. If the court reverses for that reason, will have a new trial and no double jeopardy**
v. Exception: **If an appellate court overrules because of insufficiency of the evidence, there cannot be a second trial. It is the equivalent of an acquittal and there cannot be another trial if there is an acquittal.**

v. Rule: **If the defendant is charged with multiple crimes and the jury returns a verdict convicting him of the lesser charge, that is an implicit acquittal of the higher charger. There cannot be a retrial of the higher charge.**

vi. The Collateral Estoppel

i. Ashe v. Swenson

a. Facts: D and others accused of robbing 6 men who were playing poker. They stole one of their cars and fled. The police found D some distance away from where the car had been abandoned. They tried D twice. Once against K. D doesn't dispute the robbery. He disputes that he was there. But their evidence was weak so D got off. They tried D against R. This time, the prosecutor's case was stronger. He had fined tuned the case and dropped weaker witnesses. They had admitted that the first trial was a trial run. Test: 1. ultimate finding of fact, 2. the issue was actually litigated (and D was acquitted), 3. resulted in a final judgment, and 4. the final judgment involved the same parties as the second case.
b. Issue: Whether D should have been tried the second time on the same issue.
c. Rule: collateral estoppel – it means simply that when 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.
d. Reasoning: Nope. The court says that collateral estoppel is an ingredient to the 5th Amendment right against double jeopardy. The issue in the first case that was litigated was whether D had robbed the poker players, it was litigated to finality, and the same parties, D and the state, were involved in both parties. As a general matter, the D must be acquitted. This is a rare case because here we are clear about the ultimate issue of fact that decided the case. In most cases, juries only give general verdicts and do not say what issue decided it.

ii. In multiple prosecution cases, for different offenses arising out of the same transaction, the prosecution is usually not forbidden from going to round 2. It is only forbidden when collateral estoppel kicks in and that only happens when we are certain to what the issue was. If the jury can point to an issue other that the issue being litigated in the 2nd round, there is no collateral estoppel. Narrow.
iii. Being held not guilty in a criminal case, there is no collateral estoppel bar to being sued in a civil case.

g. The Mistrial Doctrine

i. Judges have broad discretion to grant mistrials.

ii. Downum v. United States

i. Facts: Because a key witness for 2 counts didn't show up (he never got the subpoena, the prosecution asks the judge to discharge the jury. The D asks the judge to just acquit him on the charges. The judge declares a mistrial and the jury is discharged. A couple of days later, he was tried and convicted.
ii. Issue: Whether D was in jeopardy twice for the same crim.

iii. Rule: Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches.
iv. Reasoning: He was. This is one of the rare cases in which a mistrial is going to cause the court to declare double jeopardy.
v. Dissent: not a big deal because the trial hadn't really started and the second trial happened two days after the first.

iii. Rule: **Jeopardy attaches when the jury has been empanelled and sworn but no witnesses had been called**.
i. If you wait until the first witness is sworn, the prosecutor could see the D's opening statement, get an outline of D's case and can trial to get a mistrial…
ii. Jeopardy does not attach before this.

iv. Rule: **In a bench trial, jeopardy attaches when the first witness is called.**

v. Rule: **A mistrial based on a hung jury has not double jeopardy consequences.**
i. Most mistrials are a result of hung juries.

vi. Illinois v. Somevill
i. Facts: D indicted for theft. At trial the jury was empanelled and the next day the prosecutor discovered that a key element of theft was not in the indictment. Therefore, even if D had been convicted, the Appeals court could have thrown it out. It was a jurisdictional defect, meaning even if you don't bring it up at trial you can appeal on it. The court grants the state a mistrial. They retry him and convict him.
ii. Issue: Is there a double jeopardy problem here?
iii. Rule: A judge can grant a mistrial and still have a retrial if there is manifest necessity
iv. Reasoning: No. manifest necessity – 1. an impartial verdict cannot be reached or 2. a verdict can be reached but would be overruled on appeal. The assumption is that the defendant would not have been acquitted in the first trial. What's the difference between this case and the last case? In this case, the court is saying that it isn't a big deal. The last case was an aberration. Normally, when the judge grants a mistrial we are not going to find double jeopardy to attach.

vii. Rule: **When the defendant asks for a mistrial then there is usually no double jeopardy bar to a trial because the defendant is cutting short the case and has no reason to complain about a second trial.**

viii. Rule: **What if the defendant was goaded into it because of prosecutorial misconduct? In rare, cases double jeopardy will bar a mistrial**.

ix. If the court finds a manifest necessity for the mistrial, there will not be a bar against a second prosecution.

x. Page 1332, #4: During the second day of trial, the judge received word that his mother-in-law had died suddenly. The trial judge and the presiding judge considered substituting judges or adjourning the trial, but decided that a mistrial was the best solution. The judge informed counsel of the decision, without asking for their "input or consent." Neither prosecutor nor defense counsel objected when the judge formally dismissed the jury. The defendant now asks for a jeopardy bar to a second trial. Result?
i. Has jeopardy attached? Yes How does the case end? In a mistrial. Was there manifest necessity? In this case, the court holds that there was no manifest necessity. The case could have been transferred to another judge.

h. Rules and principles:
i. The first step of analysis is has jeopardy attached.
ii. In general, appellate courts will find that most mistrials are the result of manifest necessity and therefore won't bar retrial.

iii. If it is clear that the prosecutor is seeking the mistrial just because of weakness in his case then there isn't manifest necessity and it should prevent a second trial.
iv. If it is the defendant who requests a mistrial, then normally there will be no double jeopardy bar to a retrial.
v. If the judge grants a mistrial on its own because of defense counsel's inappropriate conduct, then there will certainly be no double jeopardy problem.
vi. if there is a mistrial declared because there is a hung jury then that equals manifest necessity which means there can be retrials.
vii. if the case is disposed of in favor of the defendant because of a jury verdict, then the government cannot appeal and double jeopardy bars any retrial. It does not matter that the jury's decision was made on a misunderstanding of the law.
viii. if the jury votes to convict and the judge enters a directed verdict of acquittal, the government can appeal and if the government is successful, there is no retrial, the court just reinstates the verdict of guilty.
ix. if the defendant is convicted and successful challenges the conviction on appeal then in most cases the prosecution can retry the defendant.
    i. Exception: if the appellate decision is based on insufficiency of the evidence.
x. If the defendant gets his conviction thrown out by the appellate court and the defendant can be retried by the government there is no double jeopardy violation if the defendant gets a longer sentence in the second trial.
xi. Under the collateral estoppel doctrine, if the defendant is acquitted in the first trial, the prosecution cannot bring a second trial on a different count, if the issue of fact is the same as the one in the first trial.
xii. If the defendant is convicted of a capital offense at the first trial, he is sentenced to life and he appeals his conviction and it is thrown out; at the second, he cannot be given the death penalty because as a practical matter the court views it as the D having been acquitted of the death penalty at the first trial.

i. Double Jeopardy: The "Same Offense" Doctrine
    i. What does the "same offense" mean?
        i. Most of the same offense, second prosecution cases exist because the prosecutor was dissatisfied with the sentencing in the first case
        ii. Stuff like this may also happen because of bureaucratic errors
    ii. *Blockburger v. United States*
        i. Facts: D charged with selling narcotics twice to the same person without a stamped package. He is acquitted of counts 1 and 4. He was convicted of count 2 – sale of 10 grams "not in a stamped package" on day 1; count 3 – sale of 8 grams "not in stamped package" on day 2; count 5 sale not having been made in pursuant to a written order" on day 2.
        ii. Issue: Whether the 2nd and 3rd indictments are the same continuous event and that the sale in count 3 and 5 were the same offense because they were two different parts of the statute but they resulted in one transaction.
        iii. Rule: The applicable rule is that, 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 an additional fact which the other does not.
        iv. Reasoning: They were not because the legislature did not decide that this would all be one continuous event. The legislature contemplated that each drug sale would be a different event. As to the second argument regarding count 3 and five, they are not the same offense because they can be proved using different elements. Analysis: break down the elements and determine if the same elements are present in both counts. In this each one, 3 & 5, has an element that the other does not.

iii. Rule: **The lesser included offense is the same offense. After you have been tried on one you cannot be tried on the other.**

iv. Hypo: D is prosecuted for manslaughter in year 1 and convicted; in year 2, he is prosecuted for murder; is this okay?

i. Rule: **In a successive prosecution, if there is a conviction on the lesser included offense, the prosecutor cannot later bring a prosecution for the greater included offense because it is the same offense.**

ii. Exception: later information that prosecutor didn't know at the time.

iii. Nope, because for double jeopardy murder is the same offense as manslaughter.

iv. The idea is to force the prosecutor to bring the charges at the same time.

v. Hypos:

Count 1 A & B
Count 2 A
Count 3 B
Count 4 A + C

Which counts are the same for double jeopardy?

Answer – Count 1 is the same offense as count 2 and 3; count 2 is the same offense as count 4.

What if there is a count 5 – A & B & C? Which are lesser included offenses of count 5?

Answer – all of them.

vi. The "Same Offense: Doctrine Evolves

i. There are a lot of crimes and criminal charges are ever expanding; but not all similar crimes have similar elements; key is to figure out whether they are the same offense

ii. *Brown v. Ohio*

a. Facts: D stole a car and rode around in it for 9 days before he was caught in another county; he was charged and convicted of joyriding; after he got out of jail, the second country picked him up and charged him with theft and joyriding of the same car but on a different day. The prosecutor eventually dismissed the joyriding charge.

b. Issue: Whether auto theft and joyriding, a greater and lesser included offense, constitute the same offense under the Double jeopardy Clause.

c. Rule: If you are convicted of the lesser or the greater offense at trial one, you cannot be prosecuted for the lesser or greater offense at trial 2.

d. Reasoning: Yes, the sequence of what is tried is immaterial. Says can't divide by the different date. Look at the language of the statute to determine whether the offense is continuous or divided.

e. Dissent: Would divide by date. The defense doesn't characterize this as one incident. It is a lot of separate little incidents. Not quibbling with the lesser offense theory, but rather adopting the unit of prosecution theory.

iii. Rule of lenity: **If the statute is ambiguous it should be construed in favor of the defendant.**

a. Policy to not criminalize things the defendant couldn't have known was wrong.

iv. *Harris v. Oklahoma*

a. Facts: D's accomplice shot and killed a clerk in Tulsa, Oklahoma. The underlying crime was felony. D was convicted of felony murder and later tried and convicted of robbery with firearms.

b. Rule: When conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause.

c. Reasoning: can't prosecute for lesser offense after a conviction (acquittal) of the greater offense. Can't charge felony murder in the first trial and then in the second trial charge the felony itself.

v. *Missouri v. Hunter*
   a. Facts: D was convicted of robbery and armed criminal action in the same trial.
   b. Issue: Whether there is a double jeopardy violation?
   c. Rule: With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.
   d. Reasoning: Its not because its at the same trial; cumulative punishments pursuant to statutes are okay. The legislature's express purpose was to increase the punishment for people who use arms, and court says they should follow legislative intent. What the double jeopardy clause does in multiple punishment cases is act as a tool of statutory interpretation. Look to legislative intent.
   e. Dissent: says that the person is still being put in jeopardy twice for the same offense

vi. What is the Blockburger test accomplishing:
   a. It protects the defendant
      i. If the defendant has a unique crime that can only charged in one or two statutes and
      ii. When the prosecutor makes a strategic blunder

vii. The Double Jeopardy doctrine is not particularly robust.

vii. The "Dual Sovereignty" Exception to Everything You Have Learned So Far

i. *Bartkus v. Illinois*
   a. Facts: D tried in federal court for armed robbery and acquitted; D was also convicted for the same offense in state court and sentenced to life. There was some overlap between the state and federal investigations.
   b. Issue: Double Jeopardy violation?
   c. Rule: Successive state and federal prosecutions are not in violation of the 5th Amendment.
   d. Reasoning: Two different sovereigns. Permits each sovereign to go after the D. Because this case was decided after the application of Double Jeopardy to the states, it was tried under the due process clause. The states do not have to adopt this rule.
   e. Dissent: basically, the state and feds were so intertwined in their investigation that it practically constituted a federal prosecution.

ii. The federal government has policy not to re-prosecute the conduct underlying a state verdict.

iii. If it is clear that the second prosecution by the second sovereign is just a front so that the first sovereign can just do it all over again, there has been a violation of the double jeopardy clause.

iv. *Heath v. Alabama*: Mr. Heath lived with his wife in Alabama, so hired some guys from Georgia to kill his wife; instead of killing her in Alabama, they kill her in Georgia; D is prosecuted and convicted in Georgia (pleads guilty to avoid the death penalty) and then Alabama indicts him and they seek the penalty, refuse to plea bargain, and he gets the death penalty. Double Jeopardy problem? No, because Alabama is a separate sovereign from Georgia.

XIX. Criminal Sentencing

a. does the "cruel and unusual punishment" clause prohibit sentences that are disproportionate of the crime?

i. One theory - the just prohibits modes of punishment (i.e. caning)
ii. Theories that underlie punishment:
    i. Utilitarian – greatest good for the most number of people; deterrence
    ii. Retributive – idea known as "just deserts"; people get what they deserve

b. Ideas; punish to
    i. Rehabilitate
    ii. General deterrence – by punishing X we are deterring Y and Z
    iii. Specific deterrence; incapacitation – deter X
    iv. Vengeance

c. How does sentencing and punishment work in the U.S
    i. Early 20th: judges should have wide discretion to hand out what they think is the appropriate punishment
        i. Hard to appeal
    ii. Mid 20th: indeterminate sentencing; not necessarily the judge; purpose is largely equated to rehabilitation; the parole officer is in the best position to see this
    iii. Late 20th: rigid sentencing; more uniform sentencing; specific ranges, narrow, mandatory minimums, etc; stiffer sentences
        i. the purpose was to eliminate the arbitrariness of indeterminate sentencing
        ii. transferred discretion from the judge to the prosecutor
        iii. punishment now lengthier and more severe

d. Non-capital cases – what the judge will take into account when sentencing
    i. Prior criminal convictions
    ii. Future dangerousness
    iii. False testimony
    iv. Hate crime
    v. Victim-impact statement

e. whether someone invoked their right to remain silent at criminal trial should not be considered

f. in most jurisdictions, it is the judge that does that criminal sentencing; but some, including Harris County, use juries

g. What does the 8th Amendment protect?
    i. *Ewing v. California*: Committed a couple of felonies, his third was stealing golf clubs; three strikes you are out rule; sentenced 25 years to life; Disproportionate? Nope;
    ii. The 8th Amendment does not just forbid certain modes of punishment, it also prevents certain elements that are disproportional to a crime in theory, however, its hard to see anything violating the 8th Amendment.
    iii. *Williams v. New York*
        i. Facts: D was convicted and sentenced to life by the jury but the court sentenced him to death because of additional, pre-sentence investigation, etc. During sentencing the judge said he imposed death because of material facts not revealed to the jury. The D did not refute or challenge judge's contentions.
        ii. Issue: Whether D's due process confrontation clause rights were violated when the judge used extra evidence that was not used at trial to determine D's sentence.
        iii. Rule: The due process does not render a sentence void merely because a judge gets additional out-of-court information, which the D does not have an opportunity to cross examine and not proven beyond a reasonable doubt, to asset him in the exercise of this awesome power of imposing the death sentence.
        iv. Reasoning: Nope. Historically, sentencing judges have had wide discretion to use different evidence to determine punishment. The practical reasons are that a judge is not determining guilt, type and extent of the punishment, needs all relevant evidence, punishment should fit the individual, not the crime. The right to cross examine, etc, would make the process too limited and inefficient.

iv. In most capital cases, the jury does the sentencing and it is binding.
v. *United States v. Watts*: This is a pre-Guideline principle Rule: **A sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted.**

h. McMillan v. Pennsylvania
i. Facts: Mandatory Minimum Sentencing Act; felony plus firearm = 5 years; The Ds were convicted of felonies but the punishment was not imposed because the judge found the Act unconstitutional.
ii. Issue: Whether the Act is unconstitutional, because it isn't proved beyond a reasonable doubt and due process required more then the preponderance of the evidence.
iii. Rule: When dealing with a mandatory minimum a judge can find facts that will result in that mandatory minimum without having to prove reasonable doubt. (This rule is in flux but the facts are important).

i. Federal Sentencing Guidelines
i. . A grid
i. figure out seriousness of offense, offense level, on vertical
figure out criminal history, horizontal
a. meet in the middle
b. look to see if there is a mandatory minimum sentence; it trumps the guidelines
ii. Steps
a. Base level offense
b. Specific offense characteristics:
i. Value of the property
ii. How weapon is used
iii. Bodily injury to victim, etc
c. Criminal History Category
d. Sentencing Table
iii. There can be downward and upward movements; narrow circumstances; outside the "heartland"
a. Serious mitigating circumstances that can push the sentence downward
iv. Purpose of guidelines:
a. Rejecting the idea of rehabilitation
b. Create a determinate sentence
c. To create binding rules, that the judge can't ignore
v. *United States v. Dunnigan:* D charged with conspiracy to deal cocaine. Jury finds against and convicts her. Issue: Can the trial judge increase the offense level from 22 to 24, because the sentencing guidelines say can add two offense levels if someone perjures themselves? Holding: Yes.
vi. *Koon v. United States*:
a. Facts: Police noticed that D, who had been drinking lots of malt liquor, was speeding excessively. They stopped him and ordered him and his passengers out of the car. They basically beat him into submission. The officers were indicted and acquitted at the State; but in the Federal courts two were convicted; court departed from the sentencing guidelines by 8 points
b. Issue: Whether the downward departure was okay.
c. Rule: If it is specifically contemplated, it is easier to go downward; if it is not specifically contemplated, it is not easier to go downward.
d. Reasoning: The court said the departure taken for things in the guidelines were okay, but not for other factors. Victim misconduct is an encouraged basis for downward departure. Because the D.C. correctly concluded that

the starting point was unprovoked assault and this assault was provoked, the departure was okay. Even though fighting over particular departure, only fighting for a little things. Regarding the three point departure, the publicity one was ok, but the employment one was not; doesn't buy the recidivism argument because that was already taken into account; successive prosecutions, that's burdensome; grounds for downward departure.

e. Dissent: Breyer says recidivism, etc is already considered in the guidelines.

ii. *Apprendi v. New Jersey*: D fires shots into the home of an African American family; he pleads guilty to weapons violation; carries maximum sentence of up to 10 years; the judge finds that D also committed a hate crime and tacked on two years to his 10 year sentence. Issue: Whether the judge can increase a sentence above the maximum. Rule: **Increasing the sentence because of a factual violation violates the 6th Amendment right to trial**. Other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum has to be submitted to a jury and proven beyond a reasonable doubt. Reasoning: All elements have to be proven beyond a reasonable doubt.

iii. 2004 – the Supreme Court says that the Washington guidelines are unconstitutional; these look just like the federal guidelines.

iv. *United States v. Booker* – The jury convicts D of attempt to distribute 92 grams of fact, which gives him a guideline range of 210 to 260 grams; the judge finds that the amount of crack was 560g and sentences him to ~360g to life; Issue: Unconstitutional? Rule**: The Federal Sentencing Guidelines are unconstitutional, but not thrown out entirely, they are now advisory.** Federal judges should follow them but they don't have to. Why unconstitutional? Because the judge can increase the sentence; goes against trial by jury. Goal is to give more power to the jury to find the facts beyond a reasonable doubt.

v. Purpose is to say you have a 6th Amendment right at trial to have these facts found by jury.

vi. Basically we are back to indeterminate sentencing; more judge discretion; more plea bargaining; less jury trial

vii. This area of law is in flux

XX. Appeal

a. *Chapman v. California*: The prosecutor commented on the fact that the defendant didn't testify. Was this a violation of the constitution that necessitates reversal of error? No. Rule: **There may be some constitutional errors which in the setting of a particular care are so unimportant and insignificant that they may, consistent with the Constitution, be deemed harmless, not requiring automatic reversal of the conviction. 2. The State has to prove beyond a reasonable doubt that the error is harmless.** Reasoning: Harmless error means that the error is so minor that they don't have to worry about. The burden of proof to show that the error is minor is on the state. The government has to prove that there is no reasonable possibility that the error contributed to the guilty verdict.

b. The theoretical problem is that appellate courts are supposed to only make decisions of law, not factual findings.

c. What is harmless error?

i. automatic reversals

i. structural problems with the trial ("big picture problems"); hard to test

ii. potentially harmless errors

i. trial errors

ii. is the error actually harmless?

a. An error is harmless if it is harmless beyond a reasonable doubt; the jury did not rely

iii. Burden of proof on government

d. Do all constitutional violations result in reversal of the defendant's conviction?
e. Harmless Error
    i. *Arizona v. Fulminante*
        i. Facts: D called the police and told them his stepdaughter was missing; they found her body in the desert where she had been shot; D became a suspect and went to NJ where he was arrested for possession of a firearm by a felon. D became friends with another inmate who was an informant that tired to get info about what happened to D's stepdaughter. D confessed to S after S promised to protect him from the other prisoners. Of course, S ratted D out and later his wife claimed D had confessed to her as well after he had been released from prison. The prosecutor made a big deal about the confessions. The prosecution showed heavy reliance on the confession. The court let in both confessions despite D's motions to exclude.
        ii. Issue: Whether the confession was coerced and whether allowing an involuntary statement into trial is a harmless error.
        iii. Rule: An involuntary statement can be a harmless error.
        iv. Reasoning: Although it can be a harmless error, in this case the court said the error was not harmless. The dissent would not allow an involuntary statement to ever be a harmless error; would want it to be structural/automatic reversal. The majority says that harmless error does apply to coerced confessions. Was the error harmless? It was not a harmless error because both confessions were vital to the confession, the second confession to the informant's wife depended on the confession of the informant; The jury could have thought that the confessions reinforced each other, and the jurors could have thought that the wife had motion to lie. Rehnquist likes the harmless error analysis and he doesn't believe this confession was coerced, because if they have a really bad case, the harmless error analysis will take care of it. R says it was harmless error. Scalia's position is that the confession is coerced, do harmless error analysis, and that the error is harmless. Kennedy's position is that it was not coerced, do harmless error analysis, and the confession was not harmless.
    ii. Structural v. Trial error depends on who votes; gets the majority.
    iii. Rule: **An instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt of innocence**
    iv. The purpose of the appellate issues is whether the procedure has been complied with; procedure is over regulated; very little substance is focused on
    v. Most criminal appeals follow from a final judgment; exceptions
        i. Collateral orders
            a. If the judge decides that the police have violated Miranda or the search and seizure rules and the evidence should be suppressed, the government can usually appeal immediately
            b. There can be an appeal of a bail issue
    vi. most defendants plead guilty and they agree to waive their appellate rights
f. Plain error doctrine
    i. concerned about situations where the plaintiff never objects at trial
    ii. to show plain error is very difficult to prove
    iii. elements
        i. clear error
        ii. prejudice; affects your substantial rights
        iii. seriously affects the outcome of the trial
g. The standard of review
    i. de novo

i. questions of law
ii. mixed questions of law and fact
a. ex. whether their was probable cause
ii. abuse of discretion
i. evidentiary ruling

h. Appeal Process
i. Texas: trial → 1st District → Texas Court of Criminal Appeals → SOCTUS
ii. Federal: Fed district → 5th Circuit → SCOTUS
iii. To get into federal court, need federal jurisdiction, i.e. constitution (4th, 5th, 6th, 8th)

XXI. Habeas Corpus (you have the body)

a. Do not start with Habeas Corpus until conviction is final. Conviction final after direct appeals are over: applied for a writ of certiorari and it is denied or time to file one has expired.
b. The purpose of filing a petition for habeas corpus is that it is a legal mechanism to seek the release of someone who is being wrongfully held.
c. It is a civil lawsuit.
i. It is not a continuation of the appeals process.
ii. prisoner against the warden of the jail
d. guaranteed by the United States Constitution; Art. 6 Ch. 9; as a technical matter only congress can suspend the writ
i. common-law writ
e. There is a separate hc provided by statute §28 USC 2241
f. Elements
i. being held in custody
ii. in violation of the Constitution, the laws, or treaties of the U.S (basically Federal law)
g. Who gets to bring?
i. virtually ever state has its own HC procedures
i. the defendant has a state right to state hc under state law
ii. Federal defendants have a right to federal hc relief in federal court.
iii. State prisoners can file an hc petition in federal court alleging that their federal rights have been violated by the state of Texas during the state trial.
i. *Brown v. Allen*
ii. The S.C. had been backtracking from this
iii. As a historical matter, the federal habeas statute is adopted in 1867; federal defendants until the S.C. opens the door to state defendants; in the 1960s the court has a robust doctrine – not concerned with past procedures and as long as didn't evade any procedures/rules, will give a hearing; 1960s, even if didn't go through correct steps, even if raised issue before, etc, the court would consider it, the court was willing to look for the needle in the haystack; 1970s, the S.C. scales back dramatically.
iv. 1996 - Congress narrows the federal habeas statute.
h. Correct steps
i. after final conviction, can file a writ of habeas corpus; before get to go to federal court with hc have to exhaust all state avenues; have to work your way up again in federal court.
i. Retroactivity
i. If the Supreme Court (or state supreme court) creates a new criminal procedure rule or right, how should it be applied to other cases?
i. *Teague v. Lane*: D claimed that the prosecutor in his case had struck potential jurors in a racially or gender discriminatory manner; D was on the federal habeas circuit when *Batsun* was decided; New trial? Nope. Rule: **If your conviction is**

not yet final, direct review is not over for you get the benefit of the new rule the S.C. hands down.

ii. Rule: **Federal habeas courts should not overturn a conviction based on a new Supreme Court decision after the conviction has become final unless, 1. the S.C's new rule decriminalizes an entire area of conduct, or 2. it is a watershed rule of criminal procedure, a rule essential to the conduct of fundamental fairness.**

i. In reality, if the s.c. decides a new case and your conviction is final, you do not get the benefit of it, if your conviction is not final, you do.

j. Procedural Default – The "Cause and Prejudice" Test

i. Wainwright v. Sykes

i. Facts: D claims that Florida erred in admitting testimony in violation of his Miranda rights; exhausted all state remedies. He didn't raise the Miranda objection at trial.

ii. Issue: In what instances will an adequate and independent state ground bar consideration of otherwise cognizable federal issues on federal habeas review?

iii. Rule: Cause and Prejudice – if you missed it up at the state level and did not go correctly through the state level, D cannot bring a federal habeas petition, unless D can show good cause and can show prejudice.

iv. Reasoning: Old rule - even if you fail to comply with the state procedures, the federal court will hear the petition so long as the D didn't deliberately bypass the state court. Here D just made a mistake in not raising his Miranda, but under the new rule he cannot go to federal court because he should have objected at trial; he does not have cause. Drastically constricts the availability of habeas to state prisoners.

ii. What is good enough for cause?

i. Ineffective assistance of counsel

iii. Cause

i. Most mistakes by lawyers at trial or on appeal are not grounds for cause.

ii. Rule: If a defendant raises an issue at trial, but fails to raise it at the first level of appeal, the issue is defaulted for the next level of appeal, and the issue is defaulted for federal habeas unless the petitioner can meet the grueling standard of "cause" and "prejudice."

iv. What happens if you have exhausted some issues but not others?

i. Federal court will not deal with any part of petition that has not be exhausted in state courts.

v. Can only bring one federal habeas petition.

i. *Pickard*: **If you don't sufficiently explain the issue to state court, you cannot bring it in federal court.**

vi. Exception to Habeas: **Can never bring a 4th Amendment claim as part of habeas corpus.**

vii. What happens if you brought a claim in state court and the state court considered it and now you want to bring it in federal court?

i. Under 1996 statute, if there has been a state decision on the merits, the federal court cannot alter it unless it is an unreasonable application of clearly established federal law decided by the Supreme Court.

a. Incorrect is not good enough; it needs to be unreasonable and the precedent has to be clearly established Supreme Court precedent.