CJAII OUTLINE: Goldwasser

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   2. If not charge → D must be released

C. Preliminary Hearing – Hearing before judge to determine whether probable cause to support the charges
   1. This is the first adversarial proceeding
   2. Not every jurisdiction requires this. Some jurisdictions allow to go straight to GJ and some states allow to go straight to trial
   3. In jurisdictions to do require this, D can waive this right and proceed straight to GJ

D. Grand Jury Proceeding – GJ hears evidence and decides whether sufficient to initiate a trial
   1. GJ is required in all federal felony cases, and some states require it.
   2. GJ returns an “indictment” – written statements of essential facts that support the charges against D
   3. Information - In misdemeanor cases or where D waives right to GJ, prosecutor can submit an “information” to the judge instead of having a GJ proceeding
      a. Information contains same info as an indictment, but prosecutor and not the GJ draft it.

E. Arraignment – D enters his plea
   1. If plead not guilty → go to trial
   2. If plead not guilty or not contest, or enter plea bargain → judge must accept first

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II Relevant Constitutional Provisions
A. 5th A. → Primary purpose is to ensure fairness in the criminal process
   1. EP clause
   2. DP clause
   3. Priv. against self incrimination
   4. Double Jeopardy
   5. Compulsory Process

B. 6th A. → Primary purpose is to ensure accuracy of convictions
   1. Speedy trial
   2. Jury trial
   3. Confrontation
CASE SCREENING

I Prosecutorial Screening - The Charging Decision
   A. Type of Charge Prosecutor Brings is First Step in Case Screening
      1. Could charge w/ felony, misdemeanor, or not charge at all
   B. Decision to Not to Charge in the Face of What Appears to Be Criminal Conduct
      1. Prosecutor has total discretion to not charge, unless required by statute to charge with a crime.
      2. No judicially enforceable limits on that discretion (Attica – Prisoner’s couldn’t sue gov’t for not charging prison officials)
         a. Separation of powers prevents ct. from reviewing pros. non-charging decision
            i. Ct. in no better place to determine charging decision that prosecutors
            ii. Congress had delegated charging discretion to executive branch
         b. Private citizens don’t have standing in criminal cases unless they are the ones being prosecuted (long standing rule that ct. willing to deter from)
      3. Reasons not to charge
            i. No substantial federal interest (or no evid. of criminal condut)
            ii. D is subject to effective prosecution in another jurisdiction (e.g., state)
            iii. There is an adequate non-criminal alternative
         b. ABA Model Rules
            i. When prosecution MAY be declined
               a. Circumstances in which the crime took place
               b. Motive or pressures on the D
               c. Mitigating factors
            ii. When prosecution MUST be declined
               a. Charges not supported by probable cause
               b. Insufficient evidence to obtain a conviction
      C. Decision to Charge – Selection of what charges to bring
         1. Prosecutors entitled to broad discretion and a presumption of propriety in charging decision
            a. This is a STRONG presumption
            b. Same reasons as ct. won’t review decision not to bring charges (Attica)
         2. Judicial Limits
            a. Selective Prosecution – Violates EP for prosecutor to making charging decision based on membership in a protected class (e.g., race)
               i. But not all classes are protected (e.g., Hollywood stars)
               ii. How D must prove selective prosecution (2 prongs)
                  a. Prosecution had a discriminatory effect
                     i. Must show that others similarly situation were not prosecuted
                  b. Prosecution motivated by a discriminatory purpose
                     i. This can’t be inferred based on jury conviction rates alone
                        (McClesky – Jury sentencing more ppl. to death is not prosecutorial discriminatory purpose)
iii. Must show some evid. of both prongs b/f D entitled to discovery in his selective prosecution claim (Armstrong – D no entitled to discovery simply by showing prosecutor only charged black people for the crime b/c no evid. that white people commit the crime in an equal percentage)
   a. Prof – This is almost impossible standard to meet
   b. Rat – Don’t want to delay criminal cases; chill law enforcement by scrutinizing motives w/out proof; keep gov’t enforcement policies secret
b. Vindictive Prosecution – Violates DP for prosecutor to retaliate against D for exercising his constitutional/statutory rights
   i. How D must prove retaliatory prosecution (2 prongs)
      a. Vindictiveness presumed where D appeals a conviction and prosecutor re-charges D w/ more serious crime for the same conduct (Blacklege – Vindictiveness presumed where D appealed misdemeanor and prosecutor re-charged w/ felony)
         i. D does not need to prove actual vindictiveness
         ii. Rat – The mere appearance of vindictiveness (whether actual or not) may discourage D from exercising rights
   ii. Presumption can only be overcome if prosecutor didn’t have opportunity to bring the more serious charges to begin with
   iii. Point – Prosecutor needs to bring most serious charges at first opportunity, then can always reduce, but can’t bring lesser charges, then increase later b/c vindictiveness will be presumed

3. ABA Model Rules
   a. Only bring charges that prosecutor reasonably believes can be supported by the evid. at trial
   b. Only bring charges necessary to fairly reflect the gravity of the offense

II Judicial Screening
A. Preliminary Hearing – Judge determines if enough evidence to proceed to trial (or at least proceed to GJ) → probable cause standard (could reasonable person believe there is evidence of a crime)
   1. D entitled to counsel at the hearing b/c it is a “critical stage” (Coleman)
      a. Purpose of D’s counsel in preliminary hearing:
         i. Scrutinize the evid. prosecutor puts on and poke holes in it.
            a. Imp. b/c if pros. witness not available at trial, their preliminary hearing testimony can be used.
         ii. May or may not want to put on defense
            a. Pro – Judge may decide to kick the case or pros. may want to plea bargain b/c strong defense
            b. Con – Pros. gets a sneak peak at your trial strategy
   2. Remedy for lack of counsel at preliminary hearing – Harmless error review
      a. Presumption that case remanded for new preliminary hearing w/ counsel
      b. Pros. can overcome presumption by showing D wasn’t harmed (prejudiced) by not having counsel present
B. Requirement of a Preliminary Hearing
1. Preliminary hearings are not required by the constitution.
   a. Fed. – Must either have a preliminary hearing OR a GJ hearing (see below)
   b. State – Not required to have either a preliminary hearing or a GJ hearing. Can go straight to trial after prosecutor brings charges.

2. But where preliminary hearings are had, the above constitutional rules attach

III Grand Jury Screening

A. GJ Functions
   1. Sword – Investigates crimes by subpoenaing witnesses and documents
      a. Returns indictment if probable cause of crime
   2. Shield – Prosecutor has to seek an indictment from the GJ (this is the screening function) based on:
      a. Returns indictment if probable cause of crime

B. 5th A. Requires GJ Indictment for All Felony Charges
   1. Obtaining a GJ Indictment – Pros. must present evid. of probable cause for every element of the crime charged (reasonable jury could find crime)
      a. FRE do not apply to pros. presentation of the evid. (e.g., hearsay admitted)
      b. Pros. not required to present exculpatory evid. (Williams)
         i. But may want to present it anyway to test it out on the jury
      c. Justification for the relaxed rules
         i. Ct. has no supervisory authority over GJ (independent body)
         ii. GJ is an investigatory body, not adjudicatory
         iii. All evid. will be admitted at trial anyway
   2. Once Facial Valid Indictment is Issued
      a. Case proceeds to trial
         i. Even if prosecutor didn’t present ANY evidence to GJ, Ct. won’t inquire into GJ proceedings
      b. Conviction at trial holds harmless any errors in GJ proceedings
         i. One Exception: Discrimination in selecting members of the GJ

C. Major differences b/t GJ proceeding and preliminary proceeding
   1. 5th A. requires GJ indictment for felonies; Preliminary hearings are not required by the constit.
   2. D not entitled to counsel in GJ proceedings; D is entitled to counsel at preliminary hearing
   3. Conviction at trial holds harmless errors in GJ proceedings; Errors in preliminary hearing are reviewed for harmless error even if D was subsequently convicted
PRETRIAL RELEASE

I Interests At Stake
A. D’s Interests
1. Loss of liberty – This is the major interest protected by the Constitution
2. Impedes ability to prepare defense
3. Financial - Loss of job/opportunity to seek employment
4. Harms personal relationships
5. Increases pressure to plead guilty
   a. Provides incentive to plead guilty if prosecutor will let off w/ time serve
6. Increases conviction rate and length of sentence
B. Society’s Interests
1. In favor of release
   a. Opens up more jail space
2. Against release
   a. Decreases change of plea bargain, which leads to greater strain on judicial resources b/c more trials
   b. Danger that D might flee (traditional interest recognized)
   c. Danger that might commit more crimes while on bail (modern interest recognized)

II Governing Rules in Determining Bail
A. Bails Clause of 8th A. – “No excessive bails”
1. Always start with a presumption that D should be released w/out bail
   a. Right to freedom prohibits punishment before conviction
2. Presumption of release only overcome if risk that D will flee (then set bail)
   a. Where risk is shown that D will flee, Judge can’t set a bail amount w/out looking at D’s individual circumstances (Stack v. Boyle – Violation to set uniform bail for all D’s charged w/ same crime w/out looking at circumstances of each D)
   b. D’s individual circumstances to consider:
      i. Ties to community
      ii. Nature of crime charged with
      iii. Evidence in favor of conviction
      iv. Prior history of showing up in court
   v. D’s character
3. NOTE – This clause has not been incorporated to the states, but every state constitution has a similar provision
B. Federal Bail Reform Act of 1984 – Preventative Detention Introduced
1. Still start w/ presumption that D should be released
2. Presumption of release overcome by:
   a. Showing risk that D will flee OR (same as Stack v. Boyle)
   b. D poses danger to society while pending trial (this is new interest protected that wasn’t in effect during Stack v. Boyle)
      i. U.S v. Salerno – Preventative detention doesn’t violate consti. b/c:
a. Substantive DP: Purpose is not to impose punishment, but to prevent harm which is compelling gov’t interest and conditions make it the least restrictive
b. Procedural DP: Enough procedural safeguards in bail hearings to ensure accuracy of pretrial detention decision
c. Bails Clause: 8th A. doesn’t limit bail considerations only to questions of flight/integrity of trial

3. Even when presumption of release overcome, still must impose least restrictive conditions possible and can’t impose a financial condition so high that release will not be possible.
   a. Ex. of conditions: bail money, remain in custody of parents, maintain job
   b. Pretrial detention allowed only when no conditions will ensure D shows up from trial or doesn’t harm the public.

4. Outcome: Judge must consider same individual characteristics as outlined in Stack v. Boyle AND whether D posses danger to anybody in the community before decides to impose conditions on release or detain until trial
I Pretrial Motions
   A. Generally
      1. Lots of different kids of motions to you can make for admission/exclusion of evidence (e.g., motions to suppress, motions in limine)
         a. D’s testimony during suppression hearings not admissible at trial
      2. But motions rarely granted

   B. Motions for Change of Venue – change physical location of trial
      1. Interests at Stake
         a. D’s interests – 6th A. right to impartial jury
         b. Society interests – Local community has a right to judge the character of those who live within it (includes D’s character and character of the witnesses)
      2. Prosecutor’s Choice of Venue – Can bring charge in any state in which underlying conduct of the crime occurred (Rodriguez-Moreno – Pros. could bring gun charge in NJ, where kidnapping spanned many states, but gun only used in MD)
      3. D’s Change of Venue – Must show that ANY jury drawn from the community will be prejudiced against him
         a. 2 Prong test (Murphy)
            i. Setting of the trial is inherently prejudicial OR
               a. This is basically a circus atmosphere (McVeigh)
               b. Can show through lots of media coverage, public opinion surveys, etc.
            ii. Jury selection process permits an inference of actual prejudice
               a. Must show that jurors empanelled unable to lay aside their preconceived impressions and render a verdict based on the evidence presented in court.
               b. Note – Even if juror admits prejudice, they can still stand if say that they can ignore prejudice and just decide on the evidence.
         b. Point – VERY difficult to make proper showing to get venue changed
            i. But in can be done in some cases (McVeigh)

II Discovery
   A. Discovery by the Defense
      1. Limited b/c concern that will misuse witness information
      2. Discoverable information
         a. Preliminary Hearing – Cross examination of prosecution’s witnesses
         b. Fed. R. Crim. Pro. 16 – Various items of evidence
            i. D’s statements made to a gov’t agent in response to interrogation
            ii. D’s property in possession of the gov’t
            iii. Reports, examinations, and tests of D that are material to the case
         c. Due Process – Upon request, all material exculpatory evidence in the hands of the prosecutor (Brady v. MD)
            i. Definitions
a. Exculpatory = evidence favorable to the accused on the issue of
guilt or punishment
   i. Could point to D’s innocence OR
   ii. Could cast doubt on pros. evid/witnesses
b. Material = reasonable probability that had the evidence been
disclosed, the result of the proceeding would have been different
   (Baggley)
   i. Reasonable probability = probability sufficient to undermine
      confidence in the outcome
   ii. Consider the undisclosed evid. in context of the entire trial, not
      in isolation (Argurs – No violation where prosecutor didn’t
disclose victims violent crimes conviction b/c other evid.
      which was admitted indicated victim’s violent tendencies)
c. Upon request = Pros. has duty to turn over all “obviously
exculpatory” evidence, even absent a request (Argurs)
   i. Obviously exculpatory = same test that Baggley ct. adopts for
      materiality
   ii. Bagley + Argurs = D doesn’t have to request the info.
d. In the hands of the prosecutor = anybody in the entire criminal
justice system (all viewed as on entity)
   i. But other executive branch agencies (e.g., IRS) are not viewed
      as part of the same agency
   ii. Burden on D to prove prejudice from non-disclosure (i.e., constit.
      violation) → opposite of harmless error test where prejudice is
      presumed after constit. violation is show
d. Remedy for violation of Brady Rule → Mistrial or new sentencing (redo
   whichever procedure the evid. would have been admissible at)

3. Prosecutor is under no duty to preserve discoverable evidence, but DP
violation to destroy discoverable evidence in bad faith (Youngblood – No
DP violation by police failure to refrigerate clothing which caused destruction
of the DNA evid.)
a. Bad faith – Gov’t was on notice that D wanted the evid., but gov’t
   destroyed anyway
   i. D probably has to actually serve a request for the evid. BEFORE the
gov’t destroyed it to prove bad faith
b. Justification
   i. Can’t stop police from destroying evid. if they aren’t doing it on
      purpose
   ii. Exculpatory nature of the evid. can be inferred from bad faith, but
      nothing can be inferred from negligent destruction
c. Remedy for violation of Youngblood Rule → Jury can infer the fact
   which D claims the destroyed evid. proved

B. Discovery by the Prosecution
1. Limited b/c D’s 5th A. priv. against self incrimination
2. Discoverable information
   a. Constitution imposes NO discovery obligations on D
i. Only obligations are imposed by statutes
b. Constitution does limit the type of discovery that statutes can impose

3. Constitutional limits on statutorily mandated discovery obligations of D
   a. Disclosure of alibi defense (Williams – D had to tell prosecutor pretrial if he was going to present an alibi and who his alibi witnesses were)
      i. Doesn’t violation DP if **reciprocal discovery obligations** are imposed on prosecutor:
         a. Pros. has reciprocal discovery obligations (disclose his witnesses)
         b. Advances truth finding function of trial b/c gives pros. time to investigate alibis, which can be easily fabricated
      ii. Doesn’t violate D’s 5th A. against self incrimination b/c D would be required to disclose the information at trial anyway
         a. No compulsion, just **accelerated timing**
   b. Other defenses or evidence in D’s possession
      i. William’s rational likely to apply if following conditions are met:
         a. Reciprocal discovery obligations are imposed on prosecutor (b/c the complies w/ DP)
         b. D would have to introduce the evidence at trial anyway (b/c then no 5th A. “compulsion”)
      ii. Ct. has held DP violation where prosecutor doesn’t have reciprocal disclosure obligations
      iii. Likely 5th A. self incrimination violation if D isn’t planning on presenting the evid. at trial OR withdraws the defense before trial (b/c then the accelerated timing rationale disappears)

4. **Remedy** if D doesn’t comply w/ constitutionally permissible discovery obligations → exclusion of D’s evidence (see Compulsory process section of outline)

III Joinder & Severance

A. Joinder
   1. **Joinder by Prosecutor** - 2 Types Authorized by Fed. Rule Crim. Pro. 8
      a. **Joinder of offenses** – Indictment charges single D w/ multiple crimes
         i. Whenever the crimes are:
            a. of similar character; OR
            b. part of the same transaction; OR
            c. part of a common scheme
         ii. This is the easiest type of joinder
      b. **Joinder of D’s** – Indictment charges multiple D w/ same crime
         i. Whenever D’s engaged in same transactions that constituted the crime
         ii. This is the more difficult type of joinder

   a. Ct. can order joint trial of separate cases if prosecutor could have joined the counts and/or D’s in the indictment but chose not to.

B. **Severance** – Ct orders that crimes/D’s trial not be joined
   1. **Misjoinder** – The joinder decision by the prosecutor was not authorized by the rules (the above joinder conditions were not met)
a. Ct. MUST sever trial of multiple D’s or crimes if joint trial would prejudice the D or the gov’t
   i. This is the most common reason to sever, but must make proper showing

b. Types of prejudices that warrant severance
   i. Joinder of offenses
      a. A defense to one charge is inconsistent w/ the defense to another charge
         i. D must show that he is actually going to present both of the inconsistent offenses and they are mutually exclusive (in order for one defense to be true, the other defense must be false)
   b. Jury could use the evid. inappropriately (e.g., use evid. from one crime to convict for another; view evid. cumulatively; infer a gen’l criminal disposition on part of D)
      i. D must show that the evid. of one crime would not be admissible for the other crime if trials were severed
   ii. Joinder of D’s
      a. A specific constitutional right would be violated (e.g, violation of confrontation clause to admit a confession against 1 D that implicates the other D b/c other D can’t confront the confessor)
         i. D must show that limiting instruction or redaction would ineffective (McViegh)

C. Standard of Review and Remedy
   1. Abuse of discretion – decision to join/sever is given laxed review
      a. This is why ct.’s rarely sever – strong interest of judicial economy and it probably won’t get overturned
      b. If want severance MUST get it at trial, b/c ct’s decision not to sever probably won’t be reversed
   2. Remedy - Mistrial

IV Speedy Trial
A. 6th A. Grants D Right to a “Speedy Trial”
   1. Only attaches AFTER charges have been brought (6th A. doesn’t attach until after initiation of adversarial process)
      a. Pre-charging speedy trial violation arguments have to be brought under the DP clause (see below)
   2. How to prove violation – Balancing 4 factors (Barker v. Wingo)
      a. Length of delay – Triggering factor b/f ct will even look into other factors
         i. Must be long enough for delay to be “presumptively prejudicial”
         ii. Lower ct’s have set a rule of thumb where delay is presumptively prejudicial (1 year)
      b. Reasons for the delay – Good reasons may justify a longer delay; deliberate/bad faith delay cuts against how long delay will be tolerated
         i. Good reasons for delay – a missing witness
         ii. Neutral reasons (still count against, but not as bad) – negligence; too big a case load
         iii. Bad reasons – deliberate delay; bad faith
a. Bad faith alone is not enough, D must still show he suffered prejudice by the delay

c. **At what point D asserted the right**
   i. Time b/f D asserted speedy trial right cuts against his claim b/c ct. can infer from D’s failure to assert that he wasn’t being prejudiced
   ii. But failure to assert right is not an absolute bar b/c D might not have known about the right → need to argue D not aware of the indictment or ineffective assistance of counsel (*Doggett* – D out of the country and didn’t know about indictment)

d. **Prejudice – 3 types**
   i. Whether D has “cloud of suspicion” hanging over his head while awaiting trial – but this applies to everybody and isn’t given much weight
   ii. Pretrial incarnation – important factor, but not that important b/c even those released pre-trial still have their liberty impaired
   iii. Impairment to substantive defense (e.g., exculpatory evid. is destroyed) – this is the big one and probably must be shown to win
      a. Exception – If delay was very long and gov’t can’t show good faith → no showing of specific prejudice needed (*Doggett* – 6 yr. delay w/ no showing of good faith = speedy trial violation)

3. Justification for looking at so many factors and balancing
   a. Speedy trial is vague standard under the constitution
   b. D has an incentive to NOT enforce his speedy trial right b/c remedy (dismissal of indictment w/ prejudice) is so extreme
   c. Enforcing speedy trial is in the interest of society
   d. Remedy is so extreme, that ct. wants to be sure there has been a violation

B. **DP Right to Speedy Trial**
   1. This is what you must argue in **pre-charging context** b/c 6th right hasn’t attached yet
   2. How to prove violation – 2 elements
      a. **Actual and substantial prejudice** (prejudice will not be presumed) AND
         i. Ex. D’s alibi witness died during the delay
      b. **Delay in charging decision was for an impermissible purpose**
         i. Ex. Purpose of delay was to wait for evid. to be destroyed
   3. Prof. – This is almost impossible to prove. Most speedy trial protections come from the 6th A. and statute of limitations.

C. **Remedy for Violation**
   1. Dismissal of indictment with prejudice → D is set free, even after conviction
      a. **This is the only constitution that grants this extreme remedy**
   2. Justification – If D’s trial wasn’t speedy the first time, you can’t make it any more speedy by retrial
PLEA BARGAINING & GUILTY PLEAS

I Requirements For Valid Guilty Plea (whether bargained for or not)

A. Waiver of Right to Trial must be: Voluntary, Knowing, and Intelligent

1. Voluntary
   a. Plea is voluntary unless, judging by totality of circumstances, D was induced to plead by “threats, misrepresentations, or promises that are by their nature improper” (e.g., bribes) (Brady v. U.S.)
   i. Concern is likelihood that innocent person would plead guilty → safe to assume that innocent person wouldn’t plead guilty unless prosecutor employs unlawful means
      a. Ex. of okay conduct - simply guessing at what D did ≠ misrepresentation b/c D knows whether actual did it and can assess risks of prosecutor being able to prove
      b. Ex. of bad conduct – prosecutor threatening to prosecute family member if D doesn’t plead = threat b/c decreases D’s ability to assess risk prosecutor can prove charges
   b. Not involuntary simply b/c D induced by a lesser sentence (this makes plea bargaining okay)
   c. Not involuntary b/c plea waived gov’t’s Brady Duty to turn over exculpatory information (Ruiz)
      i. Brady Rule has no relevance to voluntariness of waiver of right to trial, only relevant to fairness to D once decide to go to trial

2. Knowing – Always lumped together w/ Intelligent

3. Intelligent – 3 Things D Must be Aware of When Pleading Guilty
   a. Constitutional rights he is waiving (e.g., right against self incrimination, right to jury trial, right to confront witnesses) (Boykin)
      i. Judges meet this standard by informing D of his rights b/f accepting guilty plea (required by Fed. R. Crim. Pro. 11)
   b. Real notice of the true nature of the charge against him (Henderson)
      i. Justification – allows D to evaluate his chances of winning or loosing
         a. This focuses on fairness goal of trials rather than accuracy goal
      ii. “Real notice” is presumed where D has competent counsel or where record shows that judge explained charge
         a. Competent counsel ends the knowing and intelligent inquiry unless there is proof on the record that counsel hadn’t explained the charge to D
      iii. “True nature” of the charge = critical elements = elements that prosecutor must prove
   c. Direct consequences of pleading guilty
      i. Direct consequence = length of sentence
      ii. Collateral consequence (which doesn’t have to be explained) = things that could happen to you after you plead → very fuzzy standard
         a. Ex. ineligibility for parole; higher penalties for other offenses; registering as a sex offender; potential deportation
B. Must be a “Factual Basis” for the Plea
   1. Factual basis = some evidence showing guilt
   2. D can plead guilty, even if claims innocence, so long as there is a factual basis for the plea (Alford)
      a. Justification
         i. D is recognizing that even if he is innocent, he is likely to be convicted at trial, so would rather take the benefit of guilty plea than conviction by jury
         ii. Provides judge w/ reason to believe that D isn’t really innocent

II Plea Bargaining
A. Permissive Inducements Prosecutor May Employ
   1. Prosecutor can promise lesser charges if D pleads guilty (Brady – Voluntariness test above)
   2. Prosecutor may threaten and seek more serious charges if D doesn’t accept plea to lower charges (Bordenkircher – Okay for prosecutor to threaten and seek higher charge w/ sentence of life imprisonment when D wouldn’t plead guilty to lesser charge w/ sentence of max 10 yrs.)
      a. Diff. from prosecutorial vindictiveness b/c:
         i. Vindictiveness involves a “unilateral punishment” for exercising a right; w/ plea bargaining D gets a benefit if doesn’t exercise the right
         ii. Vindictiveness D is not aware punishment will be imposed; plea bargaining D has notice of adverse consequences of not accepting
      b. If this rule were not in effect, plea bargaining would be an illegitimate activity that would occur “in the shadows” → ct. wants transparency
   3. State statute may grant lesser sentence if plead guilty, then that possible if proceed to trial
      a. Basically the same thing as Bordenkircher, except pressure is coming from legislature instead of prosecutor
      b. Limit – State may not have statute that allows D to escape possibility of death penalty by pleading, but face possibility of death penalty by going to trial (Jackson)
         i. Line is drawn at the death penalty possibility of death is “unique in its severity and irrevocability”

B. Broken Plea Bargains
   1. When prosecutor makes a promise, which induced the plea, prosecutor MUST fulfill the promise, unless there is valid reason (Santabello – Violation for prosecutor to not make the sentencing recommendation promised in the PB)
      a. No excuse that promise broken by negligence (e.g., prosecutor who made the deal didn’t tell prosecutor who was appearing at sentencing) or that trial judge claimed he wouldn’t have followed the recommendation even if the pros. had made it.
      b. But prosecutor only has to strictly comply, doesn’t have to go out of his way to make compliance enthusiastic (Benchimol – When judge asked prosecutor if he had not recommended a sentence, and prosecutor said “That’s accurate” = compliance w/ promise not to make sentencing rec.)
2. Valid reason’s that excuse prosecutor’s non-performance  
   a. **Withdrawn offers** - Prosecutor (or D) can back out of an accepted plea bargain anytime up to D actually pleading guilty before the judge  
      (Marbury – After D accepted plea for recommendation of concurrent sentences, no violation for prosecutor to withdraw and offer new plea for successive sentences)  
      i. Rationale  
         a. Can’t force D to plead guilty if he decides to change his mind, so wouldn’t be fair to force prosecutor to fulfill his side of the bargain  
         b. If prosecutor offers, then later withdraws, D is aware of that so his voluntariness and intelligence of accepting new plea isn’t effected  
      ii. Exception – If D relied on the promise to his detriment, the prosecutor must perform (Whitehorse – Deal that prosecutor wouldn’t charge if D told him where body was enforceable after D told him where body was)  
   b. **Breach by D** – If D breaches agreement, then prosecutor doesn’t have to fulfill his end (Brechner – Ok for prosecutor to repudiate promise not to charge in exchange for D’s cooperation where D lied to prosecutor then quickly admitted lie and told the truth)  
      i. Where D is not sure whether he has complied or not, he should seek court order b/c qualifies as breach if D misinterprets (Ricketts)  

3. Remedy for broken promise  
   a. Why remedy at all – Not an intelligent waiver of rights if D doesn’t know that he won’t get the benefit that he was promised  
   b. Remand to trial ct. to choose b/t:  
      i. Order specific performance by the prosecutor  
         a. Ct. must at least order this b/c can’t hold D to a PB that he didn’t intelligently enter  
      ii. Allow D to get out of the plea agreement and start over again  
         a. Ct. should allow this if finds that prosecutor’s conduct was outrageous
THE TRIAL PROCESS

I 6th A. Right to Trial By Impartial Jury

A. Attaches in ALL Criminal Cases, Other Than Petty Offenses
   1. Includes state cases b/c “fundamental right” and incorporated through 14th A.
   2. Rat – Jury provides check on power of gov’t/arbitrary prosecutions

3. Def. “Petty Offenses”
   a. Determined on an offense by offense basis (don’t look at offenses in the aggregate)
   b. Max imprisonment – If less than 6 mo. is the max possible penalty → presumptively petty, but D can still rebut by showing offense is serious
   c. Max fine – Less clear standard; S. Ct. says less than $5K = petty; Lower Ct.s routinely hold that less than $10K = petty

4. D can waive the right w/ prosecutor and ct. approval
   a. Rat for requiring approval – just because you have a right to do something (public trial) doesn’t mean that you also have a right to not do something (private trial)
      i. But some states allow unilateral waiver
   b. May want to waive where there are prejudicial issues or defense is technical

B. Jury Requirements

1. Number
   a. Federal = 12 man jury
   b. State = 12 men not necessary but must be at least 6 (Williams v. FL – 6 okay; Ballew v. GA – 5 too small)
      i. Justification – Jury has to be large enough to:
         a. “Promote group deliberation” AND
         b. “Provide a fair possibility for obtaining a representative cross-section of society”

2. Votes necessary to convict
   a. Federal = unanimous
   b. State = unanimous not necessary but must enough not to violate “proof beyond a reasonable doubt standard”
      i. LA & OR are only two states that allow non-unanimous verdicts
         a. OR: 10-2 verdict meets proof beyond reasonable doubt standard
         b. LA: 9-3 verdict meets proof beyond reasonable doubt standard
         c. J. Blackmun: If verdict were 7-5 (75%) that may be a proof beyond reasonable doubt violation
      d. If jury size reduced, probably need unanimity (Burch v. LA – Verdict of 5-1 is unconstitutional)
      ii. Justification - Group deliberation will still take place with non-unanimous verdicts b/c jury is going to continue deliberating as long as reasoned arguments are being made
         a. Prof – This is a very suspect statement, just as likely that jury will deliberate only as long as it needs to get the number of votes necessary
3. **Venire Representation** - Jury venire must represent a "fair cross section" of the community (*Taylor* – 6th A. violated by systematic exclusion of women from jury venire; state interests in women raising their babies not enough to justify)
   i. The cross section doesn’t need to wind up in the actual petit jury, just be represented in the jury pool.
   ii. D can assert violation even if he isn’t a member of the excluded class
      a. Has standing b/c excluded jury members won’t bring suit themselves
   iii. How to prove fair cross section violation – 3 elements:
      a. "**Distinctive group**" – 3 elements
         i. Defined by an immutable characteristic (e.g., gender, race);
         ii. Similarity in attitude or experience runs common through the group AND
            a. But must be more than just purely point of view
         iii. Group has common interests that should be represented
         iv. Ct’s split whether an age group = distinctive group
      b. **Is “under represented”** in jury venires
         i. Look at percentage of group in the community compared to percentage on jury venires over period of time → group needs to be large enough that you would expect representation
      c. Under representation **caused by “systematic exclusion”**
         i. Must show a law, rule, or practice that results in the exclusion (but intent to exclude is not required)
         d. Burden then shifts to gov’t to pass strict scrutiny test
            i. legit. state interest to exclude the group AND
            ii. method of exclusion is narrowly tailored
      iv. **Remedy** for violation – reversal and retrial w/ proper cross section

4. **Petit jury selection (Voir Dire)**
   a. Purpose – trying to get impartial jury
      i. Jurors can have prejudice so long as able to put them aside and decide case based on evid. in court
   b. **Challenges for cause** - unlimited
      i. May exclude on ground defined by statute or local rule AND
      ii. **May exclude under DP b/c unable to be “fair and impartial”**
         a. Impartiality can’t be presumed based on membership in a class, it must “unmistakably clear” as shown through direct answer to voir dire question (*Salamone* – Can’t presume prejudice from NRA membership)
            i. Exception – can presume prejudice from blood relation to parties or counsel
         b. No requirement that ptys be allowed to ask about every possible prejudice (*Ham* – No violation that judge didn’t allow question about prejudice against beards)
            i. Concern about interest of time and juror privacy
         c. DP requires ptys be allowed to ask jury about racial prejudice if:
i. Race is part of D’s case (Ham – D was civil rights activist claiming cops framed him)

ii. Capital crime where D and victim are diff. races (Turner)

iii. Noncapital interracial violent crime → decided on case by case basis → ct. suggest proper course would is to allow inquiry

c. **Preemptory challenges** – can strike for almost any reason, but number of strikes limited by local rule

i. **Can not strike to remove members as same racial group as D based solely on race b/c EP violation (Batson)**
   a. This is an EP violation, not a 6th A. fair cross section violation b/c jury only has to be impartial, not representative (Holland)

b. **Standard to prove Batson violation – 3 steps**
   i. **Prima facie case of racial discrimination** (but don’t have to show actual intent to discriminate) – 3 elements
   a. D is member of cognizable racial group and prosecutor used preemptory challenges to remove members of that racial group from the jury
      i. Prior to Batson, D could only show EP claim if continuous practice of exercising strikes based on race (Swain)
   b. D can rely on fact that preemptory challenges allow those to discriminate who have a mind discriminate
   c. D must show that totality of facts raise an inference that prosecutor stuck jurors based solely on their race
      i. Can show by pattern of prosecutor’s strikes, types of questions he asked, or any other conduct by pros.

ii. **Burden then shifts to prosecutor to offer race neutral reason for the strikes**
   a. The reason must only be facially neutral to satisfy prosecutor’s burden

iii. **Ct. decides by totality of circumstances where D met burden**
   a. If D has satisfied his burden, ct.’s decision turns on how credible the prosecutor’s facially neutral reason is
   b. Counts against credibility if facially neutral reason also means that other members of venire should have been excluded but weren’t (Miller-El)

c. Policy – Rehnquist dissent in Batson notices that race really is relevant to the idea of impartiality, but Prof. says the constitution just refuses to recognize its relevancy

d. **Post-Batson broadening of the rule**
   i. D’s membership in the excluded group is no longer required (Powers)
   a. D is vindicating the interests of the wrongly accused jurors b/c not likely they will assert claim themselves and hard for them to get standing
ii. Batson rule applies to ALL litigants (prosecutor, D, and civil)
   a. All litigants considered state actors when exercising their rights
   iii. Batson rules applies to other protected groups as well (e.g., gender)

ii. **Remedy for Batson violation** – 2 choices
   a. Bring struck juror back
   b. Start over again w/ new venire

5. **Jury deliberation/nullification**
   a. Def – Jury disregards judge instructions and comes to verdict for reasons other than the evidence in favor or guilt or innocence
   b. Old Rule – Jury has duty to find a verdict based on their own conscience
      i. Works as safeguard to prevent conviction when prosecutor brings charges that are not condemnable under the values of the community
   c. **Modern Rule** – Jury’s role is to accept the law as given to them and apply it to the facts
   d. **Remedy for nullification**
      i. Nullification BEFORE verdict is returned
         a. May excuse jurors for “just cause”
            i. Nullification is “just cause” b/c it’s a violation of jurors oath
         b. But MAY NOT excuse if there is ANY evidence that juror is holding out b/c not persuaded by the evidence (**Thomas** – Where other jury members claiming juror was engaging in nullification, ct. could not dismiss b/c juror made one statement that needed more evid. to convict)
      ii. Nullification AFTER verdict is returned
         a. Ct. may not inquire into the verdict.
   e. Remedy for improper exclusion of juror for nullification – New trial

6. **Jury Misconduct**
   a. 3 types
      i. Jury tampering – someone outside of the jury purposefully attempts to influence the deliberations
      ii. Non-purposeful external influences – jury accesses outside sources of information about the case
      iii. Jury nullification – see above
   b. Mistrial/retrial declared if D is prejudiced
      i. Prejudice presumed if jury influenced by external sources
         a. Pros. can still rebut by showing D was not harmed by the misconduct
      ii. Prejudice must be proven if improper influence came from within the jury (e.g., nullification)
   c. After verdict returned → jury can’t impeach. Misconduct must be shown by means other than juror’s testimony
II 6th A. Right to Confront Prosecution’s Witnesses
   A. Def. “Witness Against the Accused” – Threshold issue
   1. Live witnesses - Any prosecution witness testifying in court
      a. See below rules for exceptions
   2. Hearsay - Any testimonial, out of courts statements, offered by the
      prosecution (except D’s statements)
      a. If statement is non-testimonial then CC won’t bar it
      b. Testimonial = Primary purpose of the statement is to establish
         information potentially relevant to later prosecution (Davis v. WA)
         i. Look to formality of the conversation, declarant’s intent in making the
            statement, and police intent in eliciting the statement
         ii. Types of testimonial statements (from Crawford):
            a. Made to police under interrogation
            b. Made under oath
            c. Reasonable witness would believe statement would be available
               for use at later trial
         iii. Types of non-testimonial statements (Davis v. WA):
            a. Primary purpose of statement was to help police deal with an
               emergency
            c. Exception: Testimonial hearsay admitted if declarant is unavailable
               AND D had prior opportunity to cross (Crawford – Pros. couldn’t play
               D’s wife statement to police where she refused to testify b/c D didn’t have
               prior opportunity to cross her)
               i. Justification: Only where D had opportunity to cross, main goal of CC
                  clause—reliability—is achieved
   3. Co-D – Co-D’s statements can’t be admitted at trial b/c D can’t cross
      examine co-D. This is so even if a limiting instruction is given (Bruton)
      a. Interlocking confessions – Bruton applies even if D’s own confession is
         admitted, which corroborated Co-D’s confession (Cruz – Co-D’s
         confession that committed crime w/ D not admissible even though D’s
         own confession got it)
      b. Redaction – Bruton applies even if D’s name is redacted from Co-D’s
         statement, but you can still tell from the contexts of Co-D’s statement that
         he is referring to D (Gray)
         i. Rat – Statement more like an unredacted statement than one in which
            D isn’t even mentioned b/c jury can immediately make the inference
      c. Evidentiary linkage – Bruton rule DOES NOT apply if D’s name is
         redacted from Co-D’s statement and it doesn’t become obvious that
         statement is referring to D until linked w/ other evid. at trial (Richardson)
   B. Confrontation Clause Grants 2 Protections (Coy v. Iowa)
      1. Face to face - D be allowed to be in same room as pros. witnesses as he
         testifies
      2. Opportunity to cross exam Pros. witness
C. Face to face requirement is not absolute
   1. Face to face NOT required where: A procedure which prevents face to face confrontation is necessary to further an impt. state interest AND the procedure still ensures the reliability of the evid. (MD v. Craig)
      a. Example - One-way closed circuit testimony of child victim where evid. presented that particular child’s well being harmed by face to face testimony (MD v. Craig)
         i. Has all assurances of reliability, other than face to face
         ii. Child’s well being is a strong state interest AND ct. made particular findings that child’s well being in jeopardy by face to face confrontation
   2. Justification of the exception
      a. Purpose of face to face requirement is to ensure reliability, which can still be done if some or all of the following assurances are still present:
         i. Witness subject to oath
         ii. Witness subject to cross examination
         iii. Jury can observe demeanor
         iv. Witness in D’s presence – harder to lie to a person’s face
      b. If face to face were absolute, no hearsay evid. would ever be allowed, but hearsay evid. is allowed b/c other indicia of reliability
         i. Craig dissent – hearsay is distinguishable b/c out of court statements, if statements are being made in court D should be able to confront

D. Opportunity to Cross is not Absolute
   1. Opportunity to cross NOT required where: Interest protected by restricting cross examine outweighs CC right (Davis v. AK)
      a. Example - Interest of state in having juvenile records sealed DID NOT outweighs D’s interest in cross examining the witnesses about juvenile record (Davis v. AK)
      b. NOTE – Opportunity to cross is the most fundamental assurance of reliability. Countervailing interest must be REALLY strong to outweigh

III 6th A. Compulsory Process Right to For Obtaining Witnesses in D’s Favor
A. Any D can Compel the Attendance of ANY Witness or Documents
   1. This right is interpreted VERY broad (Burr – Can even compel the attendance of the President)
   2. Includes right to cross examine any witness, so long as that witnesses testimony is admissible (Chambers – Violation for judge to refuse D’s request to call an adverse witness for purposes of cross exam, where hearsay exception existed for admissibility of witnesses testimony)
   3. Purpose is to ensure accurate verdict by presentation of all the evidence

B. Limits – When D’s witnesses can be excluded
   1. If the testimony is irrelevant or inadmissible on its face (Burr)
   2. As a sanction against D who, willfully and with desire to obtain tactical advantage, didn’t acknowledge existence of the witness in pre-trial discovery requests
      a. Rat.
i. Deliberate discovery violation IMPEDES truth finding function of trial (purpose of 6th A.) so impt. to provide severe disincentive
ii. Veracity of an 11th hr. witness is more questionable → weights against purpose of CP clause
iii. Prosecutor doesn’t have adequate time to prepare cross of 11th hr. witness → weighs against purpose of CP clause

IV 5th Right To NOT Testify
A. D Has 5th A. Right to Silence
B. Right to Silence Violated by Prosecutor or Judge Commenting on D’s Silence at Trial (Griffin)
   1. Rat.
      a. Commenting on D’s silence is a penalty imposed for exercising the right
      b. Inference of guilt from silence not so strong to allow pros./judge to solidify in juries minds (other reasons why D might not want to testify)
   2. Extensions of the “no negative inference” rule from Griffing
      a. Prosecutor can’t comment on D’s silence post-Miranda warnings given
      b. Judge can’t draw negative inference during sentencing from D’s silence
      c. If either pty asks, judge must give a “no negative inference” instruction to the jury
         i. Even if D objects, judge must give it as prosecutor’s request
SENTENCING

I  2 Schemes for Sentencing
   A. Determinate – Statute mandates specific sentence for the crime
      1. Model used in colonial times
   B. Indeterminate – Statute mandates a maximum sentence for the crime, with
discretion for judge to set lower sentence based on facts of the case
      1. Model used today
      2. Advantages – Allows judge to rely on his knowledge and experience;
         acknowledges that no 2 D’s or crimes are identical so shouldn’t be punished
         the same

II Constitutional Rules on Indeterminate Sentencing
   A. Gen’l Rule: Judges may consider ALL evid. during sentencing
      1. This includes
         a. Evid. that was inadmiss. to jury and D didn’t have an opportunity to
            scrutinize (Williams)
         b. Evid. of crimes for which D was charged, but acquitted (McMillian)
      2. Facts that judge considers that weren’t submitted to jury are called
         “sentencing factors”
      3. Rat – As long as the fact isn’t an element, DP doesn’t require the fact to be
         proved to jury beyond a reasonable doubt (judge just has to be convinced by a
         preponderance of the evid.)
   B. Const. Limits on Sentencing Factors
      1. Judges must put the evid. they considered on the record (Gardner – Same
         facts as McMillian but judges sentence violated DP b/c it was a capital case
         and judge didn’t put the facts he considered on the record)
         a. Ct. will scrutinize judge’s consideration of evid. beyond what jury got
            more closely when judge imposes the death penalty, b/c DP concerns
            greater in capital cases
      2. Any fact that increases the penalty for a crime beyond max. authorized
         by the stat. under which jury convicted/D plead guilty to must be
         submitted to the jury
         a. Max sentence authorized = sentence authorized under the stat. based
            solely on the facts jury found or D admitted
         b. Cases
            i. Apprendi – NJ statute that allowed sentences for underlying crimes to
               be increased if judge determines underlying crime was a “hate crime”
               violates 6th A. jury trial guarantee
            ii. Blakely – WA statute that set a “standard range” but allowed judge to
                increase sentence w/in a higher range if found that D acted w/
                deliberate cruelty violates 6th A. right to jury
      c. Rat.
         i. Increased punishment falls under jury province
         ii. Can’t allow state to avoid its burden of proof by redefining an element
             as a sentencing factor and allowing to prove to judge by
             preponderance

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d. Exception – Fact of prior convictions can be determined by the jury by a
preponderance of the evidence (Almendarez-Torres)

3. Judges sentencing decision is reviewed for “reasonableness”
   a. Sentencing guidelines are not binding (to save from violating 6th A.), but
      advisory
      i. Example
            recommend range of 10-12 yrs. for facts proved during trial; but
            15-20 yrs. for facts shown at sentencing
         b. Outcome: If guidelines were binding it would be unconstit. for
            judge to sentence higher than 12 yrs. b/c that is max authorized by
            jury verdict. But b/c guidelines “advisory” judge can sentence all
            the way up to life based own fact finding
      b. Presumption of reasonableness if sentence falls w/in the guidelines.
         i. Some ct.s hold that departures from guidelines are “unreasonable”

C. Fact Finding Still Allowed by Judge
   1. Mitigating facts – downward departure
   2. Statute only sets a mandatory minimum
   3. Statute sets a sentencing range (mandatory min. and max) and judge finds
      facts that stay w/in that range
   4. Statute allows increase from max based on prior conviction

III Judicial Vindictiveness
   A. Violates DP for Judge to Retaliate Against D for Exercising Right to Appeal
      by Imposing Higher Sentences After Re-Trial
      1. Same as prosecutorial vindictiveness
   B. How to Prove Judicial Vindictiveness
      1. D was convicted, appealed, case remanded, and D convicted again
      2. Vindictiveness presumed if higher sentence imposed after 2d conviction
         (Pearce Presumption)
         a. Rat – Mere appearance of vindictiveness (whether actual or not) may
            discourage D from exercising right to appeal
      3. Judge may rebut presumption of vindictiveness by showing:
         a. Any objective criteria that increased 2d sentence OR
         b. Jury is the one who imposed the increased sentence
            i. Rat – Ct. won’t presume that a jury can get personally involved in the
               case
         c. Different judges imposed first and second sentence
         d. One of the trials involved a plea
DOUBLE JEAPORDY

I 5th A. Prohibits D From Being “Put in Jeopardy” Twice For The “Same Offense”
   A. Interest of DJ Clause
      1. Finality concern
      2. Ordeal of being put through more than one trial
      3. Increased risk to the innocent if gov’t can keep bring charges → more likely they’ll eventually get a conviction even if D isn’t guilty
   B. Protections of DJ Clause/Context They Arise
      1. Multiple punishments for same offense
         a. D is charged with multiple crimes for same conduct
            i. Ex. D robs bank. Charged w/ robbery, trespassing, unlawful possession of firearm, etc
         b. D is charged w/ same crime multiple times for same conduct
            i. Ex. D robs 5 different people nearly simultaneously. Charged w/ 5 counts of robbery
      2. Successive trials for the same offense
         a. Ex. Re-trial for same crime after first trial ended in an acquittal, or mistrial
      3. These protections apply even if D isn’t “punished” more than once → the protection is whether put in jeopardy, not whether punishment actually occurs

II What Constitutes “Same Offense”
   A. Context – D is being charged under multiple statutes, or multiple counts under one statute
   B. 2 Questions must be answered
      1. Definitional – Do 2 different statutes define the “same offense”? 
         a. Context – Being charged under multiple statutes for same conduct
         b. Blockburger Test – Each offense must require proof of a fact (an element) that the other doesn’t.
            i. Each offense must have an element that the other does not have
            ii. Look to specific facts of the case rather than elements in the abstract
            iii. Ex. D selling same bag of drugs = count 1 for selling drugs not in a stamped package; count 2 for selling drugs w/out prescription (Blockburger facts)
      2. Unit of Prosecution – When does one offense end and another begin?
         a. Context – Being charged w/ multiple counts under same statute
         b. Blockburger test – Must be an end point to first offense and a beginning point to the second offense
            i. Ex. - D selling 2 bags of drugs on 2 diff. days to same person = sale on first day had an end point and sale on second day had beginning point (Blockburger facts)
            ii. Rule of lenity – If unclear whether congress meant to punish conduct multiple times, then can’t charge more than once
               a. Look to statutory purpose – Did statute mean to punish each indiv. act, or just the principle behind the act (Sewing on Sunday is only punishable once, not for each indiv. stitch sewn)
b. End point and beginning point to the transactions can’t be arbitrary
   (Snow – Cohabitating is only once continuous crime)

C. Outcome – **Check w/ Prof. to see if this is right**
   1. If definitional sameness not shown → no DJ violation.
   2. If definitional sameness is shown → treat as multiple counts for same crime
      and apply unit of prosecution analysis. If unit of prosecution sameness is also shown:
      a. Single trial – 2 possibilities
         i. D can be tried for same offenses, but can only be punished for one of
            them UNLESS
         ii. If legislature provides CLEAR intent to punish conduct cumulatively
             under multiple statutes then Blockbuster sameness test doesn’t bar
             prosecution (Hunter – State could charge D for armed criminal action
             and the underlying felony b/c legislature authorized consecutive
             punishment)
            a. Point – Blockburger is only a presumption that legislature intended
               to punish only once for specific conduct. But that presumption can
               be rebutted
            b. If successive trials – Second prosecution is DJ barred (Brown – D
               convicted of auto theft in one city couldn’t be tried for joyriding in other
               city b/c crimes were the “same” under Blockburger)
               i. In addition to multiple punishment (which is only protection w/ one
                  trial) DJ also protects against successive prosecution, which protects
                  additional interest of finality.

III Former Acquittal
A. Once D is Acquitted, He Can’t be Retried For Same Offense (Fong Foo)
   1. Acquittal = Judge enters judgment in D’s favor on one or more of the factual
      elements (Scott)
      a. It doesn’t matter whether the judgment was called an “acquittal” or not
      b. This allows re-trial if judge acquits D for an arbitrary reason not relating
         to the merits of the case (what Harlan was arguing for in his Fong Foo
         Concurrence)
   2. Rule attaches once jury is sworn (when first witness called in bench trial)
B. Once D is Acquitted, He Can’t be Tried for a Separate Offense that Involves
   the Same Factual Issue as the First Trial
   1. Look to all evid. of the first trial to determine if jury resolved the issue of the
      2d trial in D’s favor (Ashe – Gen’l verdict in D’s favor on robbery of V₁
      prevented charge for robbery of V₂ b/c ct. determined from the testimony that
      jury must have found that D wasn’t present at the robbery scene)
      a. Ct. doesn’t have to be certain (jury could have acquitted b/c of
         nullification)
   2. Justification
      a. Interest in finality and not making D run the gauntlet twice
      b. Have to use collateral estoppel b/c technically this passes Blockburger test
         b/c offense in first trial isn’t the same as offense in 2d trial
3. Limit – The issue in the first trial must be a single issue, so that it is clear what jury had to have found when they returned the verdict

C. Former Convictions that Act as Former Acquittals
   1. If D appeals conviction and appellate court holds that evid. insufficient as matter of law to support conviction → D can’t be re-tried on the charge
   2. If D charged w/ crime and its lesser included offense, but jury only convicts for lesser included offense → Acts as acquittal on greater offense and D can’t be re-tried for that offense in another trial (or on remand if case is appealed)

IV Mistrial
   A. A Mistrial Bars a Re-Trial for the Same Offense in 2 Situations:
      1. Reason for the mistrial was something that could be manipulated by the prosecutor (Downnum – DJ bars re-trial where pros. requested mistrial b/c after jury sworn he realized his witnesses weren’t ready)
         a. Don’t have to prove actual manipulation by the prosecutor, only that prosecutor could have manipulated the error
         b. But the error must occur AFTER jury has been empanelled (Sommerville – Mistrial for pros. error in drafting indictment doesn’t bar re-trial)
         c. Justification – Concern prosecutor will manipulate the make-up of the jury by having mistrial declared until gets the jury he wants
      2. Judge declares mistrial w/out first considering D’s DJ rights (Jorn – DJ bars re-trial where judge declared mistrial w/out given D an opportunity to express whether he was willing to proceed despite the prosecutor’s error)
         a. Judge only needs to check w/D, doesn’t have to necessarily do what D prefers
   B. When Mistrial Has No DJ consequences
      1. Declared b/c hung jury
      2. Declared out of “manifest necessity” to prevent justice from being defeated
         a. But still must at least consult w/ D first to recognize DJ rights
      3. D requested the mistrial
         a. Exception if prosecutor “intended to goad” D into requesting mistrial (OR v. Kennedy – Pros. exposed jury to improper and prejudicial information = intent to goad)

V Dual Sovereignty Exception To DJ Rules
   A. Rule: If D is Tried in State Court and Acquitted → Feds Can Try for Same Offense in Federal Ct. and Vice Versa
      1. Extends b/t states, federal gov’t, and Indian tribes
         a. But doesn’t extend b/t municipalities of the same state b/c they are part of the same sovereign (both draw their laws from the state)
      2. Justification
         a. Each sovereign is the master of his own laws
         b. Ignore DJ concerns b/c one sovereign can’t replace the other