FOURTH AMENDMENT – SEARCHES AND SEIZURES

Generally

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   B. Warrants clause

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6. Consent

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      b. Subsequently courts
   2. Terry Rule
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         c. Searches of vehicles
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   E. Extend of evid. that may be excluded – Fruit of the Poisonous Tree
      1. Types of evid that must be excluded if gained through gov’t wrongdoing
         a. Direct evid. gained through gov’t wrongdoing
         b. Knowledge indirectly gained through gov’t wrongdoing (Fruit of poisonous tree)
2. Mode of Analysis
3. Limits of Fruit of Poisonous Tree Doctrine
   a. Attenuation ("dissipation of taint") Doctrine
   b. Independent Source Doctrine
   c. Inevitable Discovery Rule
   d. NOTE – gov’t has burden of proof
EYE WITNESS IDENTIFICATIONS

I. Generally

A. Problem w/ eye witness identifications

B. Mode of analysis for analyzing constitutionality of eye witness identifications
   1. What constitutional right is implicated
   2. Did the ID occur b/f or after the initiation of an adversarial proceeding
   3. Was the ID corporeal (in person ID or picture ID)
   4. Is the evidence of the pretrial ID being introduced or is witness making ID at trial

II. 6th A. right to counsel for identifications

   A. Wade Rule:
   1. Limits
      a. 6th A. doesn’t attach until after adversarial proceedings begun (Kirby holding)
      b. 6th A. only applies to in person IDs

   B. Other ways to solve the problem w/out requiring counsel present
      1. Have pre-trial ID video taped?

III. Due Process (5th, 14th A.) right to non-suggestive witness identifications

   A. 5th/14th A. due process clause protect fairness at trial

   B. Stoval Rule
      1. 2 prong Totality of circumstances test
      2. Unnecessarily suggestive
      3. Conducive to irreparable mistaken identification
      4. Justification for 2 prongs

IV. Remedy for violation

   A. If gov’t trying to introduce evidence of the pre-trial ID that violates D’s constit. rights:
   B. If gov’t having witness make in court ID after previous pretrial ID that violates D’s constit. rights
   C. Note: Even if D can’t prove the pre-trial procedure violated a constitutional right
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   A. Background cases
      1. Confessions are not inadmissible unless freely and voluntarily given
      2. If D tortured to confess, then confesses again later not under torture, later confession still inadmiss
      3. Policy on torture
   B. 5th/14th A. Due Process protections
      1. Test for denial of DP
      2. Test for coercion:
         3. Limit – coercion must be caused by state actor (police) not 3d pty
      4. If confession coerces → must be excluded
      5. Can be violation of DP if confession not admitted against D?
   C. 5th A Protections against self incrimination …………………………………………………………………….25
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      2. But self incrimination clause only violated if D’s statements admitted against him
   D. POINT – DP claims and self incrimination claims use same inquiry → was the statement voluntarily given.  If not, must be excluded.

II. Miranda Requirements
   A. Pre-cursor to Miranda
   B. Miranda v. Arizona Holding
   C. Miranda Check-list
      1. Threshold for Miranda to kick-in - Must be in police custody and interrogation
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         b. Consequences of valid waiver
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            i. Only must excludes statement from case in chief against D
            ii. Only must exclude statement out of D’s mouth → no fruit of poisonous tree exclusions
            iii. Statements taken in violation of Miranda do not “taint” later statements given after Miranda and valid waiver
      4. Miranda Exceptions – Where Miranda warnings not required even though custodial interrogation
         a. Routine booking questions
         b. D must be aware that he is speaking to a gov’t agent
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         d. Justification for limiting Miranda protections
   D. Justification for limiting Miranda protections…………………………………………………………………….28

III. 6th A. Right to Counsel
   A. Attachment
   B. Protections (greater than 5th A.)
      1. 6th A. grantees right to have atty present at “every critical stage” after indictment, including extra judicial questioning by police or someone working for police
      2. Violation – Police/agent “deliberately eliciting” statements from D w/out counsel present
   C. Waiver
      1. Test
      2. If D waives Miranda rights after indictment, also waives Massiah rights if no counsel has been appointed yet or not requested counsel for offense which indicted………………………………………………………………….29
      3. Consequence of invocation (not securing waiver)
         a. Questioning can’t begin again unless counsel present or D initiations communication
         b. Invocation IS offense specific.
   D. Exclusion
      1. If statement made in violation of 6th A – must be excluded
2. Fruit of poisonous tree analysis applies
3. Limits – statement taken in violation of Jackson can still be used for impeachment purposes
5th A. Right to Counsel v. 6th A. right to counsel Chart
FOURTH AMENDMENT – SEARCHES AND SEIZURES

Generally

III. Reach of the 4th A.
   A. 4th A. is incorporated into the 14th A. and therefore applies to all the states.
      1. Rationale:
         a. 14th A. incorporates those Bill of Rights protections that are implicit to the concept of ordered liberty
         b. Protections of 4th A. (rights against unreasonable search/seizures) is implicit in the concept of ordered liberty
      2. Effect: Conviction in state court based on evid. that would be inadmissible in fed. ct. b/c violates 4th A. = unconstitutional 14th A. due process violation (Wolf)

IV. Protections of 4th A.:
   A. Reasonableness clause (1st clause) - “right of ppl. to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”
   B. Warrants clause (2d clause) – “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”
      1. See debate

Threshold Questions – Framework for Analysis

IV. Has there been a search or seizure?
   A. Search
      1. Pre Katz: Trespass doctrine = no search unless there has been a physical encroachment onto D’s property (constitutionally protected place)
      2. Katz Doctrine: 4th A. protects ppl. not places. Must be a reasonable expectation of privacy for 4th A. to apply (wire tap of payphone violates 4th A)
         a. 2 part test for reasonable expectation of privacy (Harlan’s concurrence)
            i. Person exhibits a subjective expectation of privacy AND
            ii. Society recognizes the expectation as reasonable (objective)
         b. Other imprt. points
            i. Must still look at place to determine reasonableness b/c place where person is factors into reasonableness evaluation
            ii. 4th A. protects intangible objects b/c expectation of privacy in words spoken
         c. Note: But 4th A is not gen’l privacy protection b/c 4th A extends beyond right to privacy AND privacy is left to state to protect
      3. Limits to Katz
         a. No 4th A. protection (no reasonable expectation of privacy) in info voluntarily revealed to 3d pty (b/c other ppl. can always choose to disseminate info you tell them):
            i. US v. White - conversation w/ UC agent who broadcasts the info to police.
            ii. Smith v. Maryland - pen register that records numbers dialed from phone.
            iii. Counter arg. – did D have a choice in revealing the info to 3d pty (no choice w/ pen register)
         b. No 4th A. protect in “open fields” (Oliver – agents went around locked gate to field of pot growing 1 mi. from D’s home)
            i. Definitions
               a. open field– unoccupied/undeveloped area outside cartilage of the home
b. curtilage – area surrounding home to which extends intimate activity associated w/ sanctity of the home and privacy of life

ii. Rat:
   a. no reas. expect. of privacy in property readily available to gen’l public
   b. Plain lang. of 4th A. doesn’t protect “property”

iii. Dunn Factors dist. open field from curtilage
   a. proximity of the area to the home (50 yrd. from house too substantial of a distance)
   b. whether area is included in an enclosure surrounding home (fence are enclosing house, excludes the barn from the cartilage)
   c. how the area is used (barn not used for “intimate activity”)
   d. steps taken by owner to protect area from observation by passersby (must be more than transparent fences or no trespassing signs)
   e. Counter arg – 4th A. should protect if act constituted a trespass on property b/c reasonable expec. of privacy on property

c. No 4th A. prot. in garbage left outside the home (CA v. Greenwood)
   i. Rat. - accessible to public, conveyance to 3d pty

d. No 4th A. prot. in illegal items (Place, Cabelles – drug sniffing dogs is not a search)
   i. Society does accept that an expectation of privacy in contraband is “reasonable”
   ii. Drug sniffing dogs do not expose non-contraband to public view.

e. No 4th A. protection from visual surveillance if cop in place that public is lawfully allowed to be (Ciraolo – cops could visually surveil from plane even where D put up a fence; Riley – cops could visually surveil from helicopter in lawfully navigable airspace)
   i. Rat. – no reasonable expect. of privacy in activ. that knowingly expose to the public (law can’t require cops to shield their eyes)
      a. Dictum from Riley – Even if aerial surveillance occurs from lawful airspace, may still violated D’s privacy expectations if creates nuisance (noise, dust, etc.) or threatens harm
      b. O’Connor concurrence in Riley – Inquiry should be whether public travels the airspace in question with “sufficient regularity”
   ii. Counter arg. raised by dissenters – was it reasonable for D to expect the public to view his activ. in same manner the cops did (circling in a helicopter)

iii. Use of technology to aid in visual surveillance
   a. Okay only if:
      i. Technology doesn’t reveal information that would have otherwise been unobtainable w/out intruding inside the home
         a. Beeper in car to track movements of car (Knotts) and mapping pictures of cartilage (Dow Chemical) okay
         b. But beeper to track movements inside home (Karo) and thermal imaging of house not okay (Kyllo)
      ii. Technology is conventionally used by the public
         a. Mapping camera used to take overhead pictures okay (Dow Chemical)
         b. But thermal imaging camera not okay (Kyllo)
      iii. These factors go towards reasonableness of privacy expectation
   iv. BUT TACTILE OBSERVATION NOT OKAY (Bond - Cops squeezing luggage violates Katz b/c reasonable expectation that public will squeeze luggage).
      a. Physical observation more invasive than visual observation.

B. Seizure
   1. Seizure of property
      a. Karo Def. – Meaningful interference w/ person’s possessory interest in property
i. Karo – no interference w/ D’s possessory interests where cops installed beeper in
canister when it was still their property then canister transferred to D.
   a. Dissent – interferes w/ D’s possessory interests b/c infringes on right to use for own
      purposes.

2. Seizure of person
   a. Terry Def. – officer, by means of physical force OR show of authority has in some way
      restrained the liberty of a person.
      i. Mendenhall Test – Under totality of circumstances a reasonable person would have
          believed they were not free to go (Mendenhall – police stopping D at airport, asking to
          see ID and plane ticket and asking questions was not seizure)
          a. Not all intercourses b/t officer and citizens are seizures
      ii. Two ways to seize (Hondari D)
          a. Any physical force by police, if even unsuccessful (suspect breaks free)
          b. Show of authority AND suspect submission to the authority (suspect who ignores
             and flees is not seized)
          c. Point – must be some physical control or submission to control
      iii. Factors (from Mendhall)
          a. officers appear threatening/display weapon, physical touching by officers,
             tone/display by officers that infers compliance w/ officers might be compelled
      iv. Situations where seizure has occurred
          a. Officer ordering someone out of a house and suspect comes out (acquiescence to
             show of authority) (Sibron)
          b. Officers at airport taking D’s license, ticket, and luggage and asking to come to
             office for questioning (Fl v. Royer – discussed in defacto arrest section)
             i. Note – the Royer facts are similar to Mendenhall but no seizure in
                Mendenhall b/c police didn’t have D’s property when asked to come back to
                office for questioning and informed Mendenhall free to go.
      v. Situations where seizure has not occurred
          a. Simple on the scene questioning – see Mendhall above
          b. Random sweeps – Drayton: officers boarding bus, not blocking aisle, questioning
             in polite tone, not brandishing weapon, advising passengers that could refuse search
             = no seizure
             i. Officers routine appearance (uniform, badge, gun) and cramped quarters of bus
                does not amount to intimidation
             ii. Marshall’s dissent in Bostick – danger that young black males will be targeted
                 through bus sweeps
          c. Police foot chase – Hodari D. police chasing someone not seizure b/c no physical
             force and no submission to show of authority.
             i. But Class discussion – some courts have found momentary pause b/f fleeing
                denotes submission

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V. Was the Search/Seizure Reasonable?

A. Traditional Rule – All search/seizure w/out prob. cause are ordinarily unreasonable (Hicks – not reasonable unless PC exists)
   1. Def. of probable cause – facts and circumstances w/in officer’s knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the (more likely than not) belief that:
      a. an offense has or is being committed (for arrest)
      b. evid. subject to seizure will be found in the place to be searched (for search)
      c. NOTE – the standard doesn’t require more probable than not, just deals w/ probabilities

B. Weight accorded to info in making PC determination
   1. Spinelli – Aguilar Test (cops giving conclusory statements and relying on anonymous tip where only verified the innocent activities was not PC):
      a. Bald and unillumining (conclusory) assertions – entitled to no weight on PC determination unless supported by reasons for the belief (cop stating D known as a gambler is given no weight)
      b. Direct information – should be considered in PC determination b/c affiant’s oath goes to honesty and personal observations go to basis of knowledge
      c. Hearsay information ( informant tip) 2 prong test
         i. Reliability/Veracity (2 types)
            a. Known informants – cops can say the know informant to be reliable or simply knowing who informant is may be enough b/c informant can be held accountable if wrong
            b. Anonymous informants – cops corroborate info given by the informant (should be more than innocent activities)/
               i. b/c right about some things, probably right about other things (the harder the info would be to obtain the better)
            c. Point – need to be able to conclude the tipster is credible/honest
         ii. Basis of knowledge – informant must state how she knows the facts being relayed OR be so detailed that judge can conclude informant has first hand knowledge of the facts being relayed (test from Draper)
            a. Point – need to be able to conclude the info relayed is first hand knowledge
   2. Gates Test: Rejects rigid 2 prong analysis and adopts totality of circumstances test, which includes the 2 prongs from Spinelli Aguilar.
      a. Strength of one prong can compensate for lack of another prong
      b. Fluid concept - everyday common sense analysis rather than rigid rules
      c. Criticisms (Brennan Dissent):
         i. TOC is such a mushy concept that may do away w/ PC altogether
         ii. Particularly concerned w/ ensuring accuracy of anonymous tip
         iii. Incorporates hindsight bias too much (from Stevens Dissent)
         iv. What if have small group and know w/ certainty 1 of them committed the crime. Can arrest whole group to identify which is the perpetrator? (From hypos flagging problem w/ PC)
   3. Sliding Scale of PC(maybe): The greater the intrusion into an area of privacy = the greater showing of PC (Schmerber v. CA – taking blood sample requires greater showing of PC)

C. When are arrest warrants required?
   1. Arrest in public place – warrantless arrest based on PC = presumptively reasonable (Watson)
      a. Rat – less intrusion on privacy and sanctity of the home
      b. Gerstein hearing – if make warrantless arrest in public place, must seek judicial determination of PC for arrest w/in 48 hrs.
2. Arrest in home – warrantless arrest, even when based on PC = presumptively unreasonable absent exigent circumstances or consent (can’t breach “threshold of the home” w/out a warrant) ([Payton - Ct. held unconstit. NY stat. that allowed warrantless entry into home to make felony arrest]
   a. Rat – greater intrusion on privacy/sanctity of home; 4th A. drafted to protect man’s privacy in home
   b. White Dissent:
      i. 4th A. protects ppl. not places (arg. from Katz)
      ii. Difficult for officers to make quick decision if exigent circumstances exits
   c. NOTE – if police see person outside home w/ drugs then runs inside home then considered more like arrest in public place (no warrant needed to enter home and arrest) then arrest in the home ([Santana])

3. Arrest in a 3rd pty’s home – even if have arrest warrant, can’t enter a 3rd person’s home unless that person’s home is named on arrest warrant or search warrant (stating PC to believe that person is in the 3rd pty’s home) ([Stegald])
   a. Rat – otherwise cops could enter anybody’s home (without judicial review) saying they are looking for the person who they have an arrest warrant for
   b. NOTE – if get tip that person have arrest warrant is “staying” in 3rd person’s home then Payton governs but if just see person enter 3rd pty’s home then Stegald governs ([Blanco])

4. Even w/ warrant, arrest is “unreasonable” if method of making arrest is unreasonable – can’t use deadly force unless PC to believe D poses a threat ([TN v. Gardner])

D. When are search warrants required?
   1. Differing Views
      a. Traditional view ([Katz]) – searches that take place outside the judicial process are per se unreasonable
         i. warrants clause (2d clause) informs the reasonableness clause (1st clause) so that searches w/out a warrant are considered unreasonable absent exigent circumstances
      b. Alternative view ([Robinowitz]) – only inquiry is whether search or seizure was reasonable, not whether warrant should have been obtained.
         i. 4th A. doesn’t state that warrants are required, only when they are sought must they meet the specifications
      c. Does the debate really matter? Evid. that judges don’t thoroughly review warrant applications anyway.

E. Elements of a valid warrant
   1. PC – see above
   2. Supported by oath or affirmation
      a. Franks hearing – D challenging truth of oath or affirmation
         i. D must first make substantial showing that a false statement was knowingly and intentionally or w/ reckless disregard included by the affiant in the warrant affidavit.
         ii. Prove at the hearing by preponderance of the evid. that statement affiant perjured self or had reckless disregard for the truth.
         iii. W/ false statement set aside, remaining content of affidavit insufficient to est. PC
         iv. NOTE – can only challenge truthfulness of affiant, not tip included in affidavit b/c tipster was not under oath
   3. Particularly set out place to be search or person to be seized
      a. Sweeping searches similar to the gen’l warrants ban by 4th A. ([Loji Sales])
      b. Nothing should be left to the discretion of the executing office (Anderson note case)
         i. gen’l description only tolerated if greater detail is not possible
         ii. greater generality is allowed in the case of contraband
iii. greater specificity is required if object to be seized encroaches on 1st A. (like LoJi Sales) or other similarly classified objects are likely to be found (like “cartons of clothing” when searching clothing warehouse)

4. Approved by neutral and detached magistrate – magistrate can’t become a member of the search pty or have a stake in the outcome (get paid for approval) (LoJi Sales)

F. Execution of Warrants

1. Knock and Announce Rule – reasonableness requirement creates an explicit knock and announce rule embodied in common law (Wilson v. Arkansas)
   a. Rat (from Richards v. WI)
      i. Citizens have opportunity to comply w/ law and avoid destruction of their property
      ii. Citizens have opportunity to prepare themselves for police entry (privacy)
   b. How long have to wait? Case by case determination but some cases have allowed 15 – 10 seconds

2. Exception to K/A rule – no per se exceptions, must be decided on a case by case basis (Richards v. WI – held unconstitutional state law exception when serving felony drug warrants)
   a. Test: Reasonable suspicion by officers that K/A would 1) pose safety concerns to officers/public, 2) risk destruction of evid., or 3) would be futile (e.g. police chasing prisoner into house)
      i. Can be on the spot decision or apply for exception in advance
   b. Rationale
      i. appropriate balance b/t legit law enforcement concerns and protecting privacy interests
      ii. if allow per se exception for felony warrants then slipper slope to allow exception for other types of warrants

3. Scope of the search
   a. Can only search containers large enough to be holding criminal evid. for which cops are searching
   b. May seize an object not described in the warrant of PC to believe it is a sizeable item (evid. of the crime)
   c. Can’t search ppl./places on the scene NOT described in the warrant unless
      i. Honest mistake (MD v. Garrison – police didn’t know residence was split into 2 apartments)
      ii. Independent PC to believe person/place concealing evid. AND justification for conducting search w/out warrant (see next section)

G. Searches justified by something other than warrant

1. Exigent Circumstances (Warden v. Hayden – police were justified to enter home to look for suspect/weapons where got tip just minutes b/f that suspect had entered home)
   a. Justifications
      i. Hot pursuit
      ii. Danger to police officers or others
      iii. Imminent destruction of evidence
      iv. Preventing suspects escape
      v. Render aid (community care taking function)
   b. Limits
      i. Less likely to be exigency where underlying offense is minor (like a DUI)
      ii. Search for suspect/evid can’t go beyond the justifications - can only search for weapons if reason to believe suspect armed (officer safety) or other evid. if reason to believe it could be destroyed

2. Searches incident to arrest
a. Search of home after arrest – can only search that area w/in suspect immediate control (Chimel – police search of entire home where arrested burglary suspect was unconstit)
   i. Justifications
      a. Secure weapons that suspect might grab (officer safety)
      b. Secure evid. that suspect may hide or destroy (destruction of evid)
   ii. Limits – can’t search rooms in which suspect was not arrested or concealed areas (e.g. desk drawers) in the room in which suspect was arrested
      a. rat – otherwise it would be the same thing as gen’l warrant (banned by 4th A.)
   iii. Protective sweeps – see Terry Expansion section
b. Search of the suspect after arrest – can search suspects person and any containers found on their person (Robinson – police arrest suspect, search him and feel cigarette pack, open it and find drugs → search of person and container okay)
   i. Justifications – same as area w/in immediate control
      a. Officer safety and preservation of evid.
   ii. Note – officer’s decision to search suspect incident to arrest is not reviewable by courts

c. Search of vehicle where arrest occupants – can search suspect, passenger compartment, and any container in passenger compartment of vehicle (Belton – police stop car and arrested occupants (none were the owner) for possessing weed, then search car and found weed in jack → search of car okay)
   i. Justifications
      a. Officer safety and preservation of evid.
         i. same thing as search incident to arrest – per se rule that passenger compartment is considered area w/in suspects immediate control
      b. need brightline rule for police in the field to follow
   ii. Limits
      a. can only search passenger compartment (Belton)
      b. can’t search vehicle incident to stop for traffic violation, must be an arrest (Knowles v. Iowa)
         i. justifications of officer safety/destruction of evid. not as strong for mere traffic citation
         ii. Note – but can arrest ppl. for minor traffic violation (Atwater bright line rule)
            a. Combination of Atwater + Knowles = incentive for police to arrest ppl. for minor traffic then use that as justification to search the car
   iii. Note – Rule applies to recent occupants of vehicle too (Thorton – police followed car, car pulled over and suspect got out, police arrested as walking away from car, search of car was okay)
      a. Justifications:
         i. same as Belton – can’t make factual distinction b/c occupants and recent occupants
         ii. police need discretion where to initiate contact w/ suspect
      b. Dissent – no way to draw line b/t recent occupant and pedestrian; more like Chimel than Belton b/c car no longer w/in suspect immediate control (no risk of officer safety/destruction of evid.)
d. Pretextual stops/arrests – courts do not inquire into officer’s subjective (pretextual) reasons for officers stop/arrest, so long as PC for the stop (Whren – cops pulling over car for stopping too long at stop sign then saw crack in the car did not violate 4th A b/c PC to stop for traffic violation, even though officers were probably profiling)
   i. No dissenters – if allowed subjective inquiry there would be a flood of litigation; every D would argue suppression on pretext grounds
   ii. But can make claim for pretextual stops under equal protection clause (discrimination)
3. Search of vehicles
   a. Searches at the scene – if vehicle stopped on roadway/in public place and PC to believe vehicle contains items the cops are justified to search for, then may search entire vehicle (including trunk if PC to believe evid. in trunk) w/out warrant
      i. Justifications
         a. ready mobility of vehicle creates inherent exigency (Carroll rule)
         b. expectation of privacy not as great w/ vehicles as residences b/c vehicles subject to pervasive regulation (Carney – police could make warrantless search of motorhome parked in lot)
      ii. Limits – if vehicle not stopped on roadway and unoccupied, then may not conduct warrantless search even w/ PC b/c danger of mobility gone and gives police time to get warrant (Coolidge – suspect arrest at home, police couldn’t conduct warrantless search of vehicles in driveway)
         a. Note – could argue against this limit under Carney analogy by stating car parked anywhere is mobile by turn of ignition key
   b. Searches away from the scene – if could have made warrantless search of car at scene then police can remove car and search elsewhere, presumably impound lot (Chambers – police arrested occupants, drove car to police station and conducted search there was okay)
      i. Justification – if justified to do Carroll search, that justification doesn’t disappear just b/c police remove vehicle to safer location
         a. Dissent – if police move vehicle, then no more inherent exigency b/c vehicle not readily moveable.
      ii. Limits – if not justified to do Carroll search, then can’t remove vehicle and search at police station (Coolidge – police not justified to do warrantless search on the scene (see above) then can’t do warrantless searches a year later after vehicle impounded

4. Search of Containers
   a. Gen’l Rule – can not search containers w/out a warrant:
      i. Justification – greater expectation of privacy in containers than in vehicles and less danger of mobility – more analogous to warrantless search of home (Chadwick – police couldn’t make warrantless search locked truck suspect had put in trunk of car)
         a. Note – police can, however, seize the container w/out a warrant if have PC, but must obtain warrant to search
      b. Exceptions
         i. Container located on the body of arrested suspect (Search incident to arrest section above)
         ii. Container in a vehicle that police have PC to search and large enough to hold evid. police are searching for (Vehicle exception above) (Ross – police had PC to believe suspect selling drugs out of trunk of car could search entire car and open brown bag found inside trunk b/c search justified under Carroll-Chambers-Carney)
            a. If PC to search car, may even search containers belonging to passengers whom not suspected of wrongdoing (Houghton – driver admitted to taking drugs, police search of purse in car belonging to passenger was justified)
         iii. PC to search container and container put inside vehicle – can search the vehicle but only for the container and may search the container (Acevedo – search of container in trunk justified b/c PC to search trunk and was put in vehicle)
            i. Justification – no dist. in privacy expectations or exigency b/t container coincidently found in car (Ross) and search of car for a specific container (Acevedo fact)
iv. Inventory Searches – police may search entire vehicle and containers therein w/out warrant or PC if vehicle lawfully impounded and search conducted pursuant to pre-established inventory procedures of the police dep’t (S.D. v. Opperman)
   a. But search of containers must be part of est. inventory procedures (Fl v. Wells – cops couldn’t open locked suitcase in trunk where no police inventory policy w/ respect to locked containers)

5. Plain View (and Touch) Doctrine – police may seize an object w/out a warrant if following conditions are met
   a. Elements
      i. Officer observes the object from a lawful vantage point
      ii. Officer has lawful right of physical access to the object
      iii. The incriminating nature of the object is immediately apparent (Hicks – no plain view where officer didn’t have PC to believe expensive stereo equipment was stolen b/f he seized it)
         a. This essentially means there is PC to believe the item is evid.(reasonable suspicion is NEVER enough)
   iv. No inadvertence requirement – if come across object don’t have to avert eyes (Horton – officer executing search warrant for specified stolen items could seize guns which not specified in warrant b/c in plain view)
      a. Justification – don’t want to inquire into subjective reasons cops came across evid., not greater intrusion on privacy interests
   b. Plain touch – same rule applies if officer feels something that has an immediately incriminating nature (e.g., drugs) if doing a lawful pat down search (MN v. Dickerson)
   c. Note – this only applies to seizures of the object w/out warrant, may not search the container w/out a warrant

6. Consent – warrantless search/seizure, even w/out probable cause, is permissible with consent
   a. Test for consent – Look to totality of circumstances to det. if consent was voluntary (can’t be coerced – explicitly or implicitly)
      i. Factors in determining voluntariness (Bustamonte – consent lawful where police requested to search car and suspect agreed but police didn’t inform of right to refuse)
         a. Police conduct
         b. Fragility of suspects mental state
         c. Suspects education/low intelligence
         d. Lack of warnings to suspect that can refuse search
      ii. Gov’t has burden of proving consent:
         a. Does not have to establish that suspect knew had right to refuse (too hard to prove)
         b. But can’t show consent where police trick suspect into thinking that they have lawful authority to search (Bumper v. NC – acquiescence to search after police lie and say they have a warrant is not consent)
      iii. Justification (implied by Bustamonte)
         a. Convenience of the suspect if want to allow police to search w/out time/trouble of waiting for warrant
         b. Interest of society in preventing innocent ppl. from being accused of crime
   b. Limits
      i. Can be limited to search a certain area and can be withdrawn at anytime
      ii. Gen’l consent to search car doesn’t extent to prior open locked containers but does extend to opening things like bags – test: what is reasonable to believe D is consenting to.
   c. 3d pty Consent:
      i. Where only 3d pty present – 3d pty can give consent if:
a. 3d pty has actual authority OR
   i. Authority = mutual use of the property by someone w/ joint access/control for
      most purposes (IL v. Rodriguez – ex-girlfriend did not have actual authority
      where moved out 1 mo. prior, not paying rent, had moved most clothes out, had
      taken key w/out D’s knowledge)
      a. This includes a houseguest/co-inhabitant if meets the qualification (not
         dependant on property interests)
   b. Police reasonably believe that 3d pty has actual authority
      i. Like a PC test – facts available to the officer warrant a man of reasonable
         caution to believe actual authority exists (IL v. Rodriguez – explicit assertion
         by ex-girlfriend that she lived there was enough to give cops reasonable belief
         of authority)
         a. Cops don’t have to be right b/c 4th A. permits searches/seizures based on
            reasonableness/probabilities which could later be wrong
   c. Examples of 3d ptys who NEVER have authority (from Georgia v. Randolph
      below)
      i. Landlord against tenant
      ii. Children against parents
   ii. If 3d pty gives consent to search common area but D refuses, police can not search
       w/out warrant (Georgia v. Randolph – Police couldn’t search where wife gave consent
       but husband refused)
      a. Refusing pty must have authority AND be present
         i. If refuses but not present then too bad, 3d pty consent is good (need this “fine
            line drawing” to keep from overruling Rodriguez)
      b. Justification
         i. Nonconsesnt pty still has 4th A. protected privacy interests
         ii. Not reasonable to assume 3d pty possess auth over common area where co-
             inhabitant is refusing that authority
      c. Dissent – nonconsenting pty will exact retribution on consenting pty after police
         leave (but majority says this will give exigent circumstances to enter)

7. Reasonable suspicion to believe officer/public safety in danger – see next section for full
   explanation
   a. This is a “narrow exception” to requirement that PC must exist for search/seizure to be
      reasonable (Dunaway)
      i. But query as to whether this exception as expanded
H. When Probable Cause (or warrant) is not required for search/seizure

1. Generally
   a. Traditional rule was that in almost all circumstances there must be probable cause to satisfy “reasonableness” req. of 4th A – see preceding sections
   b. Subsequently courts began to recognize that less intrusive searches could be “reasonable” in circumstances where probable cause didn’t exist b/c some searches/seizures not as intrusive.
      i. Focus shifted from Warrants clause (where the rule w/ reasonableness clause providing limited exceptions to warrants requirement only where PC existed for exigency, ect.) to reasonableness clause being viewed independently (PC only one factor in determining reasonableness)

2. Terry Rule: Can do limited seizure (stop for questioning) and search (pat down), only for weapons, where reasonable suspicion to believe criminality is afoot.
   a. Justifications:
      i. Balancing b/t legit law enforcement endeavors and privacy interests
         a. Officer safety/crime prevention – if required PC b/f could search person for weapons, then never be able to search for weapons until after a crime has been committed.
            i. law of arrest alone does not protect officer safety
         b. Limited stop and pat down is minor infringement on privacy
      ii. On the spot police action can’t be judged under the warrants requirement, can only look at under the reasonableness clause
   b. Def. of reasonable suspicion: specific and articulateable facts, taken together w/ inferences warrant a reasonably prudent man in officers circumstances to believe that: 1) criminality is afoot (for the seizure) and 2) suspect is armed (for the search)
      i. Very fact intensive
      ii. Must be able to articulate something more than a hunch (objective) but less than PC
   c. Test to be applied
      i. Officer is justified in stopping suspects (minimal seizure) b/c reasonable person in officer’s position would officer or public safety in danger.
      ii. Officer’s questions during the seizure are reasonably related to circumstances that justified the stop and designed to quickly confirm or dispel the reasonable suspicion of criminality.
      iii. Officer’s patting down of suspect (minimal search) b/c reasonable suspicion to believe poses threat to public or officer safety (i.e., armed)
   d. Remember mode of analysis:
      i. Has there been a seizure?
         a. If so, was it reasonable?
      ii. Has there been a search?
         a. If so, was it reasonably related to circumstances that justified seizure (reasonable suspicion to believe officer/public safety in danger)

3. Scope: Determining if reasonable suspicion exists
   a. Can draw reasonable inferences based on human behavior and cops past experience in similar situation
      i. Reasonable suspicion based on gen’l inferences
         a. Terry case – suspects pacing back and forth in front of jewelry store for several hours, cop never seen suspects there before, suspects leave and meet w/ somebody then come back
b. Sibron (companion case to Terry) – observation of suspect for 8 hrs. talking to drug addicts, suspect enters drug house, officer testifies that based on experience drug dealers often armed
   i. Note – ct. held search unreasonable but only b/c cop reached into suspects pocket (goes beyond limited pat down search).

c. Pa v. Mimms – officers can always order driver (Md v. Wilson – and passengers) out of vehicle during lawful traffic stop b/c PC for seizure by stopping the vehicle and ordering driver/passenger’s out is only incremental further infringement weighed against high interest of officer safety.
   i. But probably not reasonable suspicion to detain occupants of cab pulled over b/c no reasonable suspicion to believe they are involved in unlawful conduct of driver (based on class discussion)
   ii. Reasonable suspicion based on flight (or walking away quickly) in high crime area (Wardlow – cops in high crime area see person w/ bag, make eye contact, and person run → cops could chase and had RS to make Terry stop/frisk)
      a. Factors which weigh into totality of circumstances
         i. ppl. in high crime areas are more likely to be armed
         ii. ppl. who flee from police are more likely to have done something wrong
      b. Problems:
         i. allows police to stop for totally innocent activity (ct. is willing to accept this b/c legit. law enforcement efforts outweigh minimal infraction on privacy)
         ii. “high crime area” is vague concept and often used for profiling racial/low income neighborhoods

b. Reasonable suspicion based on tips/hearsay (expansion of Gates)
   i. Same totality of circumstances test from Gates (including veracity of information and basis of knowledge) but lesser showing required (less contented and reliability needed)
      a. Corroborated info from tip can be wholly innocent conduct (Al v. White – police only corroborated time/place of departure, type of car driving, what carrying, and stopped suspect b/f reached destination)
         i. Rat – if tipster right about some things more likely right about criminal activity
         ii. Problem – this opens the door to innocent ppl. being stopped b/c disgruntled friend/neighbor makes up story
      b. Informant known to police and provided information in the past provides reasonable suspicion (Adams v. Williams)
         ii. But anonymous tip that provides no basis of knowledge or predictive information (can’t be corroborated) IS NOT ENOUGH (Fl v. JL – tip that person at bus stop had a gun did not provide reasonable suspicion)
            a. Note – ct.s split whether anonymous tip about eratic driving is enough (no way to test veracity but very high danger)

4. Permissible Method of Terry seizure/search
   a. Limits to Terry Seizure
      i. If seizure is tantamount to defacto/custodial arrest there must be PC (Dunaway - suspect taken into custody but not told under arrest was a defacto arrests)
      ii. Factors in determining whether Terry seizure or defacto arrest
         a. Whether suspect removed from scene (freedom restrained)
            i. Class discussion – arguably just removing suspect to police car could be defacto arrest.
            ii. But if removed for reason of officer safety weights against defacto arrest (Fl v. Royer – police at airport take passenger’s license and ticket, and request come
to office for questioning was a defacto arrest b/c no justification of officer safety for removal)

b. Length of suspects questioning – must show that police could not have reasonably acted more expeditiously for seizure to turn into defacto arrest (Royer – police could have had luggage subject to sniff test on the scene rather than bringing it back to office for search)
   i. If delay caused by suspect’s own actions then no defacto arrests (US v. Sharpe – 20 minute detention of driver of vehicle that fled scene was not a defacto arrest) (US v. Montoya de Hernadez – 24 hr. detention of smuggler w/ drugs in rectum not too long b/c incident at international border, D refused X-ray, and took so long b/c D held her bowels)

c. Whether suspect informed he was “free to go”
   i. This was a major factual distinction b/t Royer (seizure) and Mendenhall (no seizure)

d. Whether police have seized suspects belongings (Royer)

iii. Note – when police make Terry stop suspect under no obligation to answer questions and police can’t arrest on that. But if state has stat. which requires suspect answer, then police can arrest for refusal (Hiibel – police make Terry stop and suspect refuses to identify self, police could arrest based on that (RS but no PC) b/c state had statue which requires identification.
   a. Police must have RS for initial stop or else statute would be void for vagueness.
   b. State law must impose positive duty of suspect to answer questions/identify himself

b. Limits to Terry search
   i. Terry pat down only justified where reason to believe suspect is armed/dangerous (e.g., not justified for shoplifting suspect)
   ii. When doing Terry pat down, if feel something that cop knows is not a weapon (e.g., drugs), can’t do further search unless PC to believe the item is seizable (MN v. Dickerson – Officer conducting Terry search could not squeeze, slide, or otherwise manipulate the contents of a pocket that knew contained no weapons).
   iii. Stop that is related to traffic citation (minimal seizure) can’t turn into an investigation that goes beyond the traffic citation (e.g., dog sniffing for drugs) unless:
      a. PC for further investigation (any of the warrants exceptions)
      b. Further investigation doesn’t go beyond time it would take for traffic citation stop (IL v. Caballes – traffic stop and brought in drug sniffing dogs w/out PC permissible b/c dogs didn’t take any longer than would take to issue a citation)
         i. Justification – no greater intrusion than would have occurred w/ traffic stop alone

5. **Expansion of Terry Doctrine** to property
   a. Protective Sweep of Home – Police can do “quick and limited search of premises incident to arrest” (Md. v. Bui – police entered home to affect arrest warrant, secured person who warrant was for, police then went into basement to see if anyone else there are found evid. → search was permissible)
      i. Justification – safety of officers, minimal intrusion
      ii. Limit – can only search house and place immediately adjoining place of arrest from where an attack could reasonably be launched
         a. Any search beyond this requires police to articulate facts that justify fear for officer/public safety
         b. Query whether can conduct protective sweep if in home just to investigate but no arrest warrant?
i. Need to be able to come up w/ reasons why officers could believe an attach
could be launched (hear ppl. moving around, see moving shadows, ppl. present
known to be violent → nervous behavior probably not enough)

iii. Note – Bui is authored by White who dissented in Chimel (search incident to arrest)
and wanted to allow search of entire house based only on PC (no warrant needed). So
Bui can be seen as an expansion of the position he advocated for in Chimel

b. Seizure/frisk of Property – Can seize personal property, based on reasonable suspicion, but
can only do limited search (can’t open containers) to quickly confirm or dispel suspicion
(US v. Place – officers had reasonable suspicion bag contained drugs, could seize bag to
get sniff test, but detention was too long)

i. Justification – gov’t have strong interest in seizing bags w/ narcotics and non-invasive
sniff test is minimally intrusive

ii. Limits – can’t open the bag (must be minimally intrusive) and must act as expeditiously
as possible (Place – cops didn’t act expeditiously where had time to bring drug dogs to
place where suspect was but instead waiting to confront suspect, seize bag, and bring it
to place where dogs were; took 90 minutes)

c. Search of cars – Can conduct cursory search of passenger compartment of cars for weapons
if RS to conduct Terry search of occupants of car (MI v. Long)

i. Justification – high risk to cops in making traffic stops and compartment of car is area
w/in suspects control
VI. Remedy for Unreasonable Search/Seizure

A. Birth of exclusionary rule

1. Evid seized by FEDERAL agents only – any evid. gathered unconstitutionally (unreasonable search/seizure) by fed. agents must be excluded at trial (Weeks – local police and fed. agent searched house w/out warrant. Ct. held only evid. gathered by fed. agent is subject to exclusion)
   a. Justification:
      i. If could use the wrongfully seized evid then 4th A. would be reduced to just “form of words” but have no meaning
      ii. Fed. ct.s should support the constitution – admitted wrongfully seized evid would be supporting fed. agent misconduct
   b. Limits – Exclusionary rule doesn’t apply to evid. wrongfully seized by state police (Wolf v. Co.)
      i. Rat – 14th A. doesn’t import exclusionary rule to the states b/c it is not a necessary part of 4th A. b/c there are other remedies for 4th A. violations that states can choose from (e.g., civil suits)

2. Evid seized by local police in limited circumstances – 14th A. DOES import the exclusionary rule to the states when:
   a. Silver Platter Doctrine – state police obtain evid. in violation of 4th A. for sole purpose of serving it up to fed. prosecutors (Byars v. US – state police serving up evid. to federal prosecutors is in substance a joint state-federal investigation)
   b. State police conduct that “shocks the conscience” (Rochin v. Ca – state police pumping stomach w/out warrant is a 4th A. violation that “shocks the conscience” and constitution must protect against this activity).

B. Exclusionary Rule in its current form

1. Exclusionary rule applies to the states too. (Mapp v. Ohio – Evid. from state police warrantless search of house must be excluded)
   a. Justifications:
      i. Times have changes since Wolf: Majority of states have adopted the exclusionary rule and all other remedies have proved unsuccessful
      ii. W/out exclusionary rule the 4th A. has no force – exclusionary rule is constitutionally required
      iii. Exclusionary rule deters police misconduct by removing the incentive
      iv. Basically a slow progression of getting fed up w/ state police misconduct (see Byars and Rochin above).

2. Should the exclusionary rule be abolished?
   a. Current arg. against exclusionary rule
      i. Can’t deter police conduct that violates 4th A. if violation in good faith
         a. Good faith violations are the most common type of 4th A. violations
      ii. Exclusionary rule is not deterring police misconduct
         a. Most cases never go to trial and those that do don’t happen for a long time and cops may not even learn of the suppression
         b. Officers will commit perjury to avoid suppression
      iii. Police misconduct is incentivized by things other than obtaining evid. (excluding wrongfully obtained evid. doesn’t remove the incentive = not a deterrent)
         a. Other incentives for police misconduct: impose hardship on D
      iv. Exclusion of evid. comes at high cost to society (sets guilty ppl free and doesn’t protect the innocent)
      v. Exclusion of evid. promotes cynicism by public, gov’t and D (b/c knows that cops lie to get evid. admitted)
vi. Exclusion of evid. is disproportionate punishment to the gov’t

vii. There are viable alternatives to the exclusionary rule
   a. Bring civil rights suit against officers
   b. Criminal prosecutions of the officers
   c. Police review boards to sanction the officers
   d. Create a tort action for 4th A. violations

b. Current arg. for the exclusionary rule
   i. Rule creates systematic deterrence (deterring misconduct of a specific officer is not the goal)
      a. increase police professionalism as a whole
   ii. More search warrants have been applied for after the Mapp case
   iii. Preservation of judicial integrity
      a. ct.’s shouldn’t condone 4th A. violation by considering fruits of the violation
      b. only fair to put D and gov’t back in position it would have been if 4th A. had not been violated
   iv. Exclusion of evid. doesn’t set that many guilty ppl. free and does protect the innocent by prevent cops from violating 4th A. of innocent ppl (violations on innocent ppl. never make it to ct. so we don’t know how often it occurs)
   v. Gov’t/public shouldn’t be cynical of the rule b/c its gov’t’s own fault if evid. is excluded.
   vi. Irrelevant that punishment to gov’t in a particular case is disproportionate by excluding evid. → criminal law requires comparing deterrence function of the punishment against the crime as a whole
   vii. Problems w/ the alternatives
      a. Bring civil action – civil immunity doctrines, juries favor cops, may be tough to find a lawyer
      b. Prosecuting the officers – prosecutors and cops are allies

C. Exceptions to Exclusionary Rule (when wrongfully obtained evid. can still be used)
   1. Inquiry in deciding if exclusionary rule should apply: Whether benefit of excluding evid. outweighs the cost to society.
      a. Only benefit ct.’s consider is increase in deterrence (no longer consider judicial integrity) (US v. Calandra)
   2. Specific areas where exclusionary rule doesn’t apply
      a. Civil cases (US v. Janis)
         i. Only slight deterrence by excluding evid. in civil cases and high costs
      b. Grand jury proceedings (US v. Calandra)
         i. Cost to society is high
            a. Delays GJ proceedings and interferes w/ GJ duties
            b. GJ doesn’t ultimately decide guilt or innocents
         ii. Benefit is low
            a. only an incremental increase in deterrence
      c. Criminal procedural settings (pretrial, probation, sentencing hearings)
         i. This is not a S. Ct. rule, but lower cts have decided this
         ii. Criticism – undermines deterrence
      d. Impeachment of the defendant (Walder v. US)
         i. Can use suppressed evid. at trial to impeach D, if D takes stand and testifies (e.g., testifies that drugs not present)
         ii. Rationale – D can’t take advantage of exclusion rule by providing a shield for lying
      e. Where officers obtains the evid. in good faith
         i. Mistake of court employees
a. Ex. – police obtained evid. pursuant to search warrant that later turned out to be invalid b/c 1) magistrate approved w/out sufficient PC (US v. Leon) and 2) magistrate approved w/out limiting contents to be seized so as to meet particularity requirement (MA v. Sheppard)

   i. Justification
      a. High cost to society of letting guilty ppl. free
      b. Little or no benefit b/c suppressing evid. due to judicial mistake doesn’t deter police conduct

b. Good Faith Test: Officer reliance on magistrate’s determination of PC was objectively reasonable and no reasonable grounds for believing warrant was improperly issued.

   i. When good faith test WOULD be met
      a. MA v. Sheppard – warrant application reviewed by dist. atty, warrant application presented to judge, judge told officer that he would make the necessary changes, officer observed judge make some changes
      b. US v. Leon – warrant application presented more than bare bones PC enough to create disagreement among judges

   ii. When good faith test WOULD NOT be met
      a. Magistrate was misled by info in the affidavit and officer knew or recklessly disregarded the truth
      b. Magistrate was not “neutral and detached” (e.g. Lo Ji Sales)
      c. Warrant so lacking in idicia of PC that officer could not have reasonably relied on it.
      d. Warrant so facially deficient (e.g., not meet particularity requirements) that officer could not reasonably believe it valid.

         i. ex. warrant application did not list things to be seized or incorporate affidavit in support (Groh v. Ramirez – officer applying for warrant made the mistake, no the judge)

   c. Good faith exception expanded to warrantless search made after mistake by court clerk (AZ v. Evans – evid. from search incident to arrest not excluded b/c arrest never should have taken place due to ct. clerk error that no outstanding arrest warrant actually existed)

      i. Same justification as Leon

ii. Mistake of officers

   a. Ex – police obtained evid. after violated the knock and announce rule (Hudson v. MI – most recent case on the issued, decided ’06)

      i. Justification

         a. High cost to society – Letting guilty ppl. go; more alternative remedies available now than in time of Mapp (congress has provided incentives to bring civil suits)
         b. Low deterrence benefit – Greater police internal controls now than in time of Mapp

   b. Test: Exclusionary Rule to be applied only in limited circumstances where benefit outweighs substantial costs, must look at whether evid. gained by exploitation of illegality or by means sufficiently distinguishable to be purged of the taint (Fruit of poisonous tree test - below)

      i. Exclusionary rule not be be applied in every case of constitutional violation

D. Standing to Exclude Evidence Unreasonably Obtained
1. Rule – The person challenging the admissibility of the evid. under the exclusionary rule must be the individual whose 4th A. rights were violated (must be the victim of the unreasonable search/seizure).
   a. Co-conspirators do not have standing to exclude evid. unreasonably obtained from other co-conspirators (Alderman Rule)
   b. Justification – expanding exclusionary rule further is outweighed by public interest of prosecuting the accused based on all evid.
   c. Analysis from Rakas (below):
      i. Is D the victim (did he have a legit expect. of privacy)?
      ii. Was the search/seizure unreasonable?

2. Who is the “victim” (who has standing)
   a. Test – Whether the defendant had a legitimate expectation of privacy (like Katz inquiry) in the area searched (Rakas – Ds had no standing to exclude evid. obtained from a car they did not own but were only driving).
      i. Only inquiry is whether D had legit. expectation of privacy in area search, no whether they owned the property seized in the search (Rawlings v. KY)
   b. Searches of homes (legit. expectation of privacy for conduct/objects in the home)
      i. Victim is owner of home = always have standing b/c legit. expectation of privacy of your activities in your own home.
      ii. Victim is house guest
         a. Factors that cut toward standing (legit. expectation of privacy):
             i. Victim is social visitor who has complete dominion of his host’s home, has key, keeping cloths there ect. (Jones – interpreted narrowly but facts suggest a legit expectation of privacy where owner gone and has given permission to house guest to stay there)
             ii. Victim is a social visitor who spends the night (MN v. Olsen – social custom suggest where visitor spends the night there is a legit. expectation of privacy b/c most vulnerable when sleeping)
                a. What if overnight guest, without permission, invites another guest for the night? Arg. both ways
                   i. For standing – guest most vulnerable when sleep
                   ii. Against standing – no legit. expectation host will respect privacy of uninvited guest.
         b. Factors that cut against standing (legit. expectation of privacy):
             i. In home to conduct purely business transaction (MN v. Carter – D just passing through town and at hosts home, whom he had never met before only to bag coke didn’t have legit expectation of privacy)
             ii. No previous connection w/ host (MN v. Carter)
             iii. Stay for short period of time (MN v. Carter)
             iv. NOTE – Carter decided on very close split (4 justices thought there was legit. expectation of privacy)
   c. Searches of vehicles (legit. expectation of privacy for objects in car)
      i. Victim is owner of car = probably standing (Rakas – found no legit. expectation of privacy b/c D did not have “ownership or possessoriy interest in vehicle, which implies owner may have standing)
      ii. Victim is non-owner of car
         a. Factors that cut in favor of standing
             i. Need to argue possessory interest in car similar to that of house guest that has complete dominion of house (like Jones)
ii. If owner present and gave D explicit permission to place his belongings in certain areas

b. Factors that cut against standing
   i. Vehicles have less expectation of privacy than homes (Rakas)
   ii. Owner not present in vehicle – just b/c person “lawfully on the premises” does not create automatic expectation of privacy (Rakas)

d. Searches of containers
   i. Guest may have legit. expectation of privacy in the container of another (e.g. purse) if
      (Rawlings – D didn’t have legit expectation of privacy in women’s purse where he put his drugs b/c none of the below were present):
      a. had prior relationship w/ owner
      b. had access to the container on prior occasions
      c. had right to exclude others from using the container
   e. Note – in all above scenarios, a guest may have legit. expectation of privacy to only certain areas of the property searched
      i. Ex. – houseguest may not have legit. expectation of privacy in basement if not given permission to go there; vehicle occupant may not have legit expectation of privacy in trunk if not given keys.

E. Extend of evid. that may be excluded – Fruit of the Poisonous Tree
1. Types of evid that must be excluded if gained through gov’t wrongdoing (Siverthrone v. US – Gov’t illegal search turned up books, ct. held gov’t couldn’t admit the books or use knowledge gained from the books)
   a. Direct evid. gained through gov’t wrongdoing
   b. Knowledge indirectly gained through gov’t wrongdoing (Fruit of poisonous tree)
      i. ex. – a lead obtained through reading a diary unlawfully obtained
   c. Justification – 4th A. wouldn’t have any meaning unless excluded direct evid. gained through gov’t wrongdoing and knowledge gained from that evid.

2. Mode of Analysis
   a. Identify the tree (the constitutional violation – could be 4th, 5th, or 6th A.)
   b. Identify the fruit (evid. the gov’t seeks to admit)
   c. Identify if the which fruit comes from which tree
   d. If the fruit did come from a poisonous tree, identify any facts that suggest the poison has dissipated.

3. Limits of Fruit of Poisonous Tree Doctrine
   a. Attenuation (“dissipation of taint”) Doctrine
      i. Test: Given the unconstitutional action, whether the evid. was obtained by exploitation of constitutional violation or by means sufficiently distinguishable so as to purge of primary taint (Wong Sun v. US – statement of D not FPT, even though D arrested illegally, he was released and come back to police station on own free will when made statement)
      a. This is not a “but for” test
      ii. Justification – sometimes taint becomes so attenuated that the deterrent effect no longer justifies the high cost of exclusion (no longer serves purpose of exclusionary rule)
      iii. Factors that dissipate the taint
         a. Temporal proximity: Length of time that has elapsed b/t the constitutional violation and the seizure of the evid. in question (Wong Sun – statement obtained in bedroom immediately after unlawful arrest was excluded but not statement made after D was released)
         b. Intervening causes of the seizure of the fruit: The greater the causal chain, the less likely police foresaw the challenged evid. as a product of their illegality (no longer
serves deterrence function) (US v. Sprinkle – a new crime is sufficiently intervening to allow it into evid. even if it was caused by the initial illegality)

c. An act of free will be the defendant (Wong Sun – D being released then voluntarily returning to police station to make statement was sufficient to dissipate the taint)
   i. But whether act was by free will must be determined by totality of circumstances (Brown v. IL – D’s statement made shortly after unlawfully arrest was not free will even though given Miranda warnings)

d. Flagrancy of the constitutional violation: (Brown v. IL – taint tougher to dissipate b/c police knew they were arresting D in violation of 4th A. (bad faith))

e. Nature of evid. obtained: Witness testimony more likely to be free from taint than physical evid. (US v. Ceccolini – live witness testimony admitted even though police found witness through unlawfully obtained information)
   i. Justification:
      a. Live witnesses have free will to testify (free will dissipates)
      b. Live witness more likely to be discovered through independent means than physical evid.
      c. Greater cost in excluding live witness testimony than physical evid. b/c live witness testimony is better evid.

b. Independent Source Doctrine
   i. Test: Even though evid. discovered unlawfully, admiss. if later obtained independently from activities untainted by the initial illegality (Murray v. US – even though cops saw weed after warrantless entry, weed was admiss. b/c cops left and obtained search warrant based wholly on PC not related to the initial illegal entry)
      a. no causal link to the taint
   ii. Justification:
      a. serves deterrence function b/c initial unlawful entry adds to police burden of showing PC not based on any evid. illegally gathered
      b. if excluded the evid., would put gov’t in WORSE position than if illegality had never occurred
   iii. Dissent – provides incentive for police to make unlawful entry first to see if its worth the trouble of obtaining a search warrant (puts innocent ppl at risk)

c. Inevitable Discovery Rule
   i. Test: Even though evid. discovered unlawfully, admiss if prove evid. ultimately would have been discovered by lawful means (Nix v. Williams – cops searching for body and called of search b/c D confessed where body was. Even though confession obtained unlawfully, body admiss. evid. b/c had police not called off search they would have discovered)
      a. Brightline rules:
         i. Evid. seized after knock and announce violation is admiss. on inevitable discovery grounds (Hudson v. MI)
         ii. Statements by D made at police station after arrest made w/ PC but violates Payton b/c arrest took place in home w/out warrant are admiss. b/c police would have just waited for D to leave home b/f questioning. (NY v. Harris)
   ii. Justification – society shouldn’t be punished by excluding evid. if police would have discovered anyway

d. NOTE – gov’t has burden of proving attenuation, independent source, or inevitable discovery by a preponderance of evid. to the judge
EYE WITNESS IDENTIFICATIONS

V. Generally
   A. Problem w/ eye witness identifications
      1. Human perception/memory is unreliable
         a. People tend to see what they want to see
         b. People not good at making cross racial IDs
         c. Memory fades over time
      2. Police may unconsciously used techniques that are suggestive to the witness
         a. Examples
            i. D is the only person being guarded by police (Kirby)
            ii. Witnesses make identifications in front of each other (Gilbert)
            iii. D was the only person handcuffed (Stoval)
            iv. Police may not tell the witness that okay to say if person they remember is not pictured
               causes witness to choose the person who looks the closest to what they remember
               rather than who they actually remember
      3. Jury gives undue weight to eye witness identifications

   B. Mode of analysis for analyzing constitutionality of eye witness identifications
      1. What constitutional right is implicated
         a. Always argue 5th A. and argue 6th A. if took place after indictment
      2. Did the ID occur b/f or after the initiation of an adversarial proceeding
         a. Only after indictment that 6th A. attaches, but 5th A. is there no matter what stage of the
            process
      3. Was the ID corporeal (in person ID or picture ID)
         a. 6th A. only applies to in person IDs
      4. Is the evidence of the pretrial ID being introduced or is witness making ID at trial

VI. 6th A. right to counsel for identifications
   A. Wade Rule: D has 6th A. right to counsel present at any corporeal identifications that occur after
      initiation of adversarial proceedings.
      1. 6th A. guarantees right to counsel at pre-trial witness identifications (Wade holding)
         a. 6th A. implicated whenever presence of counsel is necessary to preserve D’s right to a fair trial.
         b. Why counsel necessary at pre-trial IDs to preserve D’s right to fair trial
            i. Pretrial witness identifications are “riddled with danger”
               a. Unconscious police behavior that clues witness into who the defendant is.
            ii. Waiting until trial to allow defense counsel to cross examine the parties about the pre-
                trial ID doesn’t adequately resolve the dangers.
               a. B/c pre-trial suggestive behavior is conscious, defense counsel can’t recreate what
                  happened
               b. At trial the eye witness already tainted by suggestive behaviors and unlikely to go
                  back on his pervious ID.
               c. If D testifies about the suggestive behavior, jury is unlikely to believe him and
                  unlikely to doubt police conduct
      2. Limits
         a. 6th A. doesn’t attach until after adversarial proceedings begun (Kirby holding)
            i. Adversarial proceedings = indictment/arraignment (formal bringing of charges)
               a. Only then that D is faced w/ full prosecutorial force of the gov’t
               b. Only then that D is immersed in all intricacies of substantive and procedural
                  criminal law
            ii. Pre-indictment IDs are protected by 5/14th A., not 6th A. (see next section)
b. 6th A. only applies to in person IDs (Ash holding that no 6th right when ID done via photographs, even after indictment)
i. Not as much danger w/ photo line-ups b/c those can be recreated
ii. Sequential photo line-ups even more reliable b/c
   a. reduces relative judgment (comparing ppl. against each other to find best match)
   b. provides independent level of confidence

3. Effect of Wade/Kirby Rule
   a. Provides incentive for police to do witness ID before formal indictment b/c no 6th A. right
to counsel yet.
   b. Defense counsel must argue that scenario under 5th A. due process clause

B. Other ways to solve the problem w/out requiring counsel present
1. Have pre-trial ID video taped?
   a. Arg for
      i. Solves problem of trying to recreate what happened
      ii. Having defense counsel present could turn them into a witness at trial, which will
        require them to step down from representing D
   b. Arg. against
      i. Too difficult to later purge eye witness of the taint once it occurs
         a. 6th A. provides right to have counsel present to object to prejudicial behavior as it
            occurs
      ii. Defense counsel can solve problem of turning himself into a witness at trial by bringing
        somebody w/ him to the identification to serve as the witness

VII. Due Process (5th, 14th A.) right to non-suggestive witness identifications
A. 5th/14th A. due process clause protect fairness at trial
   1. Thus, can make argument under Due process clause no matter when the pre-trial ID took place,
      how it happened (whether corporeal or not), and whether or not counsel was present

B. Stoval Rule: Due process violation if totality of circumstances show that pretrial ID was
   “unnecessarily suggestive” and “conducive to irreparable mistaken identification”
   1. 2 prong Totality of circumstances test
   2. Unnecessarily suggestive
      a. Requires 2 inquires – was the ID suggestive? If so, did police have any other options?
      b. The ID can be suggestive, so long as police didn’t have any other option (Stoval – bringing
         handcuffed and guarded D into witness’s hospital room for ID was okay b/c witness could
         have died at any minute so suggestive procedure was necessary)
         i. Problem – ignores the fact that police still could have used a less suggestive technique
   3. Conducive to irreparable mistaken identification
      a. Even if ID was unnecessarily suggestive, okay if ID is reliable (Manson)
         i. Burden probably on prosecutor to show reliability
      b. Factors indicating reliability (Manson)
         i. Witness’s opportunity to view the person while crime was being committed
         ii. Witness’s degree of attention during the original viewing
            a. If witness is a cop → adds to reliability b/c trained observers
         iii. Accuracy of witness’s description
         iv. Witness’s level of certainty
         v. Time lapse b/t original viewing and witness identification.
            a. 2 days is good enough
   4. Justification for 2 prongs
      a. Serves deterrent function by excluding evid. if police procedure was both suggestive and
         witness ID was unreliable
      b. But still allows in reliable evidence.
VIII. Remedy for violation

A. If gov’t trying to introduce evidence of the pre-trial ID that violates D’s constit. rights:
   1. Per se exclusion (Gilbert)
      a. Necessary to assure that police allow D to have counsel present

B. If gov’t having witness make in court ID after previous pretrial ID that violates D’s constit. rights:
   1. Exclusion of in court ID, unless gov’t can prove by clear and convincing evid. that in court ID
      is made by means “sufficiently distinguishable to purge from primary taint” i.e., based on
      something other than pre-trial ID (Wade)
      a. This is the independent source analysis from 4th A. law

C. Note: Even if D can’t prove the pre-trial procedure violated a constitutional right, can still
   introduce evid. of unreliability to weight in credibility
IV. Voluntariness Requirement (i.e., coerced confessions)

A. Background cases
1. Confessions are not inadmissible unless freely and voluntarily given (Hector – slave tortured and confessed to seek repreve not free and voluntary)
   a. Coerced confessions likely not as reliable (D may say whatever just to get out of bad situation)
   b. Freely and voluntary is question of law for judge but even if admiss. can still admit evid. of coercion to go to weight of the confession.
2. If D tortured to confess, then confesses again later not under torture, later confession still inadmiss. (Brown – D’s tortured, then 3d pts brought in after torture to witness the confessions → confess. still inadmiss. b/c sham)
3. Policy on torture
   a. Arg. for allowing torture in some situations
      i. Protect the greater good (ticking time bomb)
      ii. Already happening, so should bring into legal system to police
   b. Arg. against ever allowing torture
      i. We already have rules prohibiting torture – end of discussion
      ii. Impossible to know whether torture yields reliable results

B. 5th/14th A. Due Process protections – No person shall be “deprived of life, liberty, or property, without due process of law”
1. Test for denial of DP: “Failure to observe fundamental fairness essential to concept of justice” (Lisbena)
   a. Fairness not observed if D coerced to testify against self or confess via threats or promises (doesn’t necessarily have to be torture)
2. Test for coercion: Totality of circumstances looking at all factors to determine if statement voluntarily given.
   a. Spano – found coercion w/ these factors
      i. Actual coercive effect of police conduct
      ii. Interrogation tactic unfair (had friend question & give guilt trip)
      iii. Indiv. characteristics of D (low education, mental problems)
      iv. Trustworthiness of D’s statement (is he just repeating what police have already told him?)
   b. Fulminante – found coercion w/ these factors
      i. D in jail so in fear of his life (confessed to secure protection – threat of violence same thing as actual violence)
3. Limit – coercion must be caused by state actor (police) not 3d pty (Connolley)
4. If confession coerces → must be excluded (Spano)
   a. Deter police misconduct – police should obey the law while enforcing it
   b. Reliability - don’t want to convict on untrustworthy evid; D more likely to say whatever police want if being coerced
      i. B/c rat., other than deterrence, unlike 4th A. excl. rule, coerced confessions must be excl. even if police act in good faith
5. Can be violation of DP if confession not admitted against D?
   a. Chavez v. Martinez brought civil claim against police
      i. Majority – test is whether police conduct “shocks the conscience
      ii. Stevens/Kennedey Dissent – test is torture or its equivalent (voluntary)
      iii. Ginsberg Dissent - test is tot. of circumstance whether voluntary
   b. Protects against coercion
C. 5th A Protections against **self incrimination** – “No person shall be compelled in any criminal case to be a witness against himself”
   1. Compelled statements = statements not voluntarily given (**Bram**) 
   2. But self incrimination clause only violated if D’s statements admitted against him (**Chavez** plurality holding)

D. **POINT** – DP claims and self incrimination claims use same inquiry → was the statement voluntarily given. If not, must be excluded.
   1. ALWAYS raise arguments under both protections.

V. **Miranda Requirements**
   A. Pre-cursor to Miranda
      1. Ct.s seeking more of a brightline rule for voluntariness b/c tot. of circum. inquiry under **Spano**, **Fullminante, Bram** tough to apply
      2. **Escobedo** – Used 6th A. to establish bright line test for coerced pre-trial confession. Right to counsel violated if:
         a. Police investigation has begun to focus on a particular subject; 
         b. Subject taken into custody; 
         c. Police interrogate using process likely to elicit incriminating statements; 
         d. D has requested and been denied opportunity to consult counsel; AND 
         e. Police did not warn D of constit. right to remain silent
      3. Problems w/ Escobedo
         a. Very fact specific inquiry
         b. Rule only kicked in if all the requirements were met (especially D having to request and be denied counsel)
            i. Lower ct.s were limiting the holding to the facts of the case
   B. **Miranda v. Arizona** Holding
      1. Bright line rule that if D was not given warnings b/f make pre-trial statement, the statement is considered per se involuntary and must be excluded
      2. **Miranda warnings** that must be given (actual warnings or their equivalent)
         a. Inform of 5th A. right against self incrimination by:
            i. Right to remain silent 
            ii. Anything said can and will be used against you
         b. Inform of 5th A. right to have counsel present during interrogation by:
            i. Right to consult a lawyer and have lawyer with you during questioning
            ii. If you can’t afford a lawyer, one will be appointed for you
      3. Justification for requiring the warnings
         a. Police interrogations (procedures and circumstances) are inherently coercive and impinge D’s free will (informal pressure similar to torture)
         b. Presence of counsel, or at least D being aware of option to have counsel present, lessens likelihood police will use coercive techniques (and if they do lawyer can testify against them)
   C. Miranda Check-list
      1. Threshold for Miranda to kick-in - Must be in police custody and interrogation
         a. Custody - Whether D has been deprived of his freedom in any significant way (**Mathiason**) so as to be functional equivalent of arrest
            i. Focus on D’s subjective point of view (**Berkemer**) 
            ii. Factors
               a. **Mathiason** holding no custody at police station and police had keys
                  i. D voluntarily came to police station (big one)
                  ii. D told not under arrest
                  iii. D was able to leave (and did leave) at any time
b. **Berkemer** holding:
   i. No custody in ordinary traffic stop
      a. Questioning done in public view
      b. Traffic stops are relatively brief
      c. Terry stop ≠ custody under 5th A. b/c suspect can refuse questioning
   ii. But custody once traffic stop escalates to further investigation
      a. Dangers of police coercion present even w/ misdemeanor traffic arrest
      b. Arrest = per se custody regardless of circumstances

b. Interrogation - Police direct questioning or its functional equivalent (**RI v. Innis**)
   i. Functional equivalent = police conduct that police should know is reasonably likely to invoke an incriminating response (**RI v. Innis** – police talking to each other about kids getting hurt if they find D’s gun ≠ interrogation)
      a. Must be some element of compulsion above simple custody to create environment conducive to coercion that Miranda designed to prevent.
   ii. Focus on perceptions of D, but disregard unforeseeable sensitivities of D that police could not have been aware of. Intent of police only relevant in determining whether they should have known their conduct was likely to invoke an incriminating response.

2. If custody and interrogation → Miranda rights must be given AND waived
   a. Waiver must be “voluntary, knowing and intelligent”
      i. Spectrum of waivers(**Butler**)
         a. Express oral waiver = usually passes the test
         b. Silence with nothing more = never passes the test
         c. Middle ground
            i. 2 prong test for inferred waiver based on Tot. of Circum.
               a. Show D understood his rights AND
               b. Course of conduct indicating waiver
            c. Relevant Factors from **Butler** inferring waiver
               i. D’s background and experience (11th grade eduction)
               ii. D’s actions (D said he understood his rights but wouldn’t sign waiver)
      ii. Point of **Butler** – If waiver is not express, it should be pretty close to functional equivalent.
         a. **Miranda** – burden on gov’t to prove waiver is “high”
         ii. Only look at facts known to D when determining valid waiver (**Moran** – D not told lawyer trying to reach him not relevant to “knowing” inquiry)
   b. Consequences of valid waiver
      i. Miranda waiver IS NOT crime specific (**CO v. Spring** – If waive Miranda rights, D can be questioned about ANY crime, not just one arrest for).
   c. Consequences of invocation (i.e., no waiver)
      i. Invocation of right to remain silent
         a. Interrogation must immediately stop (**Miranda** rule)
         b. Waiver is only crime specific (**Mosley** – After invocation, different police officers from different station may initiate questioning w/ D by seeking waiver)
      ii. Invocation of right to counsel
         a. Interrogation must immediately stop (**Miranda** rule)
         b. Questioning can’t begin again unless counsel present or D initiations communication (**Edwards** – D invoked and police came back the next day and sought waiver → held 2d waiver not valid)
         i. Test for whether D initiates: Fairly representative of desire to open up discussion relating to the investigation (**OR v. Bradshaw** – asking for water/phone no good)
c. Invocation IS NOT offense specific – Edwards rule applies to questioning about ANY crimes (AZ v. Robertson) by ANY law enforcement officers (Minnick)

   d. NOTE – For robust right to counsel rules to apply, invocation of right to counsel must be unambiguous (Davis – “Maybe I should talk to lawyer” ≠ invocation)

      i. If request is ambiguous → police can ignore and continue questioning
      ii. Test: D must articulate desire to have counsel present clearly enough that a reasonable officer in such circumstances would understand it as an invocation

3. Miranda Violations – If not warnings given b/f custodial interrogation OR no waiver obtained
   a. Statements taken in violation of Miranda = must be excluded
   b. Limits
      i. Only must excludes statement from case in chief against D (Harris – statement taken in violation of Miranda admss. for impeachment)
         a. But if statement also compelled → not admss. for ANY purpose
      ii. Only must exclude statement out of D’s mouth → no fruit of poisonous tree exclusions
         a. MI v. Tucker – Statements from witness who police found out about from D
      iii. Statements taken in violation of Miranda do not “taint” later statements given after Miranda and valid waiver (Elstad – Questioning kid in home b/f Miranda rights given didn’t taint later statements taken after Miranda given and waived)
         a. Simply letting the “cat out of the bag” does not impermissibly taint subsequent statements w/out a showing of coercion
         b. But police using a “coordinated and continuous” questioning method to intentionally subvert Miranda goals does taint subsequent statements (Siebert – police questioning w/out Miranda to get statement, then give Miranda, then get same statement again)
   c. Point – Elstad exception must be in good faith
      i. Siebert Factors to determine whether per-Miranda quest. was good faith:
         a. Completeness/detail of questions and answers in 1st round of quest.
         b. Overlapping content of the 2 statements
         c. Timing and setting of first and second set of questioning
         d. Continuity of police personnel
         e. Degree to which questions in 2d round built on questions in 1st round
      ii. If appears to be good faith based on above factors - Police took corrective measure → D 1st statement would be inadmissible (not in any S. Ct. case but good policy per lower ct. decision)

4. Miranda Exceptions – Where Miranda warnings not required even though custodial interrogation
   a. Routine booking questions (e.g., “what is your name”) not require Miranda warnings (Muniz – ct. split on rat. whether per se exception or answers just aren’t testimonial)
   b. D must be aware that he is speaking to a gov’t agent (Perkins – D giving voluntary statement to UC agent in jail not required to get Mirandized)
      i. Concerns of Miranda not implicated if D doesn’t know talking to cops
   c. Public Safety Exception – Where public safety exigency, police not required to weigh whether Miranda warnings needed
      i. Objective inquiry into whether pub. safety in danger (no inquiry into officer’s subjective motives)
      ii. Quarles facts indicating pub. safety danger – witness told police D in store w/ gun; D ran from police; D had empty gun holster; took place in public store (dissent – store was empty b/c late at night)

D. Justification for limiting Miranda protections (see limits on exclusion and exceptions above)
1. **Tucker** - Miranda only a procedural safeguard, so violation of Miranda only has evidentiary consequences

2. **Quarles** – Miranda is only “prophylactic rule” to protect 5th A. rights against inherently coercive interrogations, so violation of Miranda ≠ violation of 5th A.
   a. Danger of pub. safety outweighs danger of potentially coercive interogg.

3. **Elstad** – Miranda sweeps more broadly than 5th A. → Miranda violation does not necessarily entail 5th A. violation w/ out showing some sort of coercion

4. **But Dickerson** – Miranda is a “constitutional rule” w/ “constitutional origin and underpinnings”
   a. Ct. rectifies “prophylactic” language in previous decisions by holding that Constitution does not require the particular Miranda warnings, but it does require at least functional equivalent.
      i. Note – Opinion by Rehnquist who also authored **Tucker** which was first case to call constitutionality of Miranda into question!

VI. 6th A. Right to Counsel
   A. Attachment – 6th A. rights attach at commencement of formal adversarial proceedings and extend to “every critical stage”
   B. Protections (greater than 5th A.)
      1. 6th A. grants right to have atty present at “every critical stage” after indictment, including extra judicial questioning by police or someone working for police (**Massiah** – D had right to counsel present after release on bail when snitch wearing wire during conversation w/ D in car)
         a. By including 6th A. right when D being questioned by UC agent/snitch, Ct. is implicitly saying that not only does 6th A. protect right to consult atty about legal rights (also protected by 5th A) but also **protects D from himself** (saying something incriminating)
      2. Violation – Police/agent “deliberately eliciting” statements from D w/out counsel present (**Massiah** – After D indicted and out on bail, snitch wearing police wire, asking questions about crime = violates 6th A)
         a. Focus on subjective motivation of the questioner
            i. **Massiah** – snitch initiated conversation for purpose of getting incriminating statements
            ii. **Brewer** (below) – cops played on D’s religious beliefs
            iii. **Henry** – Gov’t placed snitch in jail, and although told him not to initiate conversation, it created an environment Gov’t “must have known” would lead to D making incriminating statements w/ out presence of lawyer
            iv. **Kuhlman** – but must be some action taken by gov’t or agent designed to illicit info (merely passive listening, even if agent is UC in jail, is not enough to violate)
         b. Justification for applying to snitches/UC gov’t agents
            i. If snitch working on his own then turned evid. over to gov’t → easier to attack his credibility
            ii. 6th A. right to counsel much more firmly rooted than prophylactic Miranda rights
   C. Waiver
      1. Test: Gov’t must prove by tot. of circum “intentional relinquishment or abandonment of known right” w/ presumption against waiver (**Brewer** – Christian burial speech in cop car)
         a. Factors from **Brewer** finding no waiver
            i. D had been consulting with attys
            ii. D said he wouldn’t talk until atty present
            iii. Cops’s actions to get D to talk were coercive
            iv. No effort by cops to seek express waiver
         b. Note – If D does not know he is talking to cops (UC agent) waiver is impossible!!!
2. If D waives Miranda rights after indictment, also waives Massiah rights if no counsel has been appointed yet or not requested counsel for offense which indicted. (Patterson v IL)

3. Consequence of invocation (not securing waiver)
   a. Questioning can’t begin again unless counsel present or D initiations communication (MI v. Jackson – Edwards rule (from 5th A) is extended to 6th A context)
      i. 6th A. guarantees at least the right the right of D to rely on his atty as a medium b/t him and the state.
   b. Invocation IS offense specific (McNeil – Invoking 6th A. for crime which have been indicted DOES NOT bar questioning about other crimes for which not been indicted)
      i. D must invoke 5th A. right to counsel to stop questioning for crimes other than those for which he has been indicted
      ii. Justification for limiting 6th A. protections
          a. Making the prot. non-offense specific would completely shut down investigating crimes by ppl. that are being held in jail
          b. If D wants counsel present for quest. about other crimes, very easy for him just to invoke that right
      iii. Test for what constitutes a “different offense”: Blockburger test for double jeopardy – each offense must involve an element that the other does not. Factual relationship of the crimes is irrelevant (Cobb – D indicted for burglary and had counsel appointed could be questioned about a murder that arose from the burglary).

D. Exclusion
   1. If statement made in violation of 6th A – must be excluded (Massiah)
   2. Fruit of poisonous tree analysis applies (Brewer FN – body could be admissible only if police would’ve found it using inevitable discovery)
      a. Inevitable discover exception also applies
   3. Limits – statement taken in violation of Jackson can still be used for impeachment purposes (MI v. Harvey – Jackson, like Miranda is a prophylactic rule only)

<table>
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<th>6th A. (narrower but prot. greater)</th>
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<td>No invocation necessary, automatic right</td>
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<td>Presence of atty to protect D from himself (saying something incriminating); atty to act as medium b/t D and gov’t</td>
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<tr>
<td>Scope</td>
<td>Not Offence Specific; Does not apply to UC agents</td>
<td>Offense Specific; Applies to UC agents too</td>
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<td>Violation after invocation</td>
<td>Any questioning or conduct police should know would be reasonably likely to illicit incriminating info. (objective test)</td>
<td>Deliberate elicitation of statements re. the specific crime for which D is indicted (subjective test of police intentions)</td>
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<tr>
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<td>No Fruit of Poisonous Tree exclusions</td>
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