Criminal Procedure Outline
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I. The Fourth Amendment: Search and Seizure
    i. *Brown v. Mississippi* (1936): Convictions, which rest solely upon confessions shown to have been extorted by brutality and violence, violate the 14th Amendment
        1. State is free to regulate the procedure of courts **unless it violates due process**
            a. 5th amendment doesn't apply to states, court applies the 14th amendment (States can make it more restrictive but not less)
b. What is a search?
    i. Before *Katz*, *Boyd v. US* (1886): a "search" required a physical intrusion (a trespass) by government agents into a constitutionally protected area in order to find something/obtain information
    ii. *Olmstead v. US* (1928) (officers used wiretaps to intercept the conversations of Olmstead and others conducted by phone from their homes and offices): court ruled was not a search because conversations are intangible, they are not "persons, house, papers, or effects, so they are unprotected"
        1. Was not a physical intrusion or trespass
        2. Searches and seizures had to involve a physical intrusion or trespass to fall under the 4th amendment
c. Protected Areas and Interests: The Katz Test
    i. *Katz v. United States* (transmitting wagering info from a telephone booth and agents attached a recording device violates 4th amendment) *Katz* Test **Reasonable Expectation of Privacy:**
        1. **Individual must have exhibited an actual (subjective) expectation of privacy**
        2. **That expectation is one that society is prepared to recognize as reasonable**
            a. Case-by-case analysis when it is a new government activity; bright line rule if the court has already decided it (per se)
            b. Did not overrule *Olmstead* or *Boyd*
    ii. *United States v. White* (whether statements made to an informant, which were then recorded by outside parties, amounted to a search under the 4th Amendment): No, police conduct didn't amount to a search—no expectation of privacy in your personal conversations
    iii. Application of *Katz*
        1. **The Third-Party Doctrine** *Smith v. Maryland* (whether the installation and use of a pen register constitutes a search within the

meaning of the 4th Amendment) Do you have an expectation of privacy in the numbers you dial on your phone?

a. No, a person has no legitimate expectation of privacy in information he voluntarily turns over to 3rd parties
    i. Subjective: everyone knows phone companies are using them and users know they share this information with the phone company
    ii. Objective: 3rd Party Doctrine

2. **Third-Party Doctrine:** a person has no legitimate expectation of privacy in information he voluntarily turns over to a third party (or made public)
3. Garbage *California v. Greenwood* (whether the search of Defendant's garbage constituted a search under the 4th Amendment): Court applies 3rd Party Doctrine, no reasonable expectation of privacy in your garbage

d. Threshold Questions
    i. Who is conducting the action: Police? Or private actor?
    ii. What is the government action and is the action a "search"?
        1. "Search" in the 4th Amendment context is a term if art
        2. If it's not considered a "search" for 4th Amendment reasons, the analysis stops and constitutional rights are not afforded
        3. Key is whether the police action is considered a "search" under the 4th Amendment
    iii. If the action is a search under the 4th Amendment, is the search reasonable?
        1. Based on probable cause/supported by warrant
        2. Or under one of the established exceptions to the warrant requirement

e. *Katz* and New Technology
    i. *Florida v. Riley* (whether surveillance of the interior of a partially covered greenhouse in a residential backyard from the vantage point of a helicopter 400 feet above the greenhouse constitutes a 'search' under the 4th Amendment) ***Riley* Test:** Could a member of the public legally have been there?
        1. No expectation of privacy in the public airways at this altitude—not a search
        2. He had a subjective expectation of privacy but not an objective expectation of privacy
    ii. *Kyllo v. US* (whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitute a "search": Yes, it's a search)
        1. ***Kyllo* Rule:** When police
            a. Use a device;
            b. That is not in general public;
            c. To explore details of a private home;

d. That would be previously unknown without physical intrusion;
e. It's a search

****Final exam always tries to lead you to *Kyllo* but it won't apply because it won't be a home (**extremely limited to its facts)

i. Did not overrule *Riley*
ii. Home most protected → curtilage → open field not protected

iii. *US v. Jones* (GPS tracking device installed on the undercarriage of a Jeep used by Jones, suspected of trafficking narcotics, while he was parked in a public lot—tracked car's movements for 28 days)

a. Holding: it is a search – government physically occupied private property for the purpose of obtaining information (trespass)
i. Scalia doesn't apply *Katz*, he cares more about the putting of the tracker on the car and calls that a trespass
1. Under *Greenwood*→not a search because 3rd Party Doctrine (exposing movements on public streets)
2. *Kyllo* doesn't apply because not a home
3. *Riley*→not a search because members of the public could be there
ii. **Significance:** now two ways to get to a search – physical intrusion or *Katz* standard
iii. Mosaic Theory of 4th Amendment: a little is not a search, but when you start piecing it together – it becomes a search
b. *Knotts* (beeper in chloroform for 1-2 days): no reasonable expectation of privacy in movements – here, 28 days

2. *Florida v. Jardines* (received tip growing marijuana in home, took a drug dog to porch)
a. Curtilage of house enjoys protection as part of the home itself
i. No reasonable expectation of privacy in smells emanating from house
b. Police can walk on porch but no drug dog, police dog waives license
c. This is a search—based on trespass

f. The Future of *Katz*, 3rd Party Doctrine, and Trespass
i. *Carpenter v. US* (2018) (FBI identified cell phone numbers, obtained cell phone records under Stored Communications Act, got CSI for Carpenter's phone, cataloging his movements over the next 127 days): This was a search under the 4th Amendment
1. How do we get to reasonable expectation of privacy?

a. *Knotts:* no reasonable expectation of privacy in your movements
b. *Jones:* search because physical trespass of vehicle (he never mentions that the 28 days being surveillance was concurrence)
c. Court says one day and *Jones* 28 days (distinguishes *Knotts*) → at some point becomes a search

2. Technically *Carpenter* is limited to its facts (but not really) probably reasonable expectation over movements for long period of time
3. Exception to 3rd party doctrine—balance for when privacy interest outweighs the transfer to 3rd parties

g. Probable Cause and Search Warrant Requirements
   i. Probable Cause Requirements
      1. Particular Information: *Spinelli v. US* (confidential informant gave tip that he was a bookmaker and gambler) A confidential informant's tip here is insufficient probable cause to support a search warrant
         a. **Aguilar-Spinelli Test:**
            i. Basis of Knowledge: How did informant get the info?
            ii. Veracity Prong: Why should I believe this person?
               1. Credibility of the information
               2. Reliability of the information

            **this case is overruled
      2. Totality of the Circumstances *Illinois v. Gates* (anonymous letter that couple selling drugs in Florida) **Overrules *Spinelli*
         a. Applies **Totality of the Circumstances Test:** Did the magistrate have a substantial basis for concluding that probable cause existed based on the totality of the circumstances?
            i. Allows magistrate to consider seemingly innocent conduct in context
            ii. Fact that they later found drugs doesn't support probable cause
            iii. Probable cause analysis very fact specific
      3. Individualized Suspicion and Common Enterprise
         a. *Maryland v. Pringle* (stops car w/3 people in it, finds cocaine, arrests all 3)
            i. Court applies totality of the circumstances test (time of day, cash in car, location of cocaine, men failed to offer info)
            ii. Holding: a reasonable officer could have concluded there was probable cause to believe Pringle committed possession

iii. Seemingly innocent conduct can add up to probable cause

b. Probable Cause in Action: *DC v. Wesby* (abandoned house w/party inside) – was there sufficient probable cause to arrest these individuals for unlawful entry?
   i. Holding: yes – under totality of the circumstances, a reasonable officer could disbelieve the claim of innocent entry and infer that they knew or should have known that they didn't have permission to be in the house
      1. Basis for arrest: unlawful entry
      2. Standard: knew or should've known entered w/o permission
         a. Probable cause: condition of house, conduct of partygoers, reaction to police, evasive answers
         b. But this could all be explained innocently
      3. **Key question for probable cause:** whether a reasonable officer could conclude – considering all of the surrounding circumstances, including the plausibility of the explanation itself – that there was a substantial chance of criminal activity
      4. Probable cause = low bar
      5. *Wesby* & *Gates:* innocent behavior can add up to equal probable cause

ii. Executing Warrants
   1. Particular Description Requirement/Reasonableness in Execution
      a. *Maryland v. Garrison* (valid search warrant for 3rd floor but didn't know it was 2 apartments)
         i. Did the factual mistake invalidate the warrant?
            1. Place to be searched must be described in the warrant with sufficient clarity that the officer executing it can identify it with reasonable effort – doesn't have to be perfect and based on info known at the time presented to magistrate
            2. If a mistake is made in executing a warrant, the Court will allow the evidence to be used if the law enforcement mistake was objectively understandable and reasonable
            3. Questions to ask:
               a. Is it particularly descriptive?
               b. Was it executed in the right way? (here, yes & yes)

c. Look at what a reasonable officer would've done

b. *Richards v. Wisconsin* (had search warrant, magistrate wouldn't give a no-knock warrant, officers undercover and not undercover, knocked but didn't wait)
   i. Issue: whether the 4th am warrant requirement requires officer to knock-and-announce prior to executing a warrant?
   ii. Holding: yes, police must knock-and-announce but there's an exception –
      1. To justify no-knock entry, police must have a reasonable suspicion that knocking and announcing would be dangerous or futile, or that it would inhibit the effective investigation by, for example, allowing the destruction of evidence
      2. Or get a no-knock warrant
      3. Exigent circumstances = reasonable

h. Arrest (Seizure) Warrants – When do you need them?
   i. Felonies in Public: *US v. Watson* (informant told inspector would furnish stolen credit cards at next public meeting, inspector arrested after getting signal)
      1. Issue: whether the police may make a public arrest w/o a warrant or an exigent circumstance based solely on probable cause
      2. Holding: yes – police may arrest an individual in public w/o a warrant or w/o exigent circumstance if there is probable cause
         a. Defer to congress (congress made it legal for postal officers to do this)
         b. Common law allowed
         c. Officer doesn't have to see the crime if it is a felony
            i. *Powell concurrence:* needs to explain why less protection for warrantless seizure
            ii. *Marshall dissent:* there was an exigent circumstance here, police can get a warrant and sit on it until the timing is right for arrest (back pocket warrants)
         d. **Rule:** post *Watson*, a warrant is not necessary for a police officer to make an arrest in a public place so long as he has probable cause to believe a felony has been committed
   ii. Felonies in Home: *Payton v. NY* (developed probable cause to believe murder, went to arrest him and broke into home w/crowbar – no warrant / armed robbery and arrested in home when they came in and found drugs)
      1. Issue: whether the 4th am forbids a warrantless arrest in the home, even if supported by probable cause
      2. Holding: yes – to arrest an individual in his home, probable cause is not enough; instead, must have a warrant or an exigent circumstance

a. Running into house = exigent circumstance
b. Police can create the exigent circumstance by chasing you into the house

3. **Rule:** need an arrest warrant (or exigent circumstances) for arrests in the home

iii. Misdemeanors in Public: *Atwater v. City of Lago Vista* (didn't have seatbelts on – arrested her)

1. Issue: whether the 4th am forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor
   a. Holding: no – probable cause standard, allowing a warrantless arrest, applies to all arrests
   b. If an officer has probable cause to believe that an individual has committed even a minor criminal offense in his presence, the officer may, w/o violating the 4th am, arrest the offender
2. Arrests in public vs. home
   a. Warrantless arrests in public (*Watson* and *Atwater*): police can make a public arrest based only on probable cause
   b. Warrantless arrest in the home (*Payton*): police cannot arrest individuals in the home based on probable cause alone, need either a warrant or an exigent circumstance

iv. Pretextual Warrantless "Seizures": *Whren v. US* (saw driver stop too long at traffic signal and looking down at passenger's lap)

1. Issue: whether an arrest or other 4th am seizure, such as a traffic stop, made on probable cause may nonetheless be "unreasonable" because of the officer's subjective motives
   a. Officer's subjective intent is irrelevant
   b. So long as a traffic stop is supported by probable cause that a traffic violation has occurred, the seizure (traffic stop) is lawful under the 4th am, regardless of officer's ulterior motives
   c. **this case is not limited to traffic stops

i. Warrantless Searches and Seizures

i. Searches Incident to an Arrest

1. Search of a Person: *US v. Robinson* (believed driver was driving w/o permit, stopped car, pat down of suspect revealed cigarette package with heroine)
   a. Issue: whether the 'search incident to an arrest' exception to the warrant requirement allows for a full search of the person, as opposed to only a "safety" search
   b. Holding: yes, search incident to an arrest allows the officer to search the entire person of the arrestee – not limited to where a gun or knife could be
   c. An arrest based on probable cause alone is a reasonable search under the 4th am. A search of the person incident to

the arrest is an exception to the warrant requirement. This allows for a full search of the person
    i. Search may be made of the area within the control of the arrestee
    ii. Rationale: officer safety and need to find/preserve evidence
    iii. Area within the control of the arrestee
    iv. Not limited to weapons or evidence

2. Search of a Home: *Chimel v. California* (police had warrant authorizing arrest for burglary of a coin shop, they searched home after he said no w/o a warrant)
    a. Issue: whether law enforcement may search the entire home when arresting an individual in his/her home
    b. Holding: no, while police may conduct a warrantless search incident to an arrest while in the home, the search is limited to:
        i. The arrestee's person; and
        ii. The area within the arrestee's immediate control, meaning the area from within which she might gain possession of a weapon or destructible device
3. Search of a Vehicle: *Arizona v. Gant* (arrested for driving with a suspended license, put in back of patrol car, searched his car and discovered cocaine in pocket of a jacket in the backseat)
    a. Issue: whether the scope of a search incident to an arrest in a vehicle extends to the entire passenger compartment after arrestee is placed in car
    b. Holding: no, police may search a vehicle incident to a recent occupant's arrest only if the arrestee is:
        i. Within reaching distance of the passenger compartment at the time of the search, OR
        ii. It is reasonable to believe the vehicle contains evidence of the offense of arrest
        iii. *Belton:* you can search anywhere in the car (limitless) – this is basically the same rule as *Belton* because the first prong is ineffectual
    c. Rule: when lawful arrest made involving vehicle, police may search:
        i. The arrestee's person; and
        ii. Anywhere within reaching distance of the passenger compartment at the time of the search, and
        iii. Anywhere it is reasonable to believe the vehicle contains evidence of the offense of arrest
4. Search of a Cell Phone: *Riley v. California* (search incident to arrest, found phone in pocket, searched phone and connected him to recent shooting): Phone has heightened expectation of privacy

and therefore law enforcement may not search the phone absent a warrant

a. still unclear is they can make you give phone or passcode
b. court goes back to original balancing test here, gets away from bright-line rule→makes it case-by-case, balancing government interests and privacy interest

5. search incident to arrest analysis:
    a. first: make sure the arrest is lawful
    b. second: ask where the arrest is being made and what's being searched (e.g. a public search of the person, a search of home, search of vehicle)
    c. third: if it's a phone seized then get a warrant to search

ii. Plain View Doctrine: *Collidge v. New Hampshire*

1. Plain View Doctrine: an objective of incriminating nature may be seized w/o a warrant if it is 'plain view' of a police officer lawfully present at the scene
    i. Not really an exception to the warrant requirement, but rather as a justification for the police to conduct a warrantless seizure of the evidence in plain view
    b. An article is in plain view and subject to warrantless seizure by police if:
        i. Police lawfully make an initial intrusion or otherwise be in a position from which they can view a particular area;
        ii. ~~Police must discover incriminating evidence inadvertently~~; and
            1. No longer required (*Horton*)
        iii. It is immediately apparent to police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure
2. *Arizona v. Hicks* (bullet fired through apartment below; moved turntable to see number – that was a search)
    a. Have to have probable cause to believe equipment stolen
    b. If you have to pick it up and look at it→not immediately incriminating
    c. Reading the serial numbers wasn't a seizure – it was the moving of the stereo that was the search and required the warrant
    d. 2nd search that required probable cause
    e. Immediately apparent: requires probable cause
        i. Issue here that it wasn't immediatetly apparent to the police that the items observed may be evidence (otherwise, wouldn't of had to move the turntable to get the numbers)
    f. **need probable cause to support the immediately apparent requirement

3. *Horton v. California* (magistrate issued search warrant only for the proceeds, he found weapons in plain view and seized them)
    a. Inadvertence prong is not a necessary condition

iii. Automobile Exception
1. Generally Speaking: *Carroll v. US*
    a. Basis for automobile exception: mobility and lower expectation of privacy in car
        i. Sidenote: exception to the warrant requirement—look at framer's intent→balance nature of intrusion v government interest→if govt interest wins, create an exception
2. What's an Automobile: *California v. Carney*
    a. Issue: whether the 4th am requires law enforcement to acquire a warrant before searching a motor home when there is probable cause of a felony being committed
    b. Holding: no—police do not have to obtain a warrant to search a vehicle, to include a motor home, so long as they have probable cause
    c. Rule: automobile exception—police don't need a warrant to search a vehicle so long as they have probable cause
        i. They can search anywhere in the car where the evidence for which they are searching may be
        ii. Includes containers if the container can fit the evidence
    d. Carroll and Ross (issue: whether the automobile exception includes containers)
        i. Carroll: creates automobile exception—can search anywhere evidence can be related to the PC
        ii. Ross: if PC justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle that may conceal the object of the search
3. Containers: *California v. Acevedo* (issue: whether the automobile exception allowed the police to open the sack w/o a warrant or did the fact that PC attached to the sack, not the car, require a warrant) (fedex package police knew contained weed put in car)
    a. No warrant required—under automobile exception you can search anywhere evidence may be
        i. Allows warrantless search of the package
    b. Overturns Sanders
    c. Rule: the police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained
        i. Police didn't have probable cause to believe contraband hidden in any other part of the car and a search of the entire car would have been w/o probable cause and unreasonable

4. Passengers' Possessions: *Wyoming v. Houghton* (boyfriend had syringe, searched girlfriend's purse): When police have probable cause to search a vehicle, they may search a passengers' belongings so long as those belongings are capable of concealing the object of the search
    a. But cannot search passengers' bodies
5. Curtilage: *Collins v. Virginia* (searched motorcycle beside home): Automobile exception does not allow for warrantless searches of vehicles parked within the curtilage of the home, scope of the automobile exception extends no further than the automobile itself

iv. Inventory Searches
1. *Colorado v. Bertine* (arrested for DUI, took van, inventoried, opened bag, and found drugs): If the police have lawfully impounded a vehicle, they may, pursuant to an established standard procedure, secure and inventory the vehicle's content
    a. Permissible even if departmental regulations gave the police officer discretion to choose between impounding and not, as the discretion is exercised according to standard procedure
        i. Rationale: Protect owner's property and guard police from danger (deference given to police procedures designed to secure and protect vehicles and their content)
        ii. Reasonable police regulations to inventory procedures administered in good faith satisfy the 4th am, even if courts later on could devise equally reasonable rules
    b. Rule: if the police have lawfully impounded a vehicle, they may, pursuant to an established standard procedure, secure and inventory the vehicle's contents in order to:
        i. Protect the owner's property while it remains in police custody;
        ii. Protected the police from claims or disputes over lost or stolen property; and
        iii. Protect the police from potential danger
    c. May extend to containers, so long as weapons or valuables might be found therein
2. *Iowa v. Ingram* (2018) – applying *Bertine:*
    a. Allows local law enforcement culture to be brought to bear in expanding or contracting the scope of 4th amendment protections, e.g. whether a container may be searched may turn on the policies of the local jurisdiction where the car was impounded
    b. Local law enforcement, and not judges/legislatures, may set the contours of the 4th amendment protections

c. Issue heightened by the fact that these policies don't have to be in writing
d. The Effect of Bertine, et. al:
    i. Whern: In making the discretionary choice to make a traffic stop, law enforcement's subjective intent is not subject to review
    ii. Atwater: Once the police have made the virtually unreviewable discretionary decision to stop a vehicle, the driver may be arrested for a minor traffic violation, even if the violation is not punishable by a jail term
    iii. Bertine: Pursuant to an impoundment under a written or unwritten policy, law enforcement may engage in a thorough search of the vehicle, including opening closed containers
        1. End result: law enforcement has virtually unlimited discretion to stop arbitrarily whomever they choose, arrest the driver for a minor offense that might not even be subject to jail penalties, and then obtain a broad inventory search of the vehicle—all w/o a warrant

v. Consent
    1. *Schneckloth v. Bustamonte* (passenger gave permission to search brother's car, found stolen checks)
        a. Issue: whether a "consent" to search is voluntarily given if the person consenting is not aware of his/her right to refuse to consent
            i. Court doesn't care that Alcala didn't have authority to consent
            ii. Generally, owner of car presumed authority to give consent→then driver
        b. Consent to search is valid if it is voluntarily given; meaning that the consent was not the result of duress or coercion, express or implied
            i. You do have the right to withdraw consent
        c. Voluntariness is a finding of fact determined by the totality of the circumstances
        d. Subject's knowledge of the right to refuse is a factor, but not dispositive
            i. Even though they say they'll take subjective into account—objective always wins
    2. *Georgia v. Randolph* (husband refused search of house, wife allowed it): Warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident

cannot be justified as reasonable as to him/her on the basis of consent given to the police by another resident

3. Third party consent generally:
    a. Allows for warrantless entry of a person's house w/o a warrant based on the voluntary consent of an individual possessing authority
    b. That person might be the householder against whom evidence is sought, or a fellow occupant who shares common authority over property, when the suspect is absent (*US v. Matlock*)
    c. Not based on property law, rests on "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched
        i. Doesn't matter if police are wrong, so long as they reasonably believed the person who consented is a resident
        ii. Child can consent to common areas

vi. Exigent Circumstances
    1. *Kentucky v. King* (went into breezeway, officers couldn't tell which apartment suspect went into): Police may conduct a warrantless search of a home when there is an exigent circumstance
        a. Even if the police create the exigent circumstance, they can still conduct a warrantless search based on the exigency exception so long as they did not gain entry to premises by means of an actual or threatened 4th am violation

vii. Searches Based on Traditional Standards of Reasonableness
    1. *Maryland v. King* (charged w/assault, took DNA while booking): Police may collect a DNA sample from an arrested individual w/o first acquiring a warrant
        a. "Taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photography, a legitimate police booking procedure that is reasonable under the 4th am
        b. Suspicion-less searches "when faced w/special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual circumstances may render a warrantless search or seizure reasonable: This case falls under this umbrella as there is a diminished expectation of privacy and minimal intrusion
            i. Above justifies the warrantless search, but it still must be reasonable

1. To decide whether it's reasonable, weigh the promotion of legitimate governmental interests against the degree to which the search intrudes upon an individual's privacy
    a. Purported government interest here: arrestee's true identity; ensures custody doesn't create risks for staff and other detainees; ensure persons accused of crimes are available for trial; determine whether bail is appropriate; free innocent people—and it is just like fingerprinting
    b. Defines the intrusion by the physical act, not by all of the info gotten from DNA
    c. We don't know what founders would think—but recognize that this is part of the analysis
    d. Limited to cheek swab
2. Dissent: this is done to solve crimes; this will allow DNA for traffic offenses

2. *Birchfield v. North Dakota* (search-incident-to-arrest case) (refused to undergo blood test) (2016)
    a. For a breath test, the 4th am does permit warrantless breath tests incident to an arrest for drunk driving; thus, state can criminalize refusing to do so
    b. For a blood test, the 4th am does not permit warrantless blood tests incident to an arrest for drunk driving; thus, state cannot criminalize refusing to do so
        i. Exigent circumstance: evidence is dissipating
        ii. As for implied consent: must be a limit to what motorists consent to while driving
3. *Mitchell v. Wisconsin* (passed out, got blood test w/o warrant) (2019) (plurality—we're still trying to figure out what this means going forward): When the police have probable cause to believe that a person has committed a drunk driving offense and the driver is unconscious, a warrant is not generally required to order a blood test
    a. Plurality:
        i. "real" exigent circumstances justify warrantless blood draws
        ii. Don't care about implied consent
        iii. Exigency exists when:
            1. BAC evidence is dissipating

2. Some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application

b. McNeely: can take blood w/o a warrant if exigent circumstance – need something beyond dissipation

j. Reasonableness Clause – Diminishing Role of Warrants and PC

i. The Stop and Frisk Doctrine

1. *Terry v. Ohio* (1968) (2 men looking into store repeatedly): Court permits a reasonable search for weapons for the protection of the officer, where he has a reason to believe that he is dealing w/an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime
    a. Standard = Reasonable Suspicion: officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonable . . . Due weight must be given not to his inchoate and unparticularized suspicion or hunch, but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience
        i. Objective→but look at officer experience so subjective
    b. Scope: Must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer
2. *Michigan v. Long* (1983) (police stopped Long, saw a large hunting knife on the floorboard, frisked Long, entered car and found an open pouch of marijuana under the armrest)
    a. Extends the self-protective search principle of Terry to search of a vehicle
    b. Allows police to search anywhere in the car where a weapon may be located, so long as police have reasonable suspicion that suspect could injure them
        i. So long as the investigation involves a police investigation at 'close range'
3. *Hibel v. 5th Jud. District*: Constitutional for state to require a suspect to identify himself to police pursuant to a Terry stop
4. *Heien v. NC:* Terry Stop still lawful if police have a mistake of fact or a mistake of law in developing reasonable suspicion
5. The Terry Framework – Stop/Seizure
    a. Is there a stop or seizure? Determined by whether a "reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." If the answer is no, then→

b. Supported by reasonable suspicion? Whether a reasonable person w/similar police experience would believe that a crime has been committed or will be committed based on totality of circumstances. If yes, then→
c. Stop conducted within permissible scope: Stop may "last no longer than is necessary to effectuate that purpose" of the stop. If yes, valid Terry Stop. If no, then a seizure under the 4th Am requiring probable cause

6. The Terry Framework – Frisk/Search
    a. Reasonable person not free to leave + reasonable suspicion that criminal activity is afoot + limited in time to the time necessary to effectuate the purpose of the stop = lawful Terry Stop→
    b. As a lawful Terry stop, police may conduct a frisk of the person's body/clothes, but only for weapons, not for evidence. If they feel something that can be a weapon, can remove from clothing seize→
    c. If the Terry Frisk results in contraband (weapon or other contraband), the reas suspicion turns into prob cause and police may arrest individual

ii. Reasonable Suspicion
1. *Alabama v. White* (1990) (anon tip that would be leaving apartment and certain time and going to motel, pulled her over): Anonymous telephone tip regarding the presence of cocaine, as corroborated by independent police work, was sufficient reasonable suspicion to make the Terry Stop
    a. Because the tip had an indicia of reliability (via sufficient corroboration), there was reasonable suspicion to stop the vehicle
    b. Probable Cause:
        i. A fair probability that contraband or evidence of a crime will be found
        ii. Totality of the circumstances
        iii. Anonymous tips Gates: "the anonymous tip contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of 3rd parties ordinarily not easily predicted
    c. Reasonable Suspicion:
        i. More than an inchoate and unparticularized suspicion or hunch
        ii. Some minimal level of justification for making the stop
        iii. Less demanding standard than PC
        iv. Can arise from info that is less reliable than that required to show PC

v. Different in quantity or content than PC
vi. Totality of the circumstances

d. The majority:
i. Court had already held that reas suspicion can arise from info that is less reliable than that required to show probable cause
ii. A tip that has a relatively low degree of reliability, more info will be required to est. the requisite quantum of suspicion than would be required if the tip were more reliable
iii. What was important was the caller's ability to predict respondent's future behavior
iv. Court said this was a close call

2. *Illinois v. Wardlow* (2000) (high crime area, def fled upon seeing officers): Unprovoked flight from police officers alone does not support reasonable suspicion; however, reasonable suspicion is a totality of the circumstances analysis and the unprovoked flight from police officers may be a consideration in the totality of the circumstances analysis
i. High crime area + something else = reasonable suspicion (totality of the circumstances)
ii. *Florida v. JL:* "several courts of appeals have held it per se foreseeable for people carrying significant amount of illegal drugs to be carrying guns as well"
iii. Reas suspicion is a totality of the circumstances analysis
iv. Key: behavior for which there can be innocent reasons can support RS

b. Stop and Frisk: Terry Stop allows police to stop and frisk based on reasonable suspicion that the suspect is armed and dangerous (limited in scope to weapons, not evidence)
c. Reasonable suspicion: Lesser standard than probable cause; objective standard from perspective of police officer

3. *Florida v. JL* (2000) (anon caller – man in plaid shirt at bus stop has gun)
a. Issue: whether an anonymous tip that a person is carrying a gun is, w/o more, sufficient to justify a police officer's stop and frisk of that person
b. Holding: No, an anonymous tip lacking indicia of reliability of the kind contemplated in Adams and White does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm (no independent police work here)
c. Rule:
i. Rejects automatic firearm exception

ii. Affirms White, for an anonymous tip to be enough reasonable suspicion to support a Terry stop, you need an additional indicia of reliability
iii. What suffices as an indicia of reliability:
1. When the anonymous call provides "predictive information"
2. Not its tendency to identify a determinative person
3. When a person provides reliable tips 2 night in a row and the voice sounds familiar?
4. When the informant places his identity at risk?
5. When an unnamed person driving a car stops for a moment and tells the police officer face to face that criminal activity is occurring?

iii. Drawing the Lines – Terry Stop v. De Facto Arrests
1. *Dunaway v. NY* (1979) (pizza parlor proprietor killed-jail inmate supplied lead. Not enough for warrant but still picked him up, wasn't told he was under arrest but would've been restrained, questioned in interrogation room): Reasonable suspicion is limited to Terry Stops and is not an applicable basis for police to compel a custodial interrogation of an individual
a. De facto arrest need probable cause
b. Probable cause required to compel custodial interrogation
i. This is a de facto arrest
ii. White concurrence: 4th am is about reasonableness, not warrants, and therefore balancing test is key. But must be categorical, not case-by-case
iii. Rehnquist dissent – this is all about consent: Dunaway went on his own free will
1. Question turns on whether the officer's conduct is objectively coercive or physically threatening, not on the mere fact that a person might in some measure feel cowed by the fact that a request is made by a police officer
2. *Florida v. Royer* (1983) (one-way ticket under assumed name, fit "drug-courier" profile): After the police officers requested Royer to accompany them to a police room, Royer followed them, and the police announced their suspicion, **the stop exceeded the permissible scope of Terry**
a. Everything was consensual? But a person is effectively seized when a "reasonable person would have believed that he was not free to leave"→

b. Simple Terry Stop? Maybe at first, but under Terry, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time"→
c. Then there's probable cause for the arrest? Not at the time he consented to the search of his luggage

3. Terry Stops: reasonable suspicion that a person has committed or is about to commit a crime
    a. Scope of Terry Stops: Investigative methods employed should be the least intrusive means reasonable available to verify or dispel the officer's suspicion in a short period of time
        i. Limitation applies to length and intrusiveness of the stop – both limited to time and extent necessary to verify or dispel officer's suspicion
            1. *Illinois v. Caballes*: Did the calling in the dog unlawfully extend the scope of the Terry stop into a seizure? "An investigative technique, even when directed toward criminality not reasonable suspected, does not violate that limitation unless the particular tactic itself infringed the detainee's constitutionally protected interest in privacy

iv. Summary
    1. Stop and frisk:
        a. RS
            i. Lesser standard than prob cause
            ii. Objective standard from perspective of police officer
            iii. Innocent conduct may add up to reas suspicion
            iv. Anonymous tip + indicia of reliability
            v. Preference against bright line rules
            vi. Limited in scope to weapons, not evidence
        b. Terry stops
            i. Stop requires reas suspicion that a crime occurred or that crim activity is afoot
            ii. Search still limited to weapons
            iii. Limitations: scope and duration – scope limited to nature of the investigation and duration limited to the amount of time necessary to dispel/confirm suspicion
        c. Terry stops to a de facto arrest: When terry stops exceed their permissible scope/duration, they become de facto arrests requiring prob cause

v. Drawing the Lines – Terry Stop v. Non-seizure (consent-based) Encounters
    1. *US v. Mendenhall* (1980) (fake name on ticket, in Cali for only 2 days, asked her to come to DEA office, asked if they could search and consented, found heroin)
        a. Plurality opinion (if there's a question on this, need to argue whether consent, reasonable suspicion, or de facto arrest—appropriately)
        b. Mendenhall was not seized for 4th am purposes when police officers initially stopped her in the concourse because:
            i. A reasonable person in her situation would have believed she was free to leave; or
            ii. Police had reasonable suspicion to stop her
        c. No, she was not seized when she went to DEA Office because under totality of circumstances, her consent was voluntarily given
        d. Stewart and Rehnquist say consent based
            i. Have to allow for the police to approach people on the street
            ii. To allow that, conclude that "a person has been seized only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave
            iii. Some objective factors:
                1. Threatening presence of several officers
                2. Display of a weapon by an officer
                3. Some physical touching of the person
                4. Use of language or tone of voice indicating that compliance was compelled
                    a. But what about her age, education, etc.
        e. Powell, Burger, Blackmun:
            i. Seizure did happen here, it wasn't consensual
            ii. Based on reasonable suspicion (her conduct)
        f. Dissent – White, Brennan, Marshall, and Stevens: Clearly a de facto arrest like in Dunaway
    2. *Florida v. Bostick* (1980) (boarded bus w/o rs and asked passengers to search their luggage): Police encounter on a bus of the type involved here does not constitute a seizure because a reasonable person in respondent's position would have felt free to decline the officer's request or otherwise terminate the encounter, the entire encounter was consensual
        a. There can't be a per se rule that these types of encounters are always seizures
        b. Test: whether, taking into all the circumstances surrounding the encounter, the police encounter would have

communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business (reasonable person test)

3. *US v. Drayton* (2000) (boarded bus, didn't block aisle, asked to search bag, asked to pat down, found cocaine): Law enforcement action on the bus did not amount to a stop or seizure triggering either Terry or 4th am protections because a reasonable person in def's situation would have felt free to decline the officers' requests or otherwise terminate the encounter
    a. Significance of Bostick: Buses are different and no per se rules allowed (person is seized dependent on "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter)
    b. Bostick Rule: Totality of the circumstances – look to nature of the encounter
        i. When officer did not remove the gun or use it in a threatening way
        ii. When officer advised passengers of their right to not cooperate and to refuse
        iii. Police did not seize folks when they boarded
        iv. Police left aisle free
        v. Spoke to passengers one-on-one in nice voice
        vi. Police said people have refused to cooperate before
4. Summary: Terry Stops v. Non-Seizure Encounters
    a. Police can stop and approach someone w/no suspicion so long as a reasonable person in the situation would feel free to refuse and terminate the encounter
    b. Extremely objective based – look at behavior of the police officers and ask whether based on the totality of the circumstance the police showed coercion or threatened force
    c. If a reasonable person would not feel free to terminate the encounter, then you need reasonable suspicion or PC
5. *Brendlin v. California* (2007) (traffic stop, conceded to be illegal for lack of rs. Defendant was passenger, found outstanding arrest warrant—arrested, drugs found on his person): A passenger of a vehicle may be seized by law enforcement as part of a traffic stop if a reasonable person in his situation would not feel free to decline the officers' requests or otherwise terminate the encounter
    a. This is just Mendenhall and Bostick
        i. Mendenhall: seizure occurs if in view of all of the circumstances surrounding an incident, a reasonable person would have believed that they were not free to leave
        ii. A passenger is restrained just as much as driver

iii. *Maryland v. Wilson*: in a traffic stop, police may order a passenger out of the car absent reasonable suspicion based on safety
iv. Reversed

6. *Rodriguez v. US* (2015) (K-9 officer pulled over and used dog w/o consent): Police may not extend a traffic stop to conduct a drug sniff absent reasonable suspicion to do so
    a. Police can stop vehicles when they have reasonable suspicion of a traffic violation
    b. Traffic stop is still considered a seizure under the 4th am, just viewed through the spectrum of a Terry Stop
    c. Consequently, limited in scope to the "seizure's mission" (to address the traffic violation that warranted the stop, and attend to related safety concerns)
        i. Authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed
        ii. Critical question is whether conducting the sniff prolongs the stop
    d. Limits Caballes, can bring the drug dog even if no reasonable suspicion of drug use, but may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining the individual
    e. *California v. Long* (drunk, pulled over, saw hunting knife, searched passenger compartment, saw bag, found weed): Search of the passenger compartment of an automobile, limited to areas where weapon, permissible if rs
7. Summary: Terry Stops v. Non-Seizure Encounters
    a. Police can stop and approach someone with no suspicion so long as a reasonable person in the situation would feel free to refuse and terminate the encounter
    b. Extremely objective based: look at behavior of the police officers and ask whether based on the totaliity of the circumstances the police showed coercion or threatened force
    c. If a reasonable person would not feel free to terminate the encounter, then you need reasonable suspicion or probable cause
    d. Extends to passengers in vehicles
    e. And can't prolong a traffic stop to wait for a drug dog

k. Remedies for 4th Amendment Violations
    i. The Exclusionary Rule
        1. *Wolf v. California*: While the 4th am applies to the states, it does not mandate the exclusion of evidence unlawfully seized evidence
            a. Remedy is not in text of Constitution, judicially created
            b. Exclusion not the majority rule

c. Goal of exclusion (deterrence) available through other means: Discipline and private action
d. Dissent: there's no other remedy to achieve deterrence—absent exclusion, 4th am has no consequence
i. After Wolf: Unlawfully seized evidence excluded in federal court, admissible in state court

2. *Mapp v. Ohio*: Wolf is overturned—4th am requires exclusion of evidence seized unlawfully in state court
a. Rationale:
i. Times have changed
ii. Court had whittled away Wolfe
1. "silver platter"
2. States and feds working together
iii. Meaning and significance to 4th am
iv. Ensures deterrence: "purpose of the exclusionary rule is to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it"
v. Comparable to coerced confessions
vi. Rule hasn't destroyed federal investigations

ii. The Exclusionary Rule—Standing and Scope
1. *Wong Sun v. US*
a. "we need not hold that all evidence is fruit of the poisonous tree simply because it would have come to light but for the illegal actions"
b. Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable, to be purged of the primary taint"
c. Significant for derivative/fruit of the poisonous tree
i. But for: But for the constitutional violation, would the evidence have been discovered?
ii. Proximate cause: "But for" cause may be too attenuated
2. Exclusionary rule applies to federal govt and the states—evidence obtained in violation of the 4th am will be excluded in trial
3. Fruit of the poisonous tree: Applies when evidence is derivative of a constitutional violation
a. Generally, looks at "but for" causation and proximate cause
b. In other words, is the evidence in question derived from an exploitation of the violation or by means sufficiently distinguishable

l. Exclusionary rule: Standing and scope

i. *US v. Byrd*: We know that Byrd has standing to claim a Constitutional violation by deciding whether he had a reasonable expectation of privacy in a rental vehicle where he's not the owner & isn't listed on rental agreement (he does)
ii. *Murray v. US*
    a. Issue: whether evidence obtained from an independent source, in conjunction with an unlawful search, is admissible
    b. Holding: independent source doctrine applies to both evidence obtained for the first time during independent lawful search, and also to evidence initially discovered during, or as consequence of unlawful search
    c. Independent source:
        i. Allows admission of evidence that has been discovered by means wholly independent of any constitutional violation
        ii. Ultimate question is whether the search pursuant to warrant was in fact a genuinely independent source of the info and tangible evidence
            1. Rationale: when the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation
        iii. Limitations: if basis for warrant was what they saw during the illegal search or what was presented to the magistrate

2. *Nix v. Williams*. Inevitable discovery: If the prosecution can establish by a preponderance of the evidence that the info ultimately or inevitably would have been discovered by lawful means, then it is admissible, despite the constitutional violation
    a. Good or bad faith doesn't matter
3. *US v. Leon* Good faith exception: When law enforcement acts in good faith (meaning they have an objectively reasonable belief that the warrant was valid) evidence will not be excluded, even if warrant was later found to be invalid
    a. Exclusion is on a case-by-case basis—only when exclusion serves deterrence
    b. As remedy, apply only where its remedial objectives (deter police misconduct) are best served. Exclusion in this situation would not deter police conduct (misconduct here is not police, but the magistrate and no empirical evidence) therefore, exclusion not appropriate
    c. Significance: Exclusionary rule is not absolute (or per se) but applied on a case-by-case basis, asking: Will excluding this evidence deter similar police misconduct?

i. Later applied to other good faith mistaken beliefs (bad statutes and bad caselaw)

d. Law enforcement belief that warrant was valid must be **objectively reasonable**

i. "Our good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization

ii. Two noted exceptions

1. Law enforcement lies or misleads to get warrant
2. Magistrate abandoned role

4. *Hudson v. Michigan:* Exclusionary rule does not apply to knock-and-announce violations

a. Exclusionary rule only applicable where its remedial measures are thought most efficaciously served—that is, where its deterrence benefits outweigh its substantial social costs

b. (BALANCING) Social costs of excluding this evidence outweighs deterrence

i. Harms: letting guilty people go free; extensive litigation, police refraining from timely entry after knocking/announcing

ii. Deterrent effect of exclusion: other remedies available (1983 and police discipline), deterring knock/announcing violations not worth a lot—such a low bar for police to get over

5. *Herring v. US* (whether evidence obtained as a result of a negligent bookkeeping error should be excluded): No, law enforcement had an objectively reasonable belief that there was a valid arrest warrant and relied on that to obtain evidence

a. In looking at deterrent effect, look at extent of police misconduct

b. Balancing: Social harms of exclusionary rule (letting guilty people go free) versus deterrent effect of exclusion: (rule serves to deter deliberate, reckless, or grossly negligent misconduct, or in some circumstances recurring or systematic negligence)

II. Fifth Amendment: Interrogation, Confession, Pre-Trial ID

a. Introduction—Right to Counsel

i. *Powell v. Alabama* (state case and 14th am had not yet applied to the 6th am to the states) Capital case "hurried to trial for a capital offense w/o effective appointment of counsel and w/o adequate opportunity to consult even the counsel casually appointed to represent them"

1. Due process requires appointment of counsel for capital cases—where def is unable to employ counsel and is incapable adequately of making his own defense
2. Did not apply 6th am to states, except in capital cases

ii. *Johnson v. Zerbst* (Federal case) Court ruled that the 6th am required courts to provide indigent defendants with appointed counsel in all serious criminal cases (at least all felony cases)

iii. *Betts v. Brady* (state case, non-capital offense): the 6th amendment right to counsel in all felony cases should not be applied to the states
1. Right to counsel is not so fundamental and essential to a fair trial and to due process of law that it should be made obligatory upon the states by the 14th amendment
2. Created test: In a non-capital case, defendant had to show specifically that he had been prejudiced by the absence of a lawyer or that special circumstances rendered criminal proceedings without attorney fundamentally unfair

iv. *Gideon v. Wainwright* (state case, non-capital case): Applies 6th amendment to states—all defendants in felony cases have the right to an attorney
1. When to apply 6th am to states through 14th: When a provision of the bill of rights is fundamental and essential to a fair trial
2. (Overruled Betts) Defense attorney is fundamental and essential to a fair trial

v. *Argersinger:* key to Gideon not misdemeanor vs. felony, but whether def was imprisoned

vi. *Scott:* states have no obligation to provide counsel to defendantss facing potential jail time—it's actual imprisonment that's the defining line for constitutional right to appointment of counsel

vii. *Alabama v. Shelton* Can only sentence someone to suspended or probated imprisonment if he had defense counsel
1. Key point: executing the punishment goes back to the underlying offense/trial that was adjudicated absent an attorney
2. So what then is the remedy when these defendants are not provided with counsel?

b. When does the right to counsel begin?

i. *Rothgery v. Gillespie County* (TX probable cause hearing: PC determination made, bail set, def appraised of the accusations against him, indicted 6 months later and a lawyer then assigned to him): A criminal defendant's initial appearance before a magistrate, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the 6th am right to counsel
1. Prior cases right to counsel attached at the initiation of adversary judicial criminal proceedings (whether by way of formal charge, preliminary hearing, indictment, information, or arraignment)

a. "the overwhelming consensus practice conforms to the rule that the first formal proceedings is the point of attachment"

c. When does the right to counsel end?
   i. *Griffin v. Illinois*: Indigent def must be provided trial transcripts at state expense if necessary to effectuate appellate review
      1. Imposes an affirmative duty to eliminate at least some inequalities not of the state's own doing—level the playing field
         a. Black: "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has"
   ii. *Douglas v. California:* Defendant has a right to counsel for first level appeal
      1. "but where the merits of the one and only appeal an indigent has of right are decided w/o benefit of counsel, we think an unconstitutional line has been drawn between right and poor"
   iii. *Ross v. Moffitt*: No right to appointed counsel on discretionary appeals
      1. In trial, defendant needs an attorney as a shield, but on appeal, needs an attorney as a sword to "upset that prior determination of guilt" (Okay if states give this right, but not going to compel the states to do so)
   iv. Right to counsel: Right to counsel for all felonies, both in federal and state court
      1. For misdemeanors, determined by whether there's actual imprisonment. If yes, then right to counsel attached
   v. When does right attach: initial appearance before magistrate
   vi. When does right end: have right in first level appeal, then ends (no right in discretionary appeal)

d. Interrogations and confessions
   i. *Massiah v. US* (whether Massiah's statement to Colson amounted to a lawful confession): Defendant's statement was **not a lawful confession**
      1. "petitioner was denied the basic protections of the 6th am when there was used against him at his trial evidence of his own incriminating words, which **federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel**"
      2. Once right to counsel attached, can't question a suspect until they actively waive their right to counsel

      *timing is key here: occurred after the right to an attorney (Gideon) had attached
   ii. *Escebedo v. Illinois:* Where the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations . . . The suspect has requested and denied an opportunity to consult with his lawyer and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied the assistance of counsel

1. Pushing the line from Massiah (Massiah said a confession isn't admissible if given w/o an attorney once the right to attorney attaches under Gideon, start of adversarial process)
2. Here, court moves the right to counsel for purposes of interrogation to custodial interrogation—when the individual is a suspect and is being questioned with the intent to obtain a confession
3. "petitioner had become the accused, and the purpose of the interrogation was to get him"
4. Balance of individual liberty vs. Security
    a. "a system of criminal law enforcement which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independent secured through skillful investigation"
    b. "no system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise these rights

iii. *Miranda v.* Arizona: By its nature, a custodial interrogation is so coercive that an accused cannot voluntarily give a confession w/o law enforcement providing protective safeguards
    1. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination
    2. Custodial interrogation: Questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way
    3. Protective safeguards:
        a. Right to remain silent
        b. Anything you say can and will be used against you
        c. Right to an attorney
        d. If you can't afford an attorney, one will be provided
    4. **Miranda Rule:** custodial interrogation is inherently coercive. Consequently, protective safeguards must be in place before anyone can voluntarily give a confession. Those safeguards are the Miranda warnings

e. What is custody under Miranda?
    i. *JDB v. NC*: Age of a child is relevant in considering whether a suspect is in custody for purposes of Miranda
        1. "Custody" under Miranda: Objective test; subjective views of both parties irrelevant
            a. Asks how a "reasonable person in suspect's position would understand his freedom to terminate questioning and leave
            b. Define a reasonable person: In terms of a child, majority would define it as a reasonable child in suspect's position

ii. *Howes v. Fields:* Whether the questioning of a prisoner is always custodial when the prisoner is removed from the general prison population and questioned about events outside the prison
    1. No, court refuses to adopt a bright-line rule that the questioning of a prisoner is always custodial under these specific circumstances
        a. Court affirms that determining whether someone is in custody for purposes of Miranda is an objective test that still must be applied in the prison context
    2. The majority:
        a. Test for custody under miranda:
            i. Initial step: ascertain whether, in light of the objective circumstances of the interrogation, a reasonable person would have felt he was not at liberty to terminate the interrogation and leave
            ii. Next step: to consider whether the suspect felt free to leave, "courts must examine all of the circumstances surrounding the interrogation. Relevant factors include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning
            iii. Final step: ask whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in Miranda

f. What is interrogation under Miranda?
    i. *Rhode Island v. Innes* (Read Miranda, asked to speak with lawyer, began talking about school for handicap children near gun): Interrogation under Miranda? No, in this case, the police conduct did not amount to interrogation under Miranda
        1. However, law enforcement actions may constitute an interrogation under Miranda via express questioning or its "functional equivalent"
    ii. Test for interrogation under Miranda:
        1. Actual interrogation; or
        2. Functional equivalent of questioning
            a. Words/actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect
                i. Focuses primarily upon the perceptions of the suspect, rather than police intent
            b. A practice that the police should know is reasonably likely to evoke an incriminating response form a suspect thus amounts to an interrogation

iii. *Illinois v. Perkins*: Miranda warnings are not required when the suspect is unaware he is speaking to a law enforcement officer and gives a voluntary statement
    1. "The essential ingredients of a police-dominated atmosphere and compulsion are not present when an incarcerated person speaks freely to someone he believes to be a fellow inmate"

g. Right to remain silent
    i. In custody invocation of the right to remain silent and waiver of the right: *Berghuis v. Thompkins*
        1. For a suspect to invoke his right to remain silent, it must be explicit
        2. For a suspect to waive his right to remain silent, it does not have to be explicit and may be implicit
            a. *Davis:* found right to counsel has to be made unambiguously
            b. Such a requirement results in an objective inquiry that avoids difficulties of proof and provides guidance to officers on how to proceed in the face of ambiguity
            c. Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity
            d. To invoke right to remain silent, suspect must unambiguously exert that right—sitting there silently is not enough to assert the right
        3. Waiver of right to remain silent?
            a. Even if he didn't invoke his right to remain silent, he still had to "knowingly and voluntarily" waive the right
            b. Test for waiver: voluntary, product of a free and deliberate choice rather than intimidation, coercion, deceptions and made with full awareness of the nature of the right and the consequences
            c. Implicit waiver of the right to remain silent is sufficient
    ii. Not in custody invocation of the right to remain silent: *Salinas v. TX*
        1. During its case in chief, the govt may utilize the suspect's silence during questioning so long as it occurred during noncustodial police questioning and the suspect did not assert his right against self-incrimination
            a. Suspect needs to invoke his 5th am right to gain the protection of it
            b. General presumption: privilege against self-incrimination is an exception to the general rule that the govt has the right to everyone's testimony. To protect that privilege, court held that a witness who "desires the protection of the privilege must claim it"
            c. With two exceptions:
                i. Being forced to testify against yourself in court
                ii. Miranda (inherently coercive environment)

iii. Under *Berghuis*, the invocation of the right needs to be explicit

d. Key point: in noncustodial questioning, suspect must explicitly invoke the 5th, w/o having been read Miranda, for the govt not to be able to use his silence in court

h. Right to counsel
   i. Invocation of the right: *US v. Davis*
   ii. Re-approaching after invocation
      1. *Edwards v. AZ*
      2. *Maryland v. Shatzer*: Law enforcement may re-approach a suspect in custody after invoking the right to counsel when there has been a minimum of a 14-day break in custody between the 1st and 2nd attempts at interrogation
         a. *Edwards* held that a suspect may not be subjected to further interrogation by the authorities "until counsel has been made available to him unless he himself initiates further communication, exchanges, or conversations with the police"
         b. And wanst this made stronger in Roberson and minnick? Whats the key difference?
            i. None of those cases involved a break in custody
         c. Why does the break in custody matter?
            i. Time to go back to normal life, have a change of heart, seek advice, decide confession is smart
            ii. Change of heart due to reflection, not badgering or inherent coerciveness
            iii. Also, will still have miranda protection at second attempt
         d. How this actually works:
            i. Suspect placed in custody, advised of Miranda rights, invokes right to counsel
            ii. Under Edwards, police cannot reinitiate w/o an attorney present while the suspect remains in custody
            iii. However, if suspect leaves custody for 14 days or more, and then returns to custody and is again given mirdana rights, the police may attempt to question the suspect
   iii. The 6th am meets Miranda. *Montejo v. US:* Law enforcement may initiate interrogation of a suspect in custody after the court has appointed the suspect a counsel as long as consistent with Edwards
      1. The 6th am right to counsel does not preclude police from attempting to interrogate someone in custody under Miranda
         a. Majority:
            i. What's the deal with Jackson?
               1. There's an entire line of 6th am cases

2. In Jackson, court tries to reconcile the 5th and 6th am: holds that when the right to an attorney attaches under the 6th, the police can then not attempt custodial interrogation under miranda, meaning that they can't read the def his rights and have him waive them w/o an attorney present
3. So under Jackson, bc Montejo had been appointed a lawyer under the 6th am, police could not approach him and he could not waive under the 5th

ii. This court overrules Jackson (saying that its policy is being adequately served by other means)

2. Rule now: Edwards and Shatzer—police may approach a suspect in custody, even if his right to counsel has attached previously under the 6th (when not in custody), but they must terminate questioning if the suspect invoked his right to counsel
1. But can try again if they are released from custody for at least 14 days

i. Right to counsel summary: (6th am)
   i. Right to counsel for any crime involving actual confinement, both in state and federal court (Gideon, Shelton)
   ii. Right to counsel attached at initial appearance (Rothgery) and ends after first level appeal (Ross)
   iii. Law enforcement cannot question you w/o an attorney or waiver after indictment and retention of counsel (Massiah)
   iv. Law enforcement cannot question you w/o an attorney pre-indictment after you affirmatively request to speak to an attorney (Escobedo)
   v. ~~When a suspect received an attorney at arraignment, police cannot initiate custodial interrogation w/o an attorney present (Jackson)~~
   (5th am)
   vi. Custodial interrogation is so inherently coercive, suspects must be told they have a right to counsel prior to any interrogation or confession being used against them (if they knowingly waive the right and answer) (Miranda)
   vii. When in custody, invocation of right to counsel must be explicit (Davis)
   viii. When in custody, when right to counsel is invoked, police cannot "try again" (Edwards) unless a 14 day or more break in custody occurs (Shatzer)

j. Public safety exception to Miranda. *NY v. Quarles*: Overriding concerns of public safety may justify an officer's failure to provide Miranda warnings
   i. Views Miranda as a prophylactic—therefore not themselves right protected by the constitution
   ii. By weakening Miranda, can balance Miranda—need for answers in public safety setting outweighs need for prohylactic rule

iii. Public safety exception: Allows for pre-Miranda statements to be admitted into evidence and is not dependent on the motivation of the involved officers
    1. "in a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to the police manual is necessarily the order of the day, the application of the exception should not be made to depend on post hoc findings at a suppression hearing concerning the officer's subjective motivation

k. Miranda and Fruit of the Poisonous Tree: Can fruits (testimonial and physical) of Miranda violation be admitted?
    i. *US v. Patane*: Physical fruits of a Miranda violation must not be excluded from trial
        1. Because Miranda rights are not constitutional rights, fruits of the poisonous tree doctrine doesn't apply
        2. "unlike unreasonable searches under the 4th am, or actual violations of the due process clause or self-incrimination clause, there is, with respect to mere failure to warn, nothing to deter"
        3. Important distinction between coerced confessions and Miranda violations
    ii. *Missouri v. Seibert* (Elstad was a good-faith Miranda mistake but here, they're trying to circumvent Miranda)
        1. Justice Kennedy (considered controlling opinion): The admissibility of post-warning statements should continue to be governed by the principles of Elstad unless the deliberate 2-step strategy is employed
        2. If deliberate, post-warning statements by excluded unless curative measures are taken before the post-warning statement is made
    iii. Exclusionary rule
        1. Applies to Miranda violations (made explicit in Miranda)
        2. Applies to violations of due process clause
        3. Applies to violation of self-incrimination clause of the 5th am
    iv. Fruit of the poisonous tree doctrine
        1. Applies to violations of due process clause (both physical evidence and statements)
        2. Applies to violations of self-incrimination clause of 5th am (both physical evidence and statements)
        3. Generally, does not apply to Miranda violations:
            a. Does not apply to physical fruits (Patane)
            b. Does not apply to statement fruits (Elstad)
            c. But does apply to "two-step" interrogation techniques when performed as a deliberate attempt to bypass Miranda (Seibert)
    v. *Dickerson:* Miranda is a Constitutional decision of this Court, Congress may not overrule it and Miranda continues to govern the admissibility of a custodial suspect's statement

vi. *Williams:* Once adversarial proceedings have commenced against an individual, he is entitled to the assistance of counsel; LE may not deliberately elicit incriminating statements from him
    1. Deliberately elicit: (different from interrogation test in *Innis*) Focuses on subjective intent of the police officer
vii. *Kuhlmann:* Law enforcement did not violate defendant's 6th amendment right to counsel because the police informant did not deliberately elicit incriminating statements from defendant
    1. Defendant must demonstrate that the police and their informant took some action, beyond mere listening, that was designed to deliberately elicit incriminating remark