Criminal Investigation Outline (Gershowitz)

Criminal Justice Process –

Crime 🡪 Arrest 🡪 Investigation 🡪 File Criminal Complaint 🡪 Initial Appearance 🡪 Indictment 🡪Arraignment

Incorporation (application of Bill of Rights to states)

* Duncan v LA – jury trial is a fundamental right, and states have a duty to protect the right to a jury trial
	+ It is not a fundamental right to have a jury of 12, or a unanimous verdict
* Other rights that have not been incorporated and thus are deemed not fundamental:
	+ Grand jury
	+ Excessive bail clause (8th Amendment)
	+ Excessive fine clause (8th Amendment)

**Fourth Amendment Analysis**

1. Has there been a search by the government?
2. If yes, was there probable cause?
3. If yes, is there a warrant?
4. If not, is there an exception to the warrant requirement?

Remedy for Violation of Fourth Amendment

* Weeks v US – If the 4th Amendment is violated, the appropriate remedy is exclusion – excluding the evidence obtained from the violation
* Mapp v OH – SCOTUS incorporates Weeks doctrine; defines exclusionary rule to apply to and be binding on the states and their officers
* Remedy of exclusion deters police misconduct and protects judicial integrity of the court (CONTROVERSY)
	+ Some claim the exclusionary rule hinders truthfinding aspects; no aspects show that it is an effective deterrent, and the costs of deterrence (setting guilty individuals free) may not be worth it
	+ Proponents of the rule argue that the rule encourages institutional compliance, and police seek more warrants since Mapp v OH
	+ Good Faith Exception to exclusionary rule:
		- US v Leon – If an officer acts in good faith on a warrant that turns out to be defective, we are going to admit the evidence, because the purpose of the rule is to deter officers and here there is nothing to deter.
		- This exception is limited to cases where there are warrants
		- This exception does not apply when
			* Magistrate doesn’t read the warrant
			* Warrant is very facially deficient (vague)
			* Support materials (affidavits) are completely conclusory
			* Officer actively misleads the court to issue warrant

What is a “search”?

* Katz v US – Federal agents bug phone and introduce conversations at trial
	+ SCOTUS gets rid of the trespass standard for searches – the 4th protects people, not places.
	+ This was a search because had a privacy interest here that must be protected (he closed the door of the phone booth)
	+ Harlan’s concurrence gives a test for when there is a search: **Whether you had a subjective expectation of privacy and, if so, whether that expectation of privacy is objectively reasonable.**
* US v White – Undercover officer pretends to be D’s friend to get him on narcotics charges, installs a wiretap in D’s house.
	+ Bright line rule – “Stab in the back” rule: It is never reasonable to trust that another person will keep your secret.
* Smith v MD – woman was robbed, robber started calling her house, police had phone co install a pen register to record the numbers of incoming calls, they get D. Was this a search?
	+ No; D had a subjective expectation of privacy perhaps, but it was not objectively reasonable; the phone company records every number you dial (this is common knowledge) and the phone book itself says they can help you stop creepy people.
	+ (Gershowitz disagrees with this case)
* Oliver v US – there is almost no objectively reasonable expectation of privacy in open (unfenced) fields, even if there is a no trespassing sign, so anything seen there will probably not be a search
* Dunn case – looking into a barn within a ranch fence is not a search because the barn is still considered to be in open field, not in curtilage
	+ In the curtilage (basically, your immediate yard) you have some (low) expectation of privacy, but much less than you would have in your home
	+ Curtilage has a very narrow definition whereas open fields doctrine is broad; open field can include a structure, as here, if it’s not in a protected area
* Ciraolo – aerial photos of curtilage is not a search, there is no reasonable expectation of privacy because there is no roof over the yard (10 foot tall weed plants within 2 fences in yard case)
* Dow Chemical – aerial pictures of curtilage taken with a fancy camera is not a search; court says enhancement of human vision by technology is not a search.
* Kyllo v US – Thermal imager showed a wall of D’s house was hotter; was scanning his house with a thermal imager a search? Yes – (2 reasons)
	+ If the government uses technology that is not in general public use
	+ To gain intimate details of the (inside of) home that would previously have been unknowable without intrusion
	+ Then, the surveillance is a search

Probable Cause

* Probable cause – the facts and circumstances in police officer’s knowledge lead them to conclude that a crime has been, is being, or will be committed.
* IL v Gates – An anonymous letter identifying drug dealers was sent to police 🡪 police corroborated some facts 🡪 got a warrant. Did police have probable cause to get the warrant? YES.
	+ Establishes test for probable cause: **Under the totality of the circumstances, is there reason to believe this person has or will engage in criminal activities?**
		- When considering an informant under this test, consider:
			* Informant’s basis of knowledge (credibility of information, how predictive the information is) and
			* Reliability of the informant
			* Strength in one prong will make up for weakness in the other; not a rigid requirement that both of these requirements be satisfied.

**Warrants & Exceptions**

Arrest Warrants

* Warrant Preference Rule (current law) – Police are obligated to get a warrant except when they can’t.
	+ Policy – Forcing police to procure a warrant protects underlying privacy of individual.
	+ There are a lot of exceptions to the “can’t”; many circumstances where it is permissible to not have a warrant
* General Rule – Police officers do not need a warrant to arrest you in public; the home receives more deference.
* Payton v NY – The area that may legally be searched is broader for a search warrant than for an arrest warrant
	+ Even if you have probable cause, you still need a warrant to search or arrest in the home, unless there are exigent circumstances
	+ If you have an arrest warrant, and you arrest D, you can search the area within immediate grabbing space of D.
	+ There is no remedy in the criminal system for an illegal arrest, though any evidence seized therefrom would be excluded.

Search Warrants – Execution Thereof

* “Knock & Announce” rule – police must knock on the door and announce police presence and then wait a short moment of time before breaking into someone’s house when executing a search warrant
	+ The purpose of this rule was to protect officers, individuals inside the home, and property
* Hudson v MI – What happens when the K&A rule is violated? (only applies when search warrant already obtained)
	+ Violations of the knock and announce rule **ONLY** lead to the suppression of evidence if, when taken as a whole with all proceedings related to the execution of the search, the entire search proceeding was unreasonable
		- Basically, K&A rule destroyed – a search is never unreasonable for the searches of the K&A rule because you had to get a warrant for the rule to even apply, which means you have probable cause and thus your search is presumptively reasonable.
* IL v MacArthur – Court dispensed with the warrant requirement for a **reasonable** seizure (to be reasonable, it requires probable cause) of a person or of property.

Warrant Exception: Exigency

* Warden v Hayden – The government (not the police) bears the burden to show, in the case of no warrant, that BOTH probable cause AND a warrant exception (such as exigent circumstances) existed.
	+ Examples of exigent circumstances: (Always must be a REASONABLE determination of exigency—therefore, need probable cause)
		- Hot pursuit
		- Prevent Destruction of Evidence
		- Public Safety
		- Escape by the suspect
		- Ongoing crime in progress
		- Render medical attention

Warrant Exception: Search Incident to Arrest

* Chimel v CA – If a search is conducted in the process of a lawful custodial arrest, it becomes permissible for the police to search incidental to that arrest, and no warrant is required.
	+ How far can the police search? Limited to searching D’s person and anything within the “area of immediate grabbing space” (Must be incident to lawful custodial arrest and contemporaneous with that arrest)
* US v Robinson – Probable cause is **not** required to search incident to arrest; once you have a lawful custodial arrest, you can search the arrestee, period – bright line rule.
	+ Probable cause is only required for the lawful arrest.
* Search Incident to Arrest RULE – Incident to a lawful arrest, you can search the person and the immediate grabbing space.
	+ Search of the person – bright line rule
	+ Search of the immediate grabbing area – how far? Evaluated case by case, though usually consists of within the same room.

Probable Cause & Warrant Exception: Inventory Search

* When someone is arrested, they are inventoried, and their possessions are tagged and any containers they have may be searched without warrant or probable cause, so long as the arrest is valid. (Three reasons for this)
	+ Prevent jail from claims of false theft
	+ Actually protect valuables of suspect
	+ Prevent illicit contraband from getting into the jail
* After a **valid** arrest has been made, there are two circumstances were an inventory search could be conducted:
	+ Of the individual – anything incriminating found from the inventory search will be admissible against the individual
	+ Of the automobile (when applicable) – if arrested while driving, the police will impound the vehicle, and will inventory the vehicle (the permissibility of a trunk search varies according to police department policy)

Probable Cause & Warrant Exception: Consent

* Schneckloth v Bustamonte – consent **must** be voluntarily given (not necessarily knowingly)
	+ The test for whether consent was given voluntarily is totality of the circumstances; SCOTUS says that letting the person know they can refuse consent can be a factor in totality of circumstances, but it alone is not necessary
		- Differs from Miranda because Miranda warnings have to be given.
* US v Matlock – If two or more people have common authority, one of those parties can consent in his or her own right to a search of the common area. (Basically, the other party has assumed the risk.)
* GA v Randolph – A warrantless search of a shared dwelling over the express refusal of a physically present resident could never be reasonable even if the other resident has consented
	+ If there is a dispute as to one resident, there should not be a search
	+ The police cannot purposefully remove someone to remove an obstacle to consent
* IL v Rodriquez – An individual who does not have common authority to give consent can still provide the basis for a legal search if the police reasonably believe that person has common authority and can give valid consent.
* FL v Jimeno – Standard for how far consent extends: What would a reasonable person think consent extended to based on the interaction between parties?
	+ Consent given to search car – extends to bag in the car (unless consent is limited)
	+ Lennons v TX – handing phone to officer is implied consent to search entire phone (unless consent is limited)
* When consent allows for a valid search and admits evidence therefrom: (3 possible scenarios)
	+ Individual gives consent
	+ Third party with common authority gives consent
	+ Third party who police reasonably believes has common authority gives consent
		- Police not obligated to do investigation to see if someone has common authority

Seizure: Plain View Doctrine

* Generally says that as long as search is proper (pursuant to warrant), all contraband that is in plain view is seizable without a warrant. (Horton v CA)
* Plain view doctrine requires: (3 things)
	+ Officer is lawfully present
	+ Item must be in plain view
	+ Character of the item must be immediately incriminating
* Plain view doctrine authorizes seizures, not searches. The search/entry must already be lawful.
	+ If you see something in plain view, you may seize that item but you may not extend the search past what is permitted by the warrant. (You go on arrest warrant, you see a gun, you can’t search the rest of the house for more guns)
* AZ v Hicks – if you have to move something one inch, it’s not in plain view; what you see has to be immediately incriminating—not just suspicious (here, could not seize serial numbers to see if equipment was stolen because neither the numbers nor the equipment was immediately incriminating)

Search Incident to Arrest of Automobile Occupants

* NY v Belton – Incident to a lawful arrest and contemporaneous to a lawful arrest, police officers can search the entire passenger compartment of a car (bright line rule)
	+ For a search incident to an arrest, this includes examining the contents of containers therein
	+ However, the police cannot search the trunk (you have a reasonable expectation of privacy therein) UNLESS the trunk is already open.
* Knowles v IO – SCOTUS says officer cannot search incident to an arrest without an actual arrest (issuing a ticket is not sufficient to allow a search)
* AZ v Gant – Two part holding; Police may search a vehicle incident to a recent occupant’s arrest only if:
	+ The arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search, OR
	+ It is reasonable to believe the vehicle contains evidence of the arrestable offense (the standard is reasonable to believe, which is less than probable cause.)
	+ Possible incentives this creates for police: to leave suspects unsecured; and to impound and inventory car.
* Whren v US – addresses **pretextual stops**
	+ **Pretextual stop** – officers have subjective reason to stop somebody, but no probable cause, so they follow them until they see a lawful reason to pull them over. (Allows for profiling)
	+ SCOTUS says, as long as there WAS a legal reason to stop the person at some point, that’s all we care about; therefore, pretextual stops are legal.

Warrant Exception: Search of a Vehicle

* Because vehicles are mobile, and you have a lesser expectation of privacy in a vehicle than in a home, warrantless search of the vehicle is permitted. (This is an exception to the warrant requirement, but NOT an exception to the probable cause requirement)
* Chambers case – Police may tow the car someplace more convenient for them to search it, and proceed to search, all without a warrant. (If they tow, the search of the vehicle must be roughly contemporaneous with the tow)
* CA v Carney – Any type of vehicle (RV, boat, car, etc.) falls under this exception
	+ Here, they searched without arresting (distinguishes this exception from search incident to arrest)
* Ca v Acevedo – There is no separate treatment for the vehicle and a container therein; if there is probable cause for the vehicle, may search anywhere in the vehicle the item may be found; if there is probable cause for a particular container, can open the container and search therein; neither of these circumstances requires a warrant.
	+ Why don’t they require a warrant? They do require probable cause so we could have gotten a warrant anyway.
* WY v Houghton – there is a limited expectation of privacy for everyone in the car, and therefore search is allowed of all containers for which there is probable cause, not just those of the driver and/or owner.
	+ However, line drawn at people; vehicle exception does not extend to passengers, because you do have a heightened expectation of privacy for your person.
* **Was there a search?**
	+ First ask – Did D have an objectively reasonable expectation of privacy? If yes, then any violation of that expectation would be a search. If no –
		- If in “open field”, has no reasonable expectation of privacy;
		- If in curtilage, you have some – generally it seems that you don’t have a reasonable expectation of privacy that people won’t look onto curtilage, but you do have a reasonable expectation of privacy that they will not enter curtilage;
		- In the home, you have fairly high expectation of privacy
	+ If the alleged search is of the (inside of the) home, (but was not done by someone physically entering the home) did it require the use of technology? If no, not a search. If yes –
	+ If so, is that technology in general public use? If no, then it is a search. If yes, then it is not a search.
* **Was there probable cause to conduct that search?**
	+ Under the totality of the circumstances, is there reason to believe that this person has or will engage in criminal activities? (Answer must be yes)
* **If there was a search, and there was probable cause to conduct that search, did police bother to obtain a warrant for that search?** If yes, covered. If no, must ask:
* **Was there an exception to the warrant requirement?**
	+ Exigency
	+ Search Incident to Arrest
	+ Consent
	+ Vehicle Exception: Search
	+ Inventory Search

**Terry Doctrine**

What is the Terry Doctrine?

* Terry v OH – When a police officer observes unusual conduct that leads him to reasonably conclude in light of his experience that the persons with whom he is dealing may be armed and presently dangerous, and he identifies himself as a policeman and makes reasonable inquiries and he still concludes the people may be armed and dangerous, he is entitled to dispel his reasonable fear for his own or others’ safety, he is entitled to protect himself and others to conduct a carefully limited search of the outer clothes of such person to try and discover weapons which may be used to assault him. (No warrant required)
* Analysis: Ask –
	+ Was there a seizure?
	+ When did the seizure occur? (Before or after reasonable suspicion/probable cause developed?)
	+ Was it an arrest or a Terry stop?
	+ CA v Hodari – to be a seizure, requires 1 of 2 things from police:
		- Application of physical force (could be Terry stop or arrest)
		- Show of authority that results in actual restraint of movement (Terry stop)
* Terry stop – If a suspect is exhibiting suspicious behavior, and the police officer has reasonable suspicion that criminal activity is afoot, then the officer can stop the suspect, briefly detain, and question.
* Terry frisk – If an officer has reasonable suspicion that the individual who you stopped is armed and dangerous, you are permitted to conduct a Terry frisk, a limited patdown of the person
	+ “Plain touch” doctrine – if, during the frisk, a police officer feels and “immediately recognizes” an object he knows is illegal (such as a weapon or drugs) then he may remove it. He cannot, however, manipulate the item to try and figure out what it is by touch.
* What is the line between a Terry stop and an arrest?
	+ If the police are not using weapons, restraints, threats, or blocking the means to leave, then it does not reach the level of a full scale arrest, and does not require probable cause, only reasonable suspicion.
	+ US v Mendenhall – When does something become a Terry stop? When the situation is one where a reasonable person would not feel free to leave (totality of the circumstances test)

Reasonable Suspicion

* AL v White – says totality of circumstances creates reasonable suspicion (in this case, hinged on a tip wherein the informant was able to accurately predict future events)
	+ A conclusory tip with no basis of knowledge is treated as no tip at all.
* IL v Wardlow – unprovoked flight from the police in a high crime area creates reasonable suspicion for the police to conduct a Terry stop
	+ Unprovoked flight from police: basically always gives reasonable suspicion to stop
	+ In a high crime area: creates reasonable suspicion to frisk
	+ Going back to standard for seizure under Terry, if a reasonable person does feel free to leave, they better walk away, not run, so the police don’t acquire reasonable suspicion.

Extending Terry Doctrine

* US v Place - Limited detention of inanimate object authorized under Terry
	+ Terry doctrine extended to inanimate objects – it is permissible to seize such object if you have reasonable suspicion it is linked to criminal activity
	+ When the detention of a human being is at issue, that detention is limited and cannot go on for too long; a legitimate terry stop can become unconstitutional if the detention goes on too long.
* MI v Long – Terry frisk of passenger compartment is permissible if there is reasonable suspicion to believe a weapon might be found there, and is reachable by suspect
	+ Terry frisk of car = cursory search of passenger compartment
	+ Differs from search incident to arrest because you cannot get into the trunk or look through documents, though you can look in the console and under the seats
* MD v Buie – the police can make a protective sweep of a dwelling during the course of an arrest if they have reasonable suspicion that there is some danger
	+ As a precautionary measure (without probable cause or reasonable suspicion) officers can look in rooms or closets immediately adjoining place of an arrest from which an attack could be launched
	+ To go beyond that – make a protective sweep of the dwelling – they need reasonable suspicion of danger to officers
		- If no reasonable suspicion of danger to officer, cannot conduct sweep

Special Needs Exception – certain searches are permitted with no reasonable suspicion at all

* Sobriety Checkpoints – require no level of suspicion at all so long as sufficient protections are put into place (planned by supervisor, detention is short, every certain number of vehicles stopped consistently)
	+ Holt v TX – Sobriety checkpoints are not permitted in TX unless/until legislature passes statutes
		- State v Skiles – to show a checkpoint is an unconstitutional sobriety checkpoint (in TX), must present evidence that it is a sobriety checkpoint, not just attempt to alleviate traffic
			* Watch for state calling it one thing but really administering a sobriety checkpoint
	+ Indianapolis v Edmond – highway checkpoints designed to advance a general interest in ordinary crime control are unconstitutional (against 4th Amd); public safety stops are permissible, but not a checkpoint for general criminal activity, such as drugs.
		- Drug checkpoints are not permissible (per Edmond rule)
	+ IL v Lidster – stopping cars for a general inquiry to gather information about an ongoing investigation is permitted (there is no need for individual suspicion)
		- Edmond rule does not apply because no one is in trouble
	+ MI v Sitz balancing test (for checkpoints in general); 3 parts:
		- What is the state’s interest in having the checkpoint? (state must have a valid interest)
		- How effective is the checkpoint at accomplishing the state’s interest?
		- How intrusive is the search? (How much touching, how long, etc.)
* Border Searches
	+ US v McCauley – You don’t need reasonable suspicion IF:
		- A person is crossing an international border (you can stop that person without suspicion)
			* This includes ports, airports, driving, etc.
		- Once they are stopped:
			* A routine search of the individual and their possessions may be conducted without any reasonable suspicion whatsoever
				+ Most searches are considered to be routine
			* If a non-routine search is to be performed (strip search, x-ray, etc.) then reasonable suspicion is needed.
	+ Border stops differ from sobriety checkpoints in that there doesn’t have to be a pattern to them (can be used for general crime control), and people can be detained for much longer from a border stop.
* Strip Searches
	+ Safford School District v Redding – Need one of three things to conduct a strip search:
		- Drug must be dangerous in itself; or
		- There is reason to believe there is an excessive quantity of an otherwise safe substance; and
		- There is reasonable suspicion that the drugs are located in the area where you need to strip search.

**Issues of Standing**

* Rakas v IL – generally, evaluate the standing question separately from the inquiry as to whether the search was legal
	+ SCOTUS gives test for if someone has standing:
		- Did D have a reasonable expectation of privacy in the area to be searched?
			* Passengers in a car, generally don’t; don’t have standing
			* Driver generally does have standing to assert a 4th Amd violation
* MN v Olson – an overnight guest does have standing to assert a 4th Amd violation – there is a greater expectation of privacy in a house, especially at night when people sleep
* MN v Carter – The apartment owner has standing to challenge the illegal search. What about the guys bagging coke?
	+ They have to demonstrate both
		- Unlawful search
		- They have standing to challenge the search
			* They have standing if they had a reasonable expectation of privacy in the apartment (which was the area searched)
	+ They did not have standing, they were not overnight guests and were only present for a short period of time, so had no reasonable expectation of privacy.
* Rawlings v KY – claiming ownership of property, even if contraband, does not give you standing to challenge the search of that property.
	+ If you only have limited connection to the storage compartment that was searched and where your property was found, no reasonable expectation of privacy and no standing
	+ (Here, guy put his drugs in girl’s purse, didn’t have standing to challenge search of her purse.)

**Fruit of the Poisonous Tree**
Poisonous Tree – illegal police activity (usually unlawful arrest, search, interrogation, or ID practice); it can affect multiple pieces of evidence

Fruit – evidence the police find as a result of the illegal activity

FOTPT doctrine is different from standing –

* Under standing, just because the police commit some kind of illegal activity does not mean we always suppress the evidence if the person doesn’t have standing to challenge it

FOTPT Exceptions:

* Attenuation (Dissipation of Taint) Exception
	+ Wong Sun v US – A leads police to B, they search illegally, B incriminates C, police search C’s without probable cause, C incriminates self and leads police to D, who police arrest though they find no drugs. All men make bail, go home, police ask them to return to station a few days later, and D confesses at that point.
		- Statement made by B to police – inadmissible against B per FOTPT, but admissible against C and D because C and D lack standing to challenge illegal search of B’s home
		- Statement made by C to police – inadmissible against C per FOTPT; inadmissible against B per FOTPT (but for illegal search of B’s, would not have gotten to C), but admissible against D (D has no standing to challenge the illegal search of B’s or C’s homes)
		- D’s confession – it is FOTPT against D, but it IS admissible BECAUSE the actual confession is **sufficiently attenuated** from the initial illegal police conduct, the courts do not suppress that evidence.
			* Inquiry: Is this (here, confession) sufficiently attenuated from illegal police activity to be admissible? There MUST be an intervening event that breaks the cause/chain. Here, it was that D was released, and returned a few days later.
* Independent Source Exception
	+ Murray v US – If information has been gotten legally by an independent source, the evidence is admissible, even if the officers arrive at the same evidence illegally; as long as there is a legal route to the evidence that was taken, even if an illegal route was also taken, the evidence will be admissible.
* Inevitable Discovery Exception
	+ Nix v Williams – If discovery of the evidence in question was inevitable, the evidence will be admitted, even if it the evidence was obtained as fruit of the poisonous tree.
		- Burden of proof – on government, as in all FOTPT exceptions; here, prove by a preponderance of the evidence that you definitely would have found the evidence anyway
		- Ties into police policy with inventory search (this exception most often used for inventory searches of cars)
		- TX has abolished this exception under the TXCCP.

**Fifth Amendment & Miranda Doctrine Analysis**

1. Was D in custody? If yes,
2. Was D interrogated? If yes,
3. Were Miranda warnings read? If yes,
4. Were they read properly? If yes,
5. Was there invocation? If yes,
6. Was it of right to counsel or right to silence?
	1. If of right to counsel – was invocation unambiguous? If yes,
		1. Did questioning cease at that point?
		2. Was there reinitiation by D? If no,
		3. Statement is suppressed
	2. If of right to silence – was there subsequent waiver of that right? If no,
		1. Was D reapproached by police? If yes,
		2. Was it after a reasonable amount of time? If no,
		3. Statement is suppressed

The Fifth Amendment – no person shall be compelled in a criminal case to be a witness against himself

* Miranda v AZ – SCOTUS does two things –
	+ Reads right to counsel into 5th Amd
	+ Reads right to remain silent into 5th Amd
	+ Miranda doctrine – protective doctrine that goes beyond the specifics of the 5th to protect the defendant from himself – required that D be warned of these rights
		- Purpose of this doctrine – prevent coercion and involuntary confessions
		- Harlan dissent – this won’t prevent any of that, police will warn suspects and just coerce waiver.
	+ How does this affect the voluntariness inquiry? Now we ask if the waiver was voluntary
		- Police are protected because the fact that the warnings were read dilutes any claim of involuntariness
	+ Two reasons to throw out confession under Miranda doctrine:
		- Can confession be thrown out because it was involuntary?
			* If police lie to suspect in interrogation, that is permitted. There is a limit on the lies within which the confession stays voluntary, governed by totality of the circumstances test. Considerations:
				+ D’s background
				+ Length of time of interrogation
				+ Type of trickery used
		- Can confession be thrown out because Miranda warnings were not complied with?
* Dickerson v US – deemed Miranda to be a constitutional rule of procedure by which states are obligated to abide
* The Miranda doctrine is known as a prophylactic rule – it covers more than the basic privilege against self-incrimination.
	+ Miranda governs custodial interrogation by the police.

Miranda Custody

* OR v Mathiason – If a suspect is not in custody, no Miranda warning is required
	+ Defining “custody” is a totality of the circumstances test, taking into account things like:
		- Whether D was told he could leave
		- Whether he came to meet police voluntarily
		- Whether police did let him leave
	+ DiStefano case – An encounter that begins voluntarily can transform into a custodial situation; once it does, Miranda warnings should be given, though it is hard to tell where this line is.
* Berkemer v McCarty – everyone in custody must be Mirandized, whether for a misdemeanor, traffic offense, or felony
	+ Test for custody – totality of the circumstances; whether you are:
		- Under arrest
		- If not under arrest, your liberty is restricted to the degree consistent with an arrest
			* Looks at factors like where they are, how many officers, whether D is handcuffed, whether police draw weapons, etc.
	+ Being pulled over is not being in custody, because it is more like a Terry stop than an arrest; the Terry standard is whether a reasonable person would feel free to leave; this is only one factor under the test for custody.

Miranda Interrogation – what constitutes interrogation for the purposes of Miranda?

* RI v Innis – If there is express questioning or the functional equivalent, then Miranda warnings have to be issued for any statement thereof to be admissible
	+ What is the functional equivalent?
		- That which is reasonably likely to elicit a criminal response (look at totality of the circumstances)
		- Subtle compulsion is not the functional equivalent of interrogation
	+ If someone comes to police and voluntarily confesses to something, still has to be Mirandized before doing any follow-up interrogation or that won’t be admissible.

Miranda Invocation & Waiver

* NC v Butler – Does D have to explicitly waive Miranda rights?
	+ No – oral/written waiver not required
	+ Silence alone in response to Miranda warnings is not enough to waive, although silence plus conduct can be enough for waiver
	+ Look to totality of the circumstances to see if the waiver is knowing and voluntary under the circumstances
* Moran v Burbine – D waived right to counsel, said he would have invoked right to counsel if he knew his attorney was present. Court says this waiver is voluntary, your Miranda rights are personal, and only you can invoke them.
* Edwards v AZ – Once a D invokes right to counsel, no law enforcement can reapproach D without counsel there, even the next day or a month later, UNLESS the suspect himself reinitiates contact with the police.
	+ If D does reinitiate, he has to be re-Mirandized and given a second chance to invoke again or waive
* MI v Mosley – Once a D invokes right to silence, police can reapproach D after a reasonable amount of time under the totality of the circumstances.
	+ If police reapproach, D has to be re-Mirandized and police can seek to have D waive right to silence.

Miranda and Fruit of the Poisonous Tree

* OR v Elstad – FOTPT doctrine does NOT apply to a violation of the Miranda doctrine because Miranda is a prophylactic rule
	+ A confession following a Miranda violation is inadmissible, but the suppression covers only that confession, not anything after the second the confession is complete
		- Refers to two-step interrogation: No warning 🡪 confession 🡪 warnings given 🡪 second confession; second confession is admissible so long as warnings have been given and it is voluntary, and any tangible piece of evidence therefrom is also admissible
		- MO v Seibert – HOWEVER, if police PURPOSEFULLY fail to give warnings for first part of two-step interrogation, the general rule is that the second confession should be inadmissible.
	+ FOTPT doctrine DOES apply to an involuntary confession, even if the suspect is Mirandized a second time; any involuntary statement and tangible evidence seized therefrom would be suppressed.

Public Safety Exception to Miranda

* NY v Quarles – Miranda warnings are not required when public safety is a matter of concern (Court creates this exception out of nowhere)
	+ Standard – Would a reasonable officer believe in this situation that public safety necessitated questioning without Miranda warnings? If so, questioning can proceed without the warnings
		- Example – Police ask “Where’s the gun?”
		- “Public safety” can mean safety to the officers, general public safety, or safety to the suspects health
		- Seems to suggest that public danger can trump the 5th Amd

When Miranda is Not Required

* For non-testimonial statements (if a suspect in a line-up is asked to say something)
* To obtain the contents of someone’s blood (governed by 4th, not 5th)
* Routine booking questions (even if suspect elaborates in answer, no Miranda required)
* Jail plant scenario – undercover officer talks to D in jail, D incriminates himself; Court says this is not interrogation because it’s not a coercive environment, and it can’t be interrogation if D doesn’t know he’s dealing with a law enforcement officer.)

**Sixth Amendment Right to Counsel**

The Sixth Amendment provides a defendant with a right to counsel for all criminal prosecutions

Right to Appointed Counsel

* Powell v AL – historical case regarding right to appointed counsel. Two holdings –
	+ Anybody who can afford their own lawyer is free to show up with a lawyer if they want to
	+ If you are too poor to hire a lawyer, we may appoint one for you, but it’s a fact-specific inquiry (look at penalty)
	+ NO LONGER THE STANDARD
* Gideon v Wainwright – If an indigent D is facing felony charges, he has a right to a free appointed lawyer. (It no longer requires a fact-specific inquiry)
* Argersinger v Hamlin – SCOTUS says a D who is charged with a misdemeanor and gets jail time is entitled to an appointed lawyer
* Scott v IL – Counsel is only required when D is actually sentenced to a term of imprisonment, not just when incarceration is a possible penalty.
	+ If D is charged with a misdemeanor offense, judge can decide up front not to sentence D to jail time; if this happens, D is not entitled to appointed counsel
	+ If judge later changes mind and does sentence to jail time, conviction is overturned based on Argersinger
	+ Although 6th Amd provides right to counsel for “all” criminal prosecutions, that doesn’t mean the government has to provide you with an attorney for all.
* If D is indigent, he has a right to a free appointed lawyer in all felony cases, and in misdemeanor cases where he is actually sentenced to jail time.
* Post-Trial Rights to Appointed Counsel
	+ Douglas v CA – D has a right to an appointed attorney on his first appeal as of right
		- D needs a right to an attorney because otherwise it would be a due process or equal protection violation (appeals are too confusing for layperson to prepare their own)
	+ Ross v Moffitt – D does NOT have a right to appointed counsel for discretionary appeal (such as petition for writ of habeas corpus)

Right to Counsel & Eyewitness ID Procedures

* US v Wade – A defendant has a right to counsel at a post-indictment lineup.
	+ If the police do a lineup of an indicted defendant without counsel, the exclusionary rule would apply to the lineup ID, AND the in-court ID could be excluded based on FOTPT doctrine, UNLESS government can prove an independent source
		- Independent source – is there a source independent of the lineup by which witness recognized D (knew him before, etc.) Totality of the circumstances test
		- Independent source exception almost always invoked, almost always allows in court identification
* Kirby v IL – If lineup occurs before adversarial criminal proceedings begin, the right to counsel does not kick in, so a suspect usually does not have a right to counsel at the lineup
	+ Therefore, this is an incentive for police to do a lineup before indicting, which is what they usually do
	+ Second lineups are permissible, and they require counsel if D has already been indicted.
* US v Ash – right to counsel does not apply to “non-corporeal” ID (for example, a photospread)
* Eyewitness Identification & Due Process of Law
	+ Stovall v Denno – To violate due process, the identification procedure must be UNNECESSARILY SUGGESTIVE to D
		- D bears the burden of proof, and it is a very high burden
		- In this case, the fact that D was the only black guy in the room, the victim had recently been stabbed and was on medication did not constitute unnecessary suggestiveness.
	+ Manson v Braithwaite – Court changes test; Even if the identification procedure is unnecessarily suggestive, the court will admit the ID if the ID is “reliable”
		- If D proves that the ID was unnecessary and suggestive, the burden shifts back to the government to prove it was reliable. (Totality of the circumstances test)
* Lineups are almost entirely unregulated by SCOTUS because most occur pre-indictment
	+ The 6th doesn’t regulate non-corporeal IDs at all
	+ Ds can challenge IDs on due process grounds, but it’s almost impossible to win.

Massiah Doctrine

* Massiah v US – After formal judicial (adversary) process against a D has begun (say, indictment), the government cannot deliberately elicit incriminating statements in the absence of counsel
	+ Statement cannot be elicited at all, via any means – not jail plant, not transmitter, nothing
	+ The Massiah rule does NOT require custody (differs from Miranda)
	+ If a D has counsel, whether the suspect knows they are eliciting testimony or not, the police cannot elicit testimony from him
	+ This creates an incentive for the police to not indict someone unless absolutely necessary; also to indict lower level criminals first and then they will turn over the kingpin to the police to protect themselves.
* Deliberate Elicitation
	+ Any deliberate elicitation of a person against whom the adversarial process has begun violates Massiah.
	+ What is deliberate elicitation?
		- Brewer v Williams – if it looks like interrogation under Miranda, it will probably be deliberate elicitation under Massiah
			* Also, FOTPT doctrine DOES apply to Massiah violations (unlike Miranda violations)
			* Therefore, if a Massiah violation results in a statement of a piece of tangible evidence, barring a FOTPT exception, that evidence will be suppressed.
	+ Kuhlmann v Wilson – If a jail plant only listens to an individual against whom adversarial proceedings have begun, that is permissible as long as the jail plant does not seek out information from the prisoner (no Massiah violation, no deliberate elicitation)
		- Plant can question an unindicted suspect as much as he wants.
* Massiah Waiver
	+ MI v Jackson – Court says regardless of if D is indicted or not, the government cannot reinitiate contact with D after he has invoked right to counsel
		- Police cannot reapproach even to request Massiah waiver if D’s counsel has not first been consulted
		- Waiver of Massiah is possible, but there’s a heavy burden on the government to demonstrate waiver
			* Looking back to Miranda, court is not going to admit statements D made even if they were Mirandized if they have invoked their right to counsel, even if they’ve already been indicted.
		- Massiah has taught police interrogate first, indict later.

Grand Jury & Prosecutorial Discretion

* Grand Jury
	+ The purpose of the grand jury is to put a layer of protection between the suspect and the criminal justice process
		- Grand jury can be used as a sword or a shield
			* Weak shield (don’t indict baselessly)
			* Strong sword (to compel testimony)
	+ However, now, the grand jury indicts 99% of people; you can conclude from this either:
		- The grand jury indicts everyone, OR
		- The State does not bring frivolous cases to the grand jury.
	+ The grand jury is entitled to hear witnesses testify. What can prosecutors do if a witness invokes the 5th?
		- Grant immunity (only prosecutors can grant immunity, not judge or defense counsel)
		- No one can force prosecutor to immunize anyone
		- Two types of immunity:
			* Transactional – typically comes with witness pleading guilty
				+ Terms – Whatever testimony you give, we cannot prosecute you for anything you talked about
				+ Ex – Fraud at Enron – can’t prosecute you for anything related to that, even if prosecutor finds evidence incriminating you from another source later on
			* Use and derivative use immunity – more common
				+ Terms – Any testimony or anything derived from the witness’s testimony before the grand jury cannot be used against the witness, BUT if prosecutor finds independent evidence, they can prosecute you with that
		- Immunity eliminates a witness’s 5th Amd right to silence (can no longer incriminate themselves); if witness still refuses to testify, will be held in civil contempt.
* Prosecutorial Discretion
	+ Charging
		- Prosecutors cannot engage in vindictiveness, nor can they punish a D for exercising his constitutional rights
		- Hayes case – prosecutor can threaten a longer sentence if D takes a case to trial
	+ Equal Protection – prohibits selective prosecution by prosecutor; but cannot raise claim unless you find similarly situated individuals who were not charged.
		- It is very hard to prevail on an equal protection claim against a prosecutor