McConnell CrimPro Outline

**Charging Federal Crimes**

* Prosecutorial Discretion
  + To charge a federal crime, there must be:
    - 1) A federal offense, and
    - 2) Admissible evidence to sustain the conviction under FRCP 29
    - There must also be a federal interest in the case, and there cannot be another jurisdiction prosecuting the person
  + Rule 29 standard – Whether any rational jury, viewing the evidence in light most favorable to the government, can find each of the elements proved beyond a reasonable doubt
  + The prosecutor will usually charge the serious readily proveable offense (one with highest guideline sentence that can be proved); cannot take into account race/sex when deciding whether to charge
  + Equal Protection Clause limitations:
    - Selective prosecution is not permitted
      * If similarly situated persons are not prosecuted
      * If defendant is singled out
      * If prosecutor uses arbitrary or unlawful considerations
      * However, court presumes good faith by the government (Armstrong case)
    - Prosecutorial Vindictiveness is not permitted
      * If a defendant chooses to exercise a constitutional right, or a non-constitutional right protected by law, a prosecutor cannot punish the defendant for exercising that right (cannot apply to request for a longer sentence, for example)

**Steps in Criminal Process**

Rule 4 – Arrest – permits a judge to issue an arrest warrant or a summons on a complaint, assuming there is probable cause

Rule 5 – Initial Appearance – A person making an arrest within the US must take the defendant without unnecessary delay before a magistrate judge.

Rule 5.1 – Preliminary Hearing – If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless:

* The defendant waives the hearing
* The defendant is indicted
* The government files an information, charging defendant with a felony or a misdemeanor
* The defendant is charged with a misdemeanor and consents to trial before a magistrate judge

Rule 10 – Arraignment – an arraignment will be conducted in open court and will ensure that the defendant has a copy of the indictment and gives the defendant a chance to plead; the defendant can waive his appearance at the arraignment.

Arrest 🡪 (sometimes complaint comes first)

Complaint 🡪 If there was no complaint prior to the arrest, then a magistrate judge must sign off on a complaint within 48 hours of the arrest (must show probable cause to magistrate); if there was a complaint prior to the arrest, proceed to the initial appearance

* Per 48 Hour Rule, there are 48 hours from time of arrest to get person charged to court for initial appearance (if arrested without warrant, based on complaint); rule does not apply if defendant is indicted and then arrested (Gerstein case)
* The remedy for Rule 5/Gerstein violation is suppression of statement, not release from arrest (so after 48 hours, bright line rule, statement excluded)
* Corley rule – If D confesses within 6 hours of being taken into custody, “safe harbor” prevents suppression based on “unnecessary delay.” After 6 hours, if D confesses and has not yet been presented to a magistrate, the burden falls on the government to show the confession was reasonable under the circumstances
  + Reasonable delays – medical treatment, if are on the high seas
* If there is unnecessary delay between arrest and initial appearance, and the defendant confesses in the interim, the confession may be found involuntary, and the remedy is to exclude it.

Initial Appearance 🡪 Per Rule 5, the defendant must be brought before the magistrate without undue delay (usually within 24 hours); at the initial appearance, the defendant is advised of pending charges, maximum penalties, right to counsel and, if applicable, preliminary hearing

* Whether already indicted or not, D will have an initial appearance
* If already indicted, then judge will schedule arraignment after the initial appearance, because probable cause has already been found for the second time (first being the complaint) by a grand jury
  + Sometimes an indictment will be issued before the defendant is arrested; in these cases, the defendant will be arrested and no complaint will be issued, and then defendant goes to initial appearance and then arraignment.
* If not already indicted, (so only complaint thus far) then next step is a preliminary hearing (under Rule 5.1), to establish probable cause for the second time; this is an opportunity for the defendant to do discovery.
  + If no indictment after initial appearance, preliminary hearing must happen; preliminary hearing will happen within 10 days of initial appearance if D is in custody; 20 if he is not
  + Then, if the defendant did not waive the indictment, you need the indictment before the arraignment
  + Preliminary hearing is the first hearing where right to counsel exists
  + You only have a preliminary hearing if the defendant is not already indicted at the time of the initial appearance (if the defendant is indicted by the time when the preliminary hearing is to be held, then you don’t need a preliminary hearing)
* Need indictment within 30 days of initial appearance
* If D waives indictment, that means he will be charged with an information; the charging instrument used when a D waives indictment is the information (must have on or the other, but never both)
  + An incentive for D to waive an indictment could be a charging incentive – if D agrees to plead to an information, then D and gov’t can agree on the front end what the charges will be.
  + You need the information because D cannot plead guilty to a complaint

Arraignment 🡪 The defendant usually has counsel; the defendant must be indicted by the time of the arraignment, and at the arraignment he will get a copy of the indictment. The defendant will offer a not guilty plea at the arraignment (Magistrate judges cannot take guilty pleas, so pleas at arraignments are always not guilty). The defendant can choose to waive his appearance at the arraignment and let counsel talk for him.

**Grand Jury**

* Rule 6 – The court summons the grand jury; the grand jury evaluates the evidence and decides whether to issue an indictment (will have 23 members; 12 needed to indict; they serve for 18 months)
  + 6e – Secrecy – In general, no obligation of secrecy is imposed on anyone except per 6e2b – the following people cannot disclose/discuss a matter occurring before the grand jury
    - A grand juror, an interpreter, a court reporter, an operator of a recoding device, a person who transcribes recorded testimony, or an attorney for the government.
    - This rule encourages witnesses to testify
    - Be aware – Jenks Act trumps Rule 6e
* The grand jury’s purpose is to establish whether there is probable cause that a person has committed a crime
  + Limitations on a grand jury – jurisdiction and venue; they can only investigate crimes that occurred within its district, for example, the Southern District of Texas
  + The grand jury foreperson is chosen by the district judge; the panel is chosen by random selection
  + The rules of evidence don’t apply to a grand jury proceeding; any evidence can be used to find probable cause; the exclusionary rule does not apply
* Subpoenas
  + The grand jury obtains documents by issuing subpoenas to document holders; the grand jury need not show probable cause or reasonable suspicion to request documents, they must only be relevant to some grand jury inquiry
    - The prosecutor is present during the grand jury proceedings; must sign off on the indictment
      * To invalidate an indictment based on alleged misconduct must show such overbearing misconduct that the indictment is in effect that of the prosecutor instead of the grand jury – US v McKenzie
    - R Enterprises Inc case – the grand jury has broad discretion to obtain materials to complete a holistic investigation; therefore it is very difficult to quash a subpoena
      * Standard to quash subpoena – When a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines there is no reasonable probability that the category of materials the government seeks will produce information relevant to the general subject of the grand jury’s investigation (HARD standard to meet)
        + Forthwith subpoena – need approval of US Atty to issue; treated like a search warrant for documents, which is why need atty approval to issue – court does not want to let grand jury issue a subpoena when are using a subpoena essentially to find probable cause/evidence for trial
      * Order denying a motion to quash subpoena not appealable – US v Ryan
* Challenging indictment/Remedies for error in Grand Jury proceedings
  + Bank of Nova Scotia case – To show a court should throw out a grand jury indictment, there must be an extreme set of circumstances
    - Standard – D has to show that the alleged error a) happened b) had a substantial impact on the grand jury and c) prejudiced D
    - Basically, the error has to be fundamental to get an indictment thrown out – racial discrimination in selecting the jury, or something similar
    - Harmless error doctrine – a very forgiving doctrine that makes it very difficult to get indictments thrown out; as long as probable cause can stand based on other evidence as well, the indictment stands regardless of errors.

**Indictments**

* Rule 7 – Must be a plain, concise, definite statement of essential facts signed by government attorney; it must include a citation to statute.
  + A count may allege that the means by which D committed offense are unknown or that D committed it by one or more specified means (must cite to statute for each of these)
  + 7f – Bill of particulars – motion by defendant within 10 days of arraignment or later with court permission to seek a more definite statement on charged crime
  + 7d – Surplusage – on D’s motion, the court may strike surplusage from the indictment or information
  + 7b – An offense punishable by imprisonment for more than one year may be prosecuted by information if the D, after being advised of rights, waives prosecution by indictment
* Venue – where the crime occurred is where the prosecution/trial occurs
  + Rule 18 – Government must prosecute an offense in a district where the offense was committed; the court must set place of trial within district with due regard for the convenience of the defendant and witnesses, and the prompt administration of justice.
    - Per Rule 21, transfer is permissible to ensure D gets fair trial/convenience of witnesses
  + Venue can be proper where offense began, continued, or completed
  + Venue can be established through acts of a co-conspirator in the district
  + Venue must be included on indictment (an element government has to prove)
* Drafting an Indictment
  + Every element you include, you will have to prove
  + Joinder (of Offenses/Defendants – Rule 8)
    - Rule 8a – Offenses can be joined on an indictment if they are of the same/similar character; the same transaction/act; or are connected together in a common scheme
      * Example – robbery of drugs 🡪 sale of stolen drugs
      * Long case – if joinder is too prejudicial against D, then the trials should be severed.
    - Rule 8b – Defendants can be joined on an indictment if they participated in the same act/transaction (shows how defendants are tied together)
  + Forfeiture (Rule 7c2) – No judgment of forfeiture or property may be entered in a criminal proceeding unless charging instrument provides notice that the defendant has an interest in property subject to forfeiture under the statute (MUST be included on indictment)
  + Avoid duplicity – charging two or more offenses in one count (look at whether each offense requires proof of an additional fact that the other does not. If they require different facts, then separate into two counts)
  + Avoid multiplicity – charging a single offense in multiple counts (look at whether each offense requires proof of an additional fact that the other does not. If all require the same facts prove, make it a single count.)
  + Variance – when the government presents evidence different that what is alleged in indictment
    - This is permitted if the evidence presented proves charges in indictment, notwithstanding to description in indictment
    - It is a problem only if the defendant is prejudiced by this evidence
    - If it is deemed to be a constructive amendment (gov’t proves something different at trial than what is an indictment) then this is a 5th Amd violation
    - Permissible variances: location of crime, type of drugs, conspiracy dates, number of co-conspirators
* Conspiracy Charges
  + A good way to charge, makes co-conspirator statements easier to admit; you still have to prove agreement and tie the Ds together
  + Pinkerton doctrine – when indicting co-conspirators, per Pinkerton, any co-conspirator is liable as the principle to a crime
    - Any overt act of one partner is imputable to all members of the conspiracy as long as the act is reasonably foreseeable in furtherance of the conspiracy
    - This makes a kingpin responsible for actions of underlings, which is good for gov’t because the kingpin is the real target

**DOJ Corporate Charging Policy** –

* Governed by US Attorney’s Manual 9-28.000 – says to charge, there must be a federal interest, and also take into account: (big 3)
  + Cooperation – company cooperating with investigation, producing records, identifying witnesses and evidence of crime
  + Compliance – company figures out why criminal conduct occurred and makes changes to business to ensure it doesn’t happen again
  + Collateral consequences (prosecutors have to look at whether their decision will land 30k people out of a job)
* Prosecution Agreements (growing trend)
  + Nonprosecution agreements – AUSA tells the corporation that they will not prosecute the company if the company complies with them; usually lasts from 12 months to several years to make sure company keeps its end of the bargain
  + Deferred prosecution agreements – the government files a charging instrument against the company, then asks the company to agree to certain conditions, and at the end of a certain time period, if the company has followed the conditions, then the government will dismiss the case
  + Monitors – an independent third party agreed to by the company and government who makes sure that company complies with the prosecution agreement; DOJ policy provides specific criteria for selection and use of monitors

**Right to Counsel (6th Amendment)**

* When does D have a right to counsel?
  + At critical stages of the trial – post-indictment lineup, preliminary hearing, arraignment, trial, appeal
  + The type of charge must be one when a defendant can expect to consult with counsel
  + Massiah case – D’s 6th Amd rights were violated when federal agents deliberately elicited incriminating words from D after he had been indicted and in the absence of counsel
    - If jailhouse snitch provides info against D, must have a Massiah hearing to ensure snitch wasn’t put up to it by law enforcement
    - Get around this by waiting to indict (Massiah pretty much specific to informants)
    - However, even if D statement violates 6th/Massiah doctrine, that statement can still be used to impeach (unless statement is involuntary, then it can’t be used)
      * Ex) *Corley*-type situation, statement given – violation of 6th Amd; that statement cannot be admitted at trial (unless can show delay was reasonable; say it wasn’t). However, if judge deems the statement voluntary – no duress or coercion, then the statement can be used for impeachment purposes. If it is deemed to have been made under duress or coercion, then that statement cannot be used for anything, impeachment or otherwise.
  + Rothgery case- - The right of counsel attaches at the initial appearance; however, D not entitled to paid government attorney until “critical stage”; initial appearance is not a critical stage
  + Rule 44 – An appointed counsel will represent from initial appearance through first appeal as of right, unless waived.
    - Right to counsel includes right to conflict-free counsel (44c)
    - Under 44c, when two or more defendants are represented by the same counsel in the same proceeding, the court must inquire and, if necessary, hold a hearing to be sure, if there is a conflict, the defendant waives it.
  + Waiver of counsel – D has a right to waive right to counsel
    - Patterson – Miranda warnings are sufficient to make D aware of right to counsel during post-indictment questioning (if waive right to silence, unless D explicitly says otherwise, also waives right to counsel)
    - Montejo v LA – It’s permissible to question D after he has invoked right to counsel as long as it is D who initiates contact with law enforcement and then waives right to counsel
    - Faretta – the defendant has a right to waive the right to counsel and proceed pro se
      * For D to do this, court must ensure that the waiver is knowing and voluntary
      * Court ensures this by having a Faretta hearing where the D is informed and questioned of 5 things (must be done on the record):
        + Disadvantage of self representation
        + Nature of charge
        + Range of penalties
        + Trial is complicated – an attorney will see possible defenses/call witnesses/test evidence
        + Judge believes counsel would be best
    - Appointment of standby counsel – If D decides to represent himself pro se, standby counsel may be appointed; this does not violate D’s 6th Amd rights, even if D objects.
      * Standby counsel cannot take over the D’s case, unless ordered to do so by the court
* When will counsel be provided?
  + When D is deemed indigent
  + 6th Amd language – “In **all** criminal prosecutions, the accused shall enjoy the right…”
  + History:
    - Powell v AL – three 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 is a fact-specific inquiry (type of charge, etc.)
      * In these circumstances, SCOTUS held that appointment of a primary defense lawyer was a requirement of due process (Scottsboro 9 accused of rape and sentenced to death)
    - Betts v Brady (1942) – D accused of robbery, could not afford a lawyer, asked court to appoint one, the judge refused, saying lawyers are only appointed for murders and rapes
      * SCOTUS holds there is a due process right to counsel under 14th amendment, but there still has to be special circumstances to be entitled to appointed counsel
    - Gideon v Wainwright – abandoned Powell “special circumstances” test; overrules Betts holding that 6th Amendment right is not incorporated
      * SCOTUS holds that 6th Amendment right to counsel is a fundamental right, which implies a right to appointed counsel if necessary
  + Sixth Amendment Right to Counsel applies where any D is subject to imprisonment
    - Argersinger case – A D accused of a misdemeanor, who gets jail time, is entitled to a free appointed lawyer
    - AL v Shelton – A suspended sentence that may end up in actual deprivation of a person’s liberty may not be imposed unless D received assistance of counsel (cannot get around 6th Amd by imposing suspended sentence)
* Adequacy of Counsel; D has a right to effective assistance of counsel
  + Strickland – Counsel will have been found to have provided ineffective assistance if:
    - Counsel’s performance fell below an objective standard of reasonableness and was thus deficient; and
    - The defendant suffered prejudice as a result, and thus was denied a fair trial (but for counsel’s unprofessional errors, the result of the proceeding would have been different)
    - A conflict of interest triggers a presumption of prejudice under Strickland (meets one prong), but D still has to show deficient performance
  + Cronic – prejudice is presumed if a) there is a complete denial of counsel during a critical stage, or b) counsel entirely fails to subject prosecution’s case to meaningful adversarial testifying. (still have to show deficient performance under Strickland)

**Bail**

* Eighth Amendment – protects against excessive bail fines and against cruel and unusual punishment. There is no constitutional right to bail, just a protection against excessive bail
  + Having a right to bail does not guarantee release before trial; a judge can deny bail or set bail at a prohibitively high amount
  + Bail/bond is a promise that if D gets out of jail, he will report to court, he will not flee, and he will comply with all conditions of bail
* Bail Reform Act (BRA) (used to determine bail in federal system)
  + Before the bail reform act, while every D was entitled to bail, the court was not entitled to set bail a D could make
    - This found to be unconstitutional under Equal Protection – cannot discriminate against poor people
  + Now, the government initiates the detention process at the initial appearance
    - If neither side makes a motion, then D gets bond/detention hearing immediately at initial appearance
      * If D makes a motion, then within 5 days
      * If government makes a motion, then within 10 days
      * Defendant can ask for release with conditions (bond, drug treatment)
    - At the detention hearing, the rules of evidence do not apply; the D can call witnesses and cross-examine government witnesses
      * Detention determination made after government looks at Pretrial Services Report – information D gives after arrested, when he’s interviewed by pretrial services personnel; information to be considered just for bail purposes – financial circumstances, background, criminal history, etc. This information cannot be used at trial.
    - Where bail is set; determine if D is flight risk/present danger to community
  + Under BRA, at the hearing, the judge can detain some Ds without bail if
    - They are a flight risk (preponderance of the evidence), (upon motion of prosecutor or sua sponte) or
    - They present a danger to the community (clear and convincing) (upon motion of prosecutor)
      * This is a rebuttable presumption; to show:
        + Must be a case that involves crime of violence punishable by 10 years or more, or
        + An offense that is punishable by life imprisonment or death
        + A drug offense punishable by 10 years or more
        + A felony not otherwise a crime of violence that involves a minor victim
    - Serious risk of danger to prospective witnesses (upon motion of prosecutor or sua sponte)
  + PER 18 USC 3141c2, the judge cannot impose financial conditions that result in detention
  + US v Salerno – SCOTUS upholds Bail Reform Act as constitutional

**Speedy Trial**

* The 6th Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy trial
* Statute of Limitations (time in which to file an indictment)
  + 5 years for most crimes
  + Runs when each element of the crime occurred and the crime is complete
  + If the offense is a continuing offense, then SoL does not run until conduct constituting the offense ceases
* Speedy Trial Act – 18 USC 3161
  + Time permitted between Arrest and Indictment – 30 days
    - Triggered when D is arrested
    - All charges charged in the complaint must be brought within 30 days
    - Excludable delay periods apply – for example, if D has to be transferred from another district
    - Remedy if takes longer than 30 days – dismiss the indictment
  + Time permitted between Indictment and Trial – 70 days
    - D’s trial “shall commence” within 70 days of indictment being returned (if arrest based on complaint) or from initial appearance
    - Starts counting from last co-defendant
    - Superseding indictment – does NOT reset the Speedy Trial Act
  + Remedy if takes longer than 30 days between arrest and indictment, or if takes longer than 70 days between indictment and trial – dismissal (with or without prejudice)
    - A violation is enough for D to get this remedy, does not need to show prejudice for a statutory Speedy Trial Violation (does need to show prejudice to get remedy on an alleged constitutional speedy trial violation)
    - To decide whether to dismiss with/without prejudice, the court looks at:
      * Seriousness of the offense
      * Facts/circumstances leading to dismissal
      * Impact of representation on speedy trial violation
      * Administration of justice
  + Go slow provision – Trial cannot commence within 30 days of the indictment/initial appearance
    - This 30 day period does not apply to a superseding indictment
  + Tolling the Speedy Trial Act
    - Any pretrial motions (even frivolous motions, though frivolous motions can cause sanctions if motion is filed only )
      * If the motion does not require a hearing (ex – motion to substitute counsel) then the clock is tolled until 30 days after the date the motion’s response time – the date court sets for gov’t to respond.
      * If the motion does require a hearing, there is no requirement for when the hearing has to happen (can take a year or more), but when it does, the clock is tolled until 30 days after the hearing
    - Continuance – (in the interest of justice)
      * Zedner v US
        + A defendant may not prospectively (in advance) waive the application of the Speedy Trial Act, although the Act does allow for retrospective waivers
        + For a continuance (and the amount of time it includes), to be excluded under the speedy trial clock, the court must make express findings on the record at or near the time it grants the continuance
      * Continuance can be granted in the interest of justice, if the court finds the interests of justice outweigh the best interests if the public and D in speedy trial
        + Cannot be based on tight court calendar, lack of preparation, or failure to obtain government witnesses
    - Jackson – New counsel does not waive the speedy trial act, but will probably merit an interests of justice continuance.
  + The Speedy Trial Act (30 days; 70 days) is not a constitutional rule. However, the 6th guarantees D a right to a speedy trial. How does D allege/prove a constitutional speedy trial violation?
    - Barker v Wingo sets out four factors (these are hard to prove unless there is a long delay)
      * Length of the delay (must be at least one year after arrest or indictment, most jurisdictions say 2-3 years)
      * Reason for the delay (If the delays are due to D’s requests for continuance, there is no violation)
      * Whether D objected at any point and asked for a speedy trial
      * A showing of prejudice to the D by the delay (a witness is dead/gone)
    - Remedy to a constitutional speedy trial violation is dismissal with prejudice – D cannot be charged again.
  + Waiving Speedy Trial Act Rights
    - D waives his rights under STA if he fails to move to dismiss the indictment prior to either the entry of a guilty plea or prior to trial
    - However, D may still being up the issue as an IAC claim, at which point court will determine if any violation occurred, and if so, whether prejudice resulted from the violation
      * Unclean hands – D cannot purposefully cause delay and then expect dismissal

**Discovery**

* No constitutional right to discovery – it is all statutorily and case law codified.
* Rule 16 – Government Disclosure (basically codification of Brady) – Upon D’s request, the government must disclose to the D relevant oral statements, written or recorded statements, defendant’s prior criminal record, summary of expert testimony, and documents and objects. (look at list bottom p. 15-top of p. 16)
  + Reciprocal discovery by D – must turn over objects intended to be used at trial, expert reports, and summary of expert testimony, but not internal defendant memoranda
    - If gov’t just turns over information without waiting for D to ask, then they lose their right to reciprocal discovery – so it’s best to wait for D to ask.
  + Rule 16c – continuing duty to disclose up to trial
* Jenks Act – 18 USC 3500
  + Statements of government witnesses are discoverable **after** testified on direct at trial (limited to government witnesses)
    - Government must disclose exculpatory/impeachment information before trial
  + DOJ policy – turn over statements before trial unless there is a witness security or national security issue
* Rule 26.2 – Extends required disclosure to any witness, defense or government (except defendant) at trial, suppression hearings, sentencings, preliminary hearings, and detention hearings.
  + - Includes grand jury statements
    - This is why districts will indict D before preliminary hearing – so don’t give D the chance for this discovery as early as the preliminary hearing.
    - If it’s not turned over, the court can strike from the record
      * There can be a mistrial if the government fails to comply and a mistrial is in the interest of justice
* Prosecutorial Duty in Discovery
  + Brady – Suppression by prosecution of evidence favorable to an accused violates due process where the evidence is material to guilt or punishment; good or bad faith of the prosecutor doesn’t matter.
    - A lot of fuss made over the word “material” – whether only material evidence is turned over, or ANY evidence that bears on guilt or punishment is turned over.
      * Materiality – reasonable probability of a different result
  + Kyles – Government has a duty to learn of favorable evidence for the defendant so they can disclose to defense.
  + Ruiz – Defense request for exculpatory information unnecessary; Prosecution team need not disclose material impeachment evidence before guilty plea
  + Banks – “Materiality” means reasonable probability of a different result, and is collective—not evaluated piece of evidence by piece of evidence
  + Giglio – a violation still existed even if the non-disclosed evidence dealt with witness impeachment/credibility (here, that a witness would not be prosecuted if he cooperated with the government) rather than direct evidence of guilt or innocence; remedy is a new trial.
    - Extends Brady to impeachment information as well.
  + Alcorta – Prosecution must correct any false testimony presented by prosecution witnesses at trial.
* DOJ Policy on Brady/Giglio (USAM 9-5.001)
  + Read Brady and Giglio expansively – err on the side of turning everything over
    - Per DOJ policy – Brady and Giglio don’t only apply to trial, but to sentencing as well.
  + Members of the prosecution team include state and local law enforcement
  + Must disclose any evidence inconsistent with any element of the crime, or any evidence that establishes an affirmative defense or casts doubt on the accuracy of the evidence
    - Includes witness statements, and non-admissible evidence
  + Disclose exculpatory information reasonably promptly after discovery; disclose impeachment information within a reasonable time before trial; disclose information that casts doubt on a sentencing factor before sentencing.
* Confessions/5th Amd
  + Fifth Amendment protects the right to be free from compelled self-incrimination
  + A confession must not violate Miranda
  + If an issue of voluntariness if raised at trial, per Denno case, defense must hold a hearing out of the presence of the jury to determine if the confession was voluntary – product of D’s free will/choice.
    - The burden is on the prosecution to prove voluntariness by a preponderance of the evidence
  + Immunity – Organized Crime Control Act (18 USC 6002) – immunity can be granted without regard to federal violation; the witness must claim the privilege; the immunity must be approved by US Atty General on application of US Atty (based on public interest)
    - US Atty must make judgment that testimony sought is necessary and benefits the public interest and the witness is likely to invoke 5th Amd
    - 18 USC 6002 – No testimony or other information compelled under order may be used against a witness in a criminal case (why immunity is offered instead)
    - Katigar v US – a limited grant of immunity to compel testimony is constitutional (making a deal)

**Confrontation Clause**

* Sixth Amendment – “in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him”
* Confrontation clause comes into play when there is hearsay in a criminal case. Ask –
  + Is the declarant testifying? (If yes, no CC problem)
  + Is there hearsay?
    - If yes, does it fall under an exception to hearsay?
  + If there is hearsay and there is no exception, then ask, is the hearsay testimonial?
  + Crawford - If the out of court statement is testimonial, then it **is not admissible** UNLESS:
    - The witness is unavailable, and
    - D had prior opportunity to cross-examine
      * What is testimonial? Ask whether declarant would reasonably expect the statements to be primarily used for prosecutorial purposes or that the statement would be available for use at a later date. 9Ex – to grand jury, to police sometimes, court proceedings)
      * What is non-testimonial? Among other things, off hand remarks, business records, statements in furtherance of a conspiracy, statements made to police to enable assistance to ongoing emergency
      * “Primary purpose” – What was the primary purpose of the exchange? To assist, or for posterity?
  + Davis v Washington – If statements made in the course of police interrogations were made under circumstances objective indicating that the primary purpose of the interrogation was to enable police to meet an ongoing emergency, then these statements are not testimonial and are not subject to the confrontation clause.
  + Dowdell – business records created before and independent of a criminal investigation, that don’t go to show guilt or innocence, do not implicate the confrontation clause
  + Bruton - Bruton Doctrine – When one co-D confesses, the confession cannot be used, even with limiting instruction, against non-confessing D, because the danger of prejudice—that the jury will consider it against both—is very high.
    - Cruz – SCOTUS says Bruton bars only when the confession of a co-D is devastating to the case of the other
    - Gray v MD – redacted confession (if confession of co-D IS let in) must be reworded to NOT implicate another D.
    - Bruton doctrine does not apply to co-conspirator declarations, or if the co-D testifies at trial
  + Melendez-Diaz (2009) – Lab analyst certificate of analysis offered at trial to ID drugs were considered testimonial, and the analysts were “witnesses” for purposes of CC, so certificates not admissible without analyst there to testify
    - DOJ Fallout – DOJ used to rely on certificates of nonexistence of records, which before this case did not implicate Crawford (these were post-investigation reports of whether the records ever existed)
      * Before the trials, there was no record that said X; the only reason the record was created was for purposes of litigation, so there is now a Crawford issue and a live witness must be called.

**Guilty Plea**

* Rule 11 – Pleas – If D offers a plea of guilty or nolo contendere, the court must make sure that the plea is knowingly and voluntarily made, and that it is premised on sufficient factual basis
  + D must be informed that he has a right to plead not guilty, a right to a jury trial, a right to counsel, a right to confront witnesses, and that he waives these rights if the court accepts his plea.
    - He must also be advised of the nature of the charges to which he is pleading, the maximum possible penalty
  + 11(d) D may withdraw guilty plea before the Court accepts it for any reason – after the Court accepts the plea, D may only withdraw it for a “fair and just” reason
  + 11(c)(2) – Parties must disclose plea agreement in open court
* Two types of plea agreements:
  + C1A or C1B agreement – the defendant pleads, and the government makes a sentencing recommendation that is not binding on the court
  + C plea – the government and D make a deal where the court can either agree or not – if the court refuses to accept the plea, then D gets out of the plea (the court has no discretion to change the terms of the plea agreement)
    - Ds want C plea, gives them some certainty
* Case Law
  + Ruiz – D has no right to impeachment information before a guilty plea, because that is a trial right; it does not impact whether D’s plea is knowing and voluntary. The Constitution does not require complete knowledge of relevant circumstances prior to the Court accepting a guilty plea.
  + Santobello – D has a right to enforce the terms of the plea agreement entered into with the government – D can enforce it by appealing if the government violates an aspect

**Trial**

* Rule 23 – Jury Trial – the D has a constitutional right to a jury trial for all non-petty offenses (for all offenses that carry a penalty of more than 6 months in jail), unless he knowingly, intelligently, and voluntarily waives this right in writing, government agrees, and court signs off.
  + D has non-waivable right to unanimous jury.
* Jury Selection
  + Rule 24(b) – Peremptory Challenges (striking a jury not for cause)
    - In a capital case, each side has 20 peremptory challenges
    - In a felony case (D is charged with crime punishable by imprisonment of more than one year), the government has 6 peremptory challenges, and the D has 10
    - In a misdemeanor case, each side has 3 peremptory challenges
  + Either side can also challenge a juror for cause – if the juror indicates he will be biased, if he’s familiar with the party/participant, if he is found to have concealed information, if his views will impair his performance of duties
* Batson – Prosecutors cannot exercise peremptory challenges to exclude jury members of the defendant’s race solely because of their race; such exclusion is a violation of the Equal Protection Clause
  + Extensions of Batson:
    - Applies regardless of D’s race
      * A white male has standing to make a Batson challenge
    - Applies to D’s challenges as well as government’s (Powers v OH)
    - Does not permit exclusion based on gender
    - Some circuits extend Batson to religion
  + Batson Analysis
    - First – D must show a prima facie Batson case
      * Show D is a member of a cognizable group
      * Raise an inference that the prosecutor exercised a peremptory challenge to remove members of racial/gender group from jury
    - Second – burden switches to prosecutor to offer facially neutral reason why they used a peremptory strike for that juror (they can’t just deny a racial motive; have to offer an alternate explanation)
    - Third – the judge evaluates the credibility of the prosecutor, and determines whether D has shown purposeful discrimination
* Double Jeopardy
  + The Fifth Amendment protects Ds from being subject “for the same offense to be twice put in jeopardy of life or limb.”
  + Blockburger test – be sure each offense requires proof of an additional fact which the other does not. If both require the same proof, then the D is subject to double jeopardy
    - If you have two offenses charged in the same indictment, they have to be for different crimes
    - Ex – Writs – D claimed he was subject to double jeopardy because was charged with two counts sexual assault of a child. However, one required proof that D had touched the girl’s sexual organ with his sexual organ, and the other required proof that D had touched the girl’s sexual organ with his mouth – different elements, so no double jeopardy.
    - Double jeopardy also protects the D from being retried for an offense after an acquittal
    - Blockburger is a strict element test. If each statute provision has one element different, then it is a separate crime and they are different offenses.
    - Same offense means:
      * + “Different” Crime w/Identical Elements – A second offense that has the same elements as first (armed bank robbery/using a gun in connection w/crime of violence).
        + Greater/Lesser – A second offense is a subset of elements of the First offense (robbery/theft).
        + Lesser/Greater – The first offense is a subset of elements of the second offense (robbery/murder in course of robbery).
    - Ex: Crime of armed bank robbery v. crime of using, carrying or possessing a firearm in the course of a federal crime of violence. Elements of these two crimes are the same when dealing w/bank robbery. Under Blockburger, this would be the “same offense.”
    - Ex: Theft is a lesser-included offense to robbery. If tried on theft, you have been put in jeopardy and cannot then be tried for robbery for same transaction.
  + Jeopardy is attached when:
    - Jury is impaneled (if jury trial)
    - Judge starts hearing evidence (if bench trial)
    - Double jeopardy is waived if it’s not raised before trial
  + Exceptions to double jeopardy: (It is not double jeopardy when)
    - Defendant’s appeal where the appellate court reverses trial errors
    - A mistrial for a hung jury or because the D requests one (unless one is requested due to bad faith by the government)
    - If D is being tried be separate sovereigns
  + DOJ Petite Policy – If DOJ wants to prosecute someone who has already been prosecuted by the state, then DOJ needs to go to the witness immunity unit in Washington and show that a substantial federal interest has been left unvindicated by state prosecution. If this can be shown, then D can be charged federally although he was already charged by the state.

**Sentencing**

Sentencing Reform Act – (historical) established US Sentencing Commission and set up a determinate sentencing system that made guidelines binding on the courts. Judicial discretion was limited, and more consistency/predictability was provided in sentencing

Limiting the Sentencing Reform Act –

* Blakely – SCOTUS held that WA’s state mandatory sentencing scheme violated D’s 6th Amd right
* Booker – SCOTUS excised provision of USC 3553 making federal sentencing guidelines mandatory – guidelines became advisory (applied holding of Blakely to federal sentencing guidelines)
  + Apprendi – Other than the fact of a prior conviction, any fact that increases the penalty for a crime above the statutory maximum must be submitted to the jury
  + Irizarry – Judge can impose a sentence as a 3553(a) variance from the sentencing guidelines without prior notice to parties

Post-Booker Sentencing Process –

* Presentence Investigation Report (PSR) prepared – All information that a court would consider in sentencing a D gets prepared and put into a report
  + The PSR will include
    - All applicable guideline ranges/policy statements
    - Calculates D’s offense level and criminal history, and the resulting punishment range available
      * Grouping – Ds get more punishment for committing more crimes, but to avoid double counting, related crimes are put into a group, an offense level is assigned for the group, and a single offense level is given to the case.
      * Purpose of criminal history is to ensure that worse criminals are getting punished more severely.
      * Courts pay special attention to when a person was released from custody/jail, and how recently that person committed another offense
        + Guidelines hit hard if D gets out and, within a short period of time, commits another crime
    - Identifies relevant factors to sentencing and any basis for departure from the guidelines
      * Relevant factors – D’s preparation for the offense, trying to avoid getting caught, any cooperation with government
  + The Rules of Evidence do not apply at a sentencing hearing
  + Rule 32(e) – the contents of a PSR are disclosed 35 days before sentencing
  + Rule 32(f) – parties have 14 days to object to the PSR
  + Rule 32(g) – 7 days before sentencing, the officer who prepared the PSR submits a recommendation and any unresolved objections to the court
* Sentencing Hearing
  + Court uses Sentencing Guidelines to calculate D’s conduct – assigns offense level 1-43, makes adjustments based on specific conduct.
    - Court also determines criminal history category I through IV based on criminal history points
  + Undisputed portions of PSR treated as findings of fact
  + It is D’s burden to show PSR is inaccurate
    - Except when immunity is involved, then the burden shifts to the government to show that the information therein is not based on immunity
  + Court can allow new objections any time before imposing the sentence
  + Court makes findings on disputed matters in the PSR (but only on those that affect sentencing)
  + Crime Victim Rights Act – victims have a right to be heard at pleas and at sentencing
    - Victims get notice of all steps in the proceeding (best efforts taken to give victims reasonably accurate and timely notice of the proceedings)
* Court determines advisory Guideline range
  + Gall – the advisory guideline range MUST be calculated
    - Sentencing will always be reversed on appeal if the judge did not calculate the guideline range accurately (regardless of whether the punishment imposed did actually fall within the accurate guideline range)
* Court considers 3553(a) factors:
  + At this stage, the defendant, his attorney, the prosecutor, and any victim, per Crime Victims Rights Act, get opportunities to speak
  + 3553(a) factors –
    - Nature and circumstances of the offense and the history and characteristics of the D
    - Need for sentence imposed
      * Must reflect seriousness of the offense, promote respect for the law, provide just punishment for the offense
      * Must afford adequate deterrence; must protect the public from further crimes by D
      * Must provide D with needed training, medical care, of other correctional treatment effectively
    - Kinds of sentences available
    - Sentencing range established for the offense category in the guidelines
    - Any policy statement issued by Sentencing Commission
    - Need to avoid unwarranted sentence disparities among similar Ds
    - Need to provide restitution to any victims
  + Per 3553(a), judge can deviate from guidelines if he/she sees fit.
* Sentence imposed
  + If sentence calls for forfeiture, or includes forfeiture of property, that must have been included on the indictment against D.
  + Substantial Assistance Motion – 5K1.1 allows a Court to go below a guideline (preferred method to reward cooperators under DOJ policy)
  + 3553(e) filing – IF there is a mandatory minimum sentence required, a 3553(e) filing can permit the court to issue a sentence below the mandatory minimum for substantial assistance (D cooperated)
    - Wade – failure to file a 3553e motion is not subject to review, unless there was an unconstitutional basis (eg, race) for failure to file such motion

**Appeals**

When to appeal? After entry of judgment

Who can appeal? Either party

* If D wants to appeal (D was convicted), defense attorney files notice of appeal
  + This notice is then filed with the 5th circuit (if appealing from TX)
  + Whichever side files for appeal has the responsibility to order the trial record and send to the Court of Appeals
* If DOJ wants to appeal:
  + First, have to report any adverse decision in a criminal case to DOJ Appellate Division
    - Any adverse decision includes indictment dismissed, lose suppression hearing, etc.
    - Appellate division makes recommendation on what to appeal, what not to appeal
  + Notice of appeal must be filed within 30 days
  + Solicitor General must sign off on every appeal DOJ submits
    - SG needs to sign off to ensure DOJ stays consistent as far as its policy among districts
    - If SG does sign off, then SG will send out a notice to every federal prosecutor telling them what position they need to take on things, so AUSAs stay consistent
    - Generally, the government doesn’t try to appeal unless there is a good chance the SG will sign off on it – cuts down any frivolous appeals

Standards of Review:

* Harmless error
  + Rule 52(a) – If defendant raises a timely objection, then error is preserved for appeal
  + Constitutional issues are subject to harmless error test as well
  + If the error is found to be harmless, then it does not affect the outcome and the integrity of the proceeding is not compromised
  + If there is no objection, so the error is not preserved for appeal, the standard of review becomes plain error (very difficult to meet)
  + Per Rule 52a – if the error is harmless, then it must be disregarded
* Plain error (higher standard) looks to see if:
  + There is error
  + It is plain/obvious
  + It affects substantial rights/caused prejudice against defendant
  + It affected the fairness and integrity of judicial proceeding
  + Olano – sets out these four factors as test for plain error
  + Rule 52b allows for plain error review
* De novo – when legal conclusions are to be reviewed on appeal.
* Clear error – this standard applies to lower court’s factual findings
  + The reviewing court must accept a factual finding as correct unless no rational fact finder could conclude otherwise based on the evidence presented.

Ex Post Facto Clause:

* Specifically in Articles III and IV of the Constitution itself
* If the Legislature changes the law after D’s offense (changes elements, makes new sentencing guideline), there is no retroactive application. The D is charged/punished according to the law in effect at the time of the offense