# Criminal Procedure

## 4th Amendment: Searches and Seizures

### General Overview

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. - U.S. Const., amend. IV.

* These protections are only applicable to government conduct
  + 4A protections generally do not extend to against acts of private individuals
    - Exception: **State action doctrine**
      * 4A might apply to acts of private individuals if they are attributable to the state (e.g., private party acting w/ government authority aka "under color of state law")
      * Some situations in which private party may be deemed a state actor include:
        + Where State has outsourced traditional government functions to the private party (e.g., private prisons, deputized private police)
        + Where there is a close operational relationship between state and the private party (so-called "symbiotic relationships" or "joint ventures")
        + Where party is acting under coercion/influence/encouragement from the state
        + Government is "pervasively entwined" with the leadership of a private organization
  + Incorporated against the states, as are all rights enumerated in the BoR, by the 14th Amendment
    - Hence 4A protections apply to actions taken by state/municipal law enforcement
* Standing - can only bring claims for violation of one's own constitutional rights (can't do so vicariously);
  + Not sure if this is always true? I think it is assumed to be true since nearly all cases involving claimed violations of constitutional rights are brought in federal court under federal question jurisdiction, thus they are subject to Article III standing requirements. However, this is still area of concurrent jurisdiction that could theoretically be heard in state court, many of whom have much more relaxed standing requirements.
* Standards
  + **Reasonable suspicion** - Knowledge of specific and articulable facts that would lead a reasonable person/officer to believe that criminal activity is occurring and requires further investigation
    - Lower standard than PC but more than just a hunch
  + **Probable cause** - Specific acts and circumstances, of which one has reliable information, that would lead a reasonable person to conclude there is a "substantial chance" or "fair probability" the individual in question is (about to be) engaged in criminal activity or that evidence of criminal activity can be found at a particular location
    - Needs to be specific and individualized (particular person/place/thing)
    - Knowledge of facts/circumstances is more concrete and reliable than reasonable suspicion
      * Need not be first-hand, but source must be trustworthy/reliable

### Searches

* A search is an invasion of a protected privacy interest; for a search to have occurred must be an **intrusion of a reasonable expectation of privacy or physical trespass to a protected space** for the purpose of investigation
  + Questions about whether the law still recognizes the former (sometimes referred to as Trespass Doctrine) as a test for identifying 4th amendment interest; *Jones* suggests it is alive and well, while *Carpenter* declines to provide any further clarification
  + REP test has both objective and subjective test, but the latter is mostly ignored since it is assumes that individual expectations are shaped by societal ones
* Things that are not searches:
  + Things in plain view - plain sight observation by police from a place they are legally entitled to be is not a search
  + Open fields - area outside a property owner's curtilage
  + Movements in public - tailing or areal surveillance (limited post-*Carpenter*)
  + Non-content/meta data possessed by third part (third-party doctrine)
  + Canine sniffs
* Anything the falls under the definition of "search" requires a search warrant supported by probable cause to be proper (unless it falls under one of the warrant exceptions detailed below)

### Seizures of Property

* A seizure of property is an act that invades/interferes with an individual's possessory interest in that property
  + This can consist of taking possession of the property (i.e., as evidence), destroying the property, preventing the property from being accessed
* Requires warrant (search warrant) supported by probable cause in order to be "reasonable" and thus steer clear of 4th Amendment violations
  + Seizures of property are really just an extension of searches

### Seizures of Persons

* Not all dealings with police are seizures; "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred" - dictum in *Terry*
  + *Mendenhall* test for when seizure has occurred (objective) - person has been 'seized' within the meaning of the Fourth Amendment only if, **in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave**
  + Encounters w/ police were reasonable person would feel free to go at any time are are **not seizures** at all (lack show of force/coercion or authority); the extent these encounters occur can be characterized as **consensual**
    - Police can approach people, ask questions, request permission to search without any PC or reasonable suspicion (however, needs to be somewhat reasonable; can't go around arbitrarily harassing random citizens)
  + Even where there is use of force/coercion or show of authority, not considered a seizure unless person actually submits to it
* Seizure can either be an arrest or a detention short of arrest (aka "*Terry* stop")
  + This distinction is significant, as the former is subject to warrant requirement (w/ exceptions), whereas the later merely requires reasonable suspicion
  + Distinguished by level of coercion/intrusiveness, length of detention, whether seized person is moved to different location
  + Arrest - in formal arrest, person is taken into legal custody to be further questioned and/or charged with a crime
    - **Arrest in the home --> Requires PC AND a warrant** (absent exception)
    - **Arrest in public place --> Requires PC, but can be without warrant**
  + Detention short of arrest (aka *Terry* stops)
    - These still constitute seizures for 4A purposes (since person is not free to leave), but **only require reasonable suspicion**
    - Detention is brief and cursory, limited level of restraint/intrusiveness; reasonable person would feel free to leave after limited purpose of stop (brief questioning or pat down) is completed
    - Stops for questioning - temporarily detaining person for brief questioning in order to dispel the reasonable suspicion of ongoing/imminent criminal activity that is basis for the stop
    - **Stop-and-frisk**- brief detention for purpose of pat-down search of persons outer clothing;
      * Must be **reasonable suspicion of criminal activity AND that person is carrying weapon**
      * **Plain-feel doctrine** - if during pat-down, officer detects weapon OR other contraband based solely on its feel or from plain sight, it can be seized

### Warrants

* Valid search warrant:
  + States, with specificity, the **place to be searched and, with reasonable detail, the items to be searched/seized**
  + Signed and issue judge/magistrate after reviewing warrant application
    - Application for warrant accompanied by affidavit stating basis/justification for warrant that is being sought
* Challenges to validity of search warrants
  + Warrant is invalid where it relies on a faulty affidavit;
    - If D challenges warrant for lack of PC, court will only review whether there was "substantial basis" for magistrate's finding of PC UNLESS D can prove (by preponderance of evidence) that knowingly/recklessly included false statement of material fact, at which point it may be reviewed de novo
  + May also be challenged on grounds that it failed particularity requirements, that magistrate lacked requisite neutrality/detachment, or contained some other error
    - Good faith exception - where error on behalf of magistrate causes warrant to become invalid but police relied on its validity in good faith, evidence obtained through execution of this warrant might not be suppressed (these are warrants that would pretty much otherwise be valid)
* Execution of warrant - facial validity of warrant notwithstanding, search/seizure with warrant may be improper due to defects in the execution of warrant
  + Searches and seizures that exceed the warrant's scope of authorization, such as places/items not specified
    - **Plain view Doctrine** - however, even if item not specified in warrant, can be properly seized if item's incriminating nature is immediately apparent and observable from place within scope of warrant
  + Knock and announce - generally required to announce presence and give person enough time before breaching the place (unless exigent circumstances); however, failure to do this will not result in evidence being suppressed
  + Execution of search warrant caries with it implicit authorization to temporarily detain any persons present the place to be searched

### Exception to Warrant Requirement

* General note: any warrantless search or seizure is presumed to be unreasonable; burden is on the state to prove it falls under one of the exceptions
* **Search incident to arrest** - where police make lawful arrest (i.e., supported by PC), can perform warrantless search of person being taken into custody, seize any contraband/evidence of crime
  + This extends to suspect's so-called "**wingspan**" (areas within his reach) if there is reason to believe contraband **related to crime of arrest** might be found
    - If arrested in vehicle, this wingspan consist of front compartment, rear/passenger seats
* **Plain view Doctrine** - detailed earlier, item can be seized if it is plain view from place police are legally authorized to be and whose incriminating nature is immediately apparent (i.e., giving rise to PC)
* ***Terry* frisk** - detailed earlier, can perform warrantless pat-down search where reasonable suspicion of crime AND that suspect is armed/dangerous
  + Can extend to parts of vehicle (e.g., glove compartment) from which suspect could gain immediate control of weapon
* **Vehicle exception** - warrantless search is permissible where PC exists that a "readily mobile" (i.e., not a mobile home) vehicle has evidence of crime or other contraband located in it.
  + Unlike searches incident to arrest or Terry frisk of vehicles, authorizes complete search of vehicle (not just parts in immediate control)
  + However, once the evidence/contraband for which there is PC has been seized, cannot continue general search of vehicle
* **Exigent circumstances** - where circumstances make waiting for warrant impossible, warrantless search/entry may be allowed if there is PC
  + In hot pursuit of felon - warrantless entry into otherwise protected area if fleeing suspect pursued into place (e.g., home) where arrest is made; once therein, items in plain view may be seized
  + Emergency situations - where, under "totality of circumstances" test, it is reasonably necessary to prevent physical harm or imminent destruction/removal of evidence
* **Consent** - must be given voluntarily and without coercion; person consenting can limit scope of authorization and withdraw it
  + Consent of third-party may also suffice where they share common authority over property with suspect (e.g., roommate, parent, but NOT hotel or landlord)
* **Inventory search** - Allows a warrantless search of impounded vehicle, without PC or RS, for purpose of inventorying contents; must be done pursuant to standard policies/procedures

## Confessions and Privilege Against Self-Incrimination

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury ... nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law .... - U.S. Const., amend. V.

### Privilege Against Self-Incrimination

* Only protect persons from compulsory disclosure of testimonial evidence
  + **Testimonial evidence** - the substantive content of one's mind as expressed through words; this does NOT include things like standing in a police lineup, reciting some words for purpose of voice recognition, submitting to some sort of test (e.g., handwriting, urine, blood, breathalyzer, etc.)
  + In addition to statements, certain acts which are testimonial in nature may also be protected
    - **Act of production doctrine** - can be invoked against requests to produce documents or other tangible evidence, the very act of which is incriminating on its own
      * Tends to communicate that the incriminating documents exist, are under person's control, are authentic, and are relevant to the subpoena
      * Availability of 5A privilege here depends on whether the existence of these documents is a "**foregone conclusion**" or not; if it is, 5A is N/A because production is not testimonial in nature, but rather surrendering of thing known to exist
    - However, the contents of pre-existing documents are not subject to 5A protection (because their creation was not “compelled”); only the act of producing them in response to something like a subpoena is
      * These can be lawfully searched for and seized
  + **Compulsory disclosure** - compulsion can be legal (e.g., threat of being held in contempt) or physical/psychological (e.g., intimidation by police)
    - Nor can person exercising this privilege face punishment for doing so; prosecutor in criminal case may not ask the jury to draw an inference of guilt from D's invocation of 5A rights (not necessarily the case in civil proceedings)
* The 5th Amendment privilege against self-incrimination provides basis for refusal to testify in proceedings if answers provide **reasonable possibility of incriminating D in future criminal proceeding**
  + Applies to both civil and criminal proceedings, as well as other proceedings, formal or informal (e.g., Pharma Bro's congressional testimony)
  + Can be invoked by D in criminal proceeding against him as a basis for not taking the stand as a witness
    - Exception: if D is granted **immunity** from criminal prosecution for anything disclosed through his testimony or anything derived from it, can be compelled to testify
  + Other non-D witnesses can be compelled to take stand, but can invoke it as basis for refusing to respond to specific question(s)
    - Exception: if W has already testified against D (e.g., in earlier deposition), may not be able to invoke 5A at the trial due other constitutional issues (D's right of confrontation)
    - This privilege can be voluntarily waived
      * D waives it by taking the stand; however, once he does, he can't invoke it to when prosecution cross-examines his testimony
      * Witness waives it by disclosing self-incriminating information in response to a specific question
* In addition giving right of refusal to testify in legal proceedings, 5A privilege against self-incrimination also extends to questioning while in police custody (see following sub-section)

### Police Interrogations

* 5th Amendment privilege against self-incrimination, combined with 6th Amendment right to counsel and rights to due process under the 5th (federal) and 14th (state) Amendments, provide number of procedural safeguards/protections for suspects in police custody
* First, any incriminating statement of evidence or confession obtained as result of **custodial interrogation** may not be used against suspect at subsequent trial unless police inform subject of *Miranda* rights
  + *Miranda* court takes expansive understanding of "compulsion" for purposes of 5A: **custodial interrogations = inherently coercive**
    - Since 5A protects against compulsory disclosure of self-incriminating statements, *Miranda* court concluded that statements obtained through such interrogations violate 5A absent some procedural safeguard (i.e., *Miranda* warning)
  + Custodial interrogation is what triggers need for for *Miranda* warning
    - Custodial - in custody means **formal arrest or the deprivation of freedom/restraint of movement to an extent associated with formal arrest**
      * Uses objective test: **given the totality of the circumstances, would reasonable person believe they could leave?**
        + For *Miranda* purposes, traffic stops and Terry stops do not amount to custody; nor is when police question at one's home or one voluntarily goes to police station for questioning
    - Interrogation - any action by police they **know or should know is reasonably likely to elicit an incriminating response**
      * "should know" - means it does not require intent to elicit such a response (although intent is still relevant, as is knowledge of suspect's vulnerability)
      * Does not include: questions need for booking, questions by undercover officers, administration of breathalyzer test, or where questions are motivated by **concern for public safety** or officer's safety
      * Volunteered statements, those offered purely on suspect's own volition and not in response to police inquiry, do not get *Miranda* protection
  + Miranda warning, by which law-enforcement provides suspects notice of their rights, must be issued before custodial interrogation begins
    - ***Miranda* rights** - Law-enforcement officials must inform suspects:
      * (1) Of their right to **remain silent**
      * (2) Any statement made while in custody can be used **against them in court**
      * (3) That they right to **presence of attorney**
      * (4) If they cannot afford one, an **attorney will be appointed**
    - Any statements before these rights are read and subsequently waived by the suspect can be **suppressed via the exclusionary exclusionary rule**
    - 5A right to presence of attorney is not the same as 6A, only triggered after one makes a **specific, unambiguous statement asserting his desire to have attorney present**
      * However, once invoked, **all questioning must stop until counsel is present**
    - Likewise, **invoking right to remain silent must be done affirmatively by clear, explicit statement** saying as much; police **must but honor the exercise of this right and suspend questioning until a later time**
      * If one simply remains silent, police don't have to honor this right nor stop questioning
  + **Waiver** of *Miranda* rights must be **voluntary, knowing, and intelligent**
    - Burden of proof is on government to show this has been met
    - **Need not be explicit**; if **totality of circumstances** reveal someone who is issued *Miranda* warning **understood the nature of the rights and consequences of abandoning them**, their choice not to invoke them and make statement to police is **implied waiver**
  + Resuming custodial interrogation - police can **re-initiate custodial interrogation if**:
    - (1) Suspect **re-read rights**
    - (2) Suspect **waives** them (voluntarily and knowingly) **AND**
    - (3) Either
      * (a) **Counsel is present**
      * (b) **14 days have passed** since last custody OR
      * (c) **Suspect initiates** the communication
* Second, there **involuntary confessions**, which may be excluded for violating 5th/14th Amendment Due Process Clause if **obtained through police coercion to an extent that was overbearing the suspect’s free will**
  + Doesn't matter if *Miranda* does not apply (i.e., not in "custody")or if *Miranda* rights have been waived
  + Deceptive police tactics such as lying (e.g., "your friend already confessed") typically do not render confession involuntary since they do not overbear on free will, though false promises might
  + In determining whether confession was voluntary or coerced, **totality of the circumstances considered**
    - Officer's conduct
    - Interrogation conditions
    - Suspect's characteristics
  + Involuntary confessions **cannot be used as substantive evidence or for impeachment purposes**
    - However, involuntary evidence somehow makes its way into evidence, conviction not necessarily overturned if, on appeal, prosecution can show other overwhelming and untainted evidence of guilt (harmless error)

## 6th Amendment Right to Counsel

In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense. - U.S. Const., amend. VI

### Confessions Obtained in Absence of Counsel

* As expressly stated in the 6th Amendment, accused has the right to assistance of counsel in all criminal prosecutions against them
  + **Exception: misdemeanor** offenses that are not punishable by imprisonment of at least one year
* This right comes into play, or **"attaches", at the initiation of the formal adversary process** (i.e., the start of prosecutorial proceedings, such as a preliminary hearing, arraignment, indictment, information, or any other formal charging)
  + Once right comes into effect, any police efforts to **deliberately elicit statements/confessions from D without an attorney present violate the 6th Amendment**
  + Police investigation or questioning before formal charges have been brought does not trigger this right
    - **Scope** of this right's protection is also **limited to offenses D has been charged with**; even if D has already been charged with an offense, police interrogating D w/o attorney present does not violate 6A if it is about unrelated crimes
  + Right continues to attach **throughout all critical stages of the trial**, usually ending at acquittal or sentencing; may extend to appeals (depending on basis), but does not continue to things like parole/probation hearings
* Waiver of this right is same as w/ Miranda (voluntarily and knowingly); no violations of 6A where there is valid waiver

### Denial of Counsel and Right to Effective Counsel

* Where right to counsel attaches, regardless of whether proceedings are in state or federal court, D who is indigent and **cannot afford an attorney has the right to have one appointed** (*Gideon*)
  + Non-indigent D (able to afford attorney) is entitled to the counsel of his own choice; however, **indigent D generally has no ability to chose preferred counsel**
  + If right to assistance of counsel attaches yet D is **improperly denied** it, any **conviction is automatically reversed** without any need for "harmless error" analysis on review
    - Supreme Court has extended this automatic reversal remedy to instances where non-indigent D is improperly denied attorney of his preference
    - Similarly, any guilty pleas entered into can be withdrawn is inadmissible as evidence when case is re-tried
* **Even indigent D has right to effective advocate in the form of a reasonably competent attorney**
  + Ineffective assistance of counsel is a violation of 6A rights, can result in reversal of conviction
  + To **establish ineffectiveness, must prove:**
    - (1) Competence of **representation fell below objective standard of reasonableness AND**
      * Things like attorney inexperience, lack of rapport w/ client, or their strategic choices usually don't rise to level of unreasonableness
    - (2) **Reasonable probability** the outcome would have been different **but-for the deficient representation** (i.e., it actually prejudiced D)
* Finally, D has right to knowingly and intelligently waive his right to assistance of counsel and proceed *pro se*
  + However, court retains some discretion over allowing this; may still deny motion to proceed pro se, on grounds that D is not capable of representing themselves even though deemed competent enough to stand trial (like with Uncle Ted)
  + Courts often elect to appoint standby counsel or permit hybrid representation to mitigate some of the obvious risks of pure self-representation

## Exclusionary rule

* Exclusionary rules are a judicially crafted that serve as a remedy for violations of 4th (searches and seizures), 5th/14th (involuntary confessions, un-Mirandandized statements), and 6th (statements in absence of counsel) Amendments, **preventing unlawfully obtained statements/evidence from being introduced in criminal trial**, as well as a deterrent for prosecutors/law enforcement.
  + Does not apply in civil case, grand jury proceedings, or in parole hearings
* Not only is illegally obtained evidence suppressed, but **derivative evidence**--that which is only obtained as a result of the suppressed evidence--is usually also excluded in what is referred to as the "**fruit of the poisonous tree**" doctrine
  + **One exception: physical/tangible evidence obtained as a result of un-Mirandized statements in a custodial interrogation is not required to be suppressed so long as it is not coerced**
  + Where derivative evidence is challenged under this doctrine, the state bears the burden of establishing **admissibility by a preponderance of the evidence**
* Standing requirement - since exclusionary rule operates as remedy for individuals whose 4A rights are violated, the person seeking to invoke exclusionary rule must have actually had their rights violated
  + This means it cannot be used to suppress evidence obtained from an illegal search/seizure of a third-party
* **Exceptions to Exclusionary Rules**:
  + **Independent source rule** - Where evidence is discovered via source independent from the violation (e.g., where strong PC already exists at the time of unconstitutional warrantless search, can go back and get a warrant, supported by initial PC, to obtain same evidence lawfully)
  + **Inevitable discovery** - Where **discovery of the evidence was inevitable**; it would have eventually been discovered absent the violation
  + **Attenuation principle** - where passage of **time or intervening events attenuates the causal chain** between the violation and derivative evidence such that the violation is not served by suppression
  + **Good faith exception** - As noted earlier, where there is **good faith reliance on defective warrant** (due to magistrate or other non-police error), evidence obtained is not suppressed
  + **Impeachment** - even where illegally-obtained evidence/statement is excluded, prosecution may, for purposes of impeachment (i.e., prior inconsistent statement, contradictory evidence), question D about it in cross-examination and potentially even introduce it as extrinsic evidence if D denies it
    - **Only applies to impeaching D as a witness, not other witnesses**
    - Remember: extrinsic evidence is subject to "foundation requirement" and is not admissible when impeaching witness on collateral matters. If illegally obtained evidence is not relevant to material issue at trial, but only relevant insofar as it shows contradiction which damages credibility, can only inquire into it in cross-examination and must accept D's answer
    - Exception: **involuntary statements/confessions** obtained through coercion in violation of due process are **not admissible for any purpose**

## Pre-trial Rights and Procedures

### Police Lineups and Other Identification Procedures

* Identification procedures, in which eyewitness identifies or confirms the identity of the suspect, can involve due process issues as well as 6A right to assistance of council issues
  + Identification procedure can involve presenting the suspect in-person to the witness, either as part of a group (lineup) or alone (show-up), or a collection of photographs which includes that of the suspect
    - Remember, out-of-court identification (so long as W can be cross-examined) is explicitly carved out of the definition of hearsay in the FRE
* **6th Amendment Implications** - if one of the **in-person identification** procedures, D **cannot be subjected to it without waiver or presence of counsel** so long as right to assistance of counsel has **already attached** (i.e., after adversarial processes has commenced)
  + Violations treated the same as post-charging statements made in absence of counsel or waiver: **out of court identification is inadmissible at trial**; further, under independent source rule, **in-court identification only admissible if** it can be shown (clear and convincing standard) to be **independent from inadmissible out of court identification** (i.e., W relying entirely on memory and initial observation)
* **Due Process Implications** - unlike 6A issues, these can arise at any stage of investigation or proceedings and regardless of if identification is based on photographs or in-person, as its focus is on the **reliability of the procedures**
  + Due process is violated if police identification procedures are so **(1) unnecessarily suggestive** that they create **(2) substantial risk of misidentification**
    - Suggestiveness - focuses solely on procedures, whether it was **designed in a way that causes an individual to stand out** and/or nudge the witness to select them
    - Risk of misidentification - focuses on **strength of witness basis for identifying suspect and susceptibility to suggestiveness** ; the weaker it is, the greater the influence suggestiveness could have on the W's identification
      * Considers things like the length and clarity of their opportunity to witness the suspect committing the crime, how vivid their memory/description was, the amount of time that had since passed, etc.
  + Similar to 6A violations, identification pursuant to procedures proven to be unreliable are **inadmissible at trial** and subsequent in-court identification is **only admissible if satisfying independent source rule (else fruit of the poisonous tree)**

### Grand-Jury

* Grand jury proceedings are secret, *ex parte* proceedings in which body (grand jury) reviews evidence and determines whether probable cause exists to charge D with a crime
  + Grand jury indictment, aka a "true bill", is a written accusation stating charges against D issued by a grand jury after finding probable cause
  + These are non-adversarial proceedings; D's are not entitled to be present, nor do rules of evidence or exclusionary rules apply
    - Instead, their chief function is an investigatory one, while also serving as a check on over-zealous prosecution
* At the federal level, use of grand juries are constitutionally required for felonies
  + However, grand jury clause of 5A is not incorporated against the states, therefore not all (less than half) use them; as alternative, charging process is initiated by the filing of an information

### Bail Hearings

* No constitutional right to bail, although denial of bail must comport with due process (i.e., chance to be heard)
  + D thus **entitled to individualized hearing** to determine whether bail should be granted or denied; this is typically risk-based determination that takes a number of factors into consideration
* If bail is appropriate, which it is presumed to be unless shown otherwise, it **may not be excessive** else could violate 8th Amendment ("Excessive bail shall not be required")
  + There is no such presumption for post-conviction bail
* This is not the same as a "*Gerstein* Hearing", which is typically held promptly after warrantless arrest to determine whether probable cause exists to continue detaining arrestee
  + Can be part of another preliminary hearing or a standalone one

### Other Preliminary Proceedings

* Initial Appearance - D appears before judge post-arrest to learn the charges brought against him and his rights; this is also typically the stage at which an indigent is appointed counsel
* Arraignment - sometimes held in lieu of initial appearance or as a separate hearing; D formally read of charges against him and is expected to enter a plea in response
  + Guilty Plea - entering into guilty plea is effectively a legal acknowledgement by D that the facts contained in the charges against him are true
    - This is a waiver of one's constitutional right to trial (among others) and must thus be made "**knowingly, voluntarily and intelligently**"
    - Can also plead *nolo contendere*, where D does not admit guilt or that the charges against him are true, but that they simply do not intend to contest them
      * Cannot be use as admission of truth in other proceedings against D
  + Plea bargain, where D agrees to enter guilty plea in exchange for lowered or dropped charges or a shorter sentence.
    - Terms of the plea bargain (and surrounding circumstances) are subject to the review of judge presiding over the trial who can either approve or reject the plea

### Protection Against Undue Pre-Trial Delay

* Not always a 6th Amendment speedy trial issue; where person is not actively being held, delay in bringing charges is only a constitutional issue, under 5/14A due process clause, if it substantially prejudices suspect and is done intentionally, such as to give tactical advantage to prosecution.
  + However, person **arrested and being held to answer a criminal charge causes 6A speedy trial rights to attach, as does formal charges being filed** in form of indictment/information
* Constitution does not provide specific time limits for determining reasonableness and state statutory limits range from 90-days to a year; instead, **test for determining constitutional violations** of right to speedy trial involves **court weighing 3-4 different factors**:
  + **Length of the delay** (usually can't exceed a year)
  + **Reason for the delay** (legitimate circumstances or intentional?)
  + **Prejudice to D** as result of delay
  + Whether D has asserted right to speedy trial (the is arguably part of the third factor)
* Remedy for violations of right to speedy trial is **dismissal with prejudice**

## Criminal Prosecution, Trials, and Sentencing

### Right to Jury Trial

* Competence to Stand Trial - D can only be tried if deemed competent for trial
  + D is competent to stand trial if he has:
    - (1) A **sufficient ability to consult with counsel** (able to assist in preparing his defense) **AND**
    - (2) a **rational and factual understanding** of proceedings
  + If fails competency determination, may be reassessed at a later date and tried then
    - Proceeding with trial when deemed incompetent or failing to even provide adequate competency assessment violates due process rights
* 6th Amendment guarantees a criminal D the right to a **jury trial for crimes that are potentially punishable by imprisonment of at least 6 months**
  + This is any offense where max sentence is greater than 6 months; if no max sentence proceeding without jury limits max sentence D can receive to 6 months
  + Any question of fact that increases the maximum penalty for a crime MUST be submitted to a jury, and proven beyond a reasonable doubt by
  + D can waive the right to a jury trial and instead elect for bench trial (when this happens, sentence not limited to 6 months)
* Jury must be composed of **6 jurors at a minimum** to comply with due process, though **federal trials for felonies require 12**
  + Constitution requires that **verdicts be unanimous** for serious offenses, a requirement SCOTUS has ruled is incorporated at the state level as well (2020 *Ramos* decision)
* Unconstitutional discrimination in jury selection/composition
  + *Strauder* (1880) - state excluding persons from service on a jury on account of race or former slave status violates Equal Protection Clause
  + *Glasser* (1942) - jury selection pool must be a "representative cross-section of the community" (includes race and gender)
    - Although the actual composition of the jury selected need not meet the requirement above, discriminatory use of challenges (by either party) in jury selection still violates 14A
  + D can bring challenge to fairness of selection process, showing by preponderance of the evidence that certain group in the community was systematically excluded (i.e., not just random) from selection pool
* Jury selection
  + Parties can bring **unlimited number of *challenges for cause***, in which it moves disqualify a potential juror for some stated reason (e.g., prior knowledge, inability to be impartial, etc.)
  + Also allowed a **statutorily limited number of *preemptory challenges***, where no reason needs to be given
    - However, as noted above, may not exclude based on race or gender
    - Where one party raises challenge to the other's use of preemptory strikes which display discriminatory pattern, the latter needs to proffer some plausible explanation, if it does, the other must show this is just a pretext and establish discriminatory intent (very difficult)

### Duty to Disclose and Compulsory Process

* ***Brady* rule** - Where prosecution has material evidence that is favorable to D -- such as evidence that tends to exculpate D, mitigate the offense, or impeach witness against him -- P has affirmative duty to disclose this to D
  + SCOTUS has held that failure can be violation of D's due process rights
  + Conviction can be reversed if D can show reasonable probability of different outcome were it no for this failure to disclose
* Compulsory Process - Similarly, where witness has material, favorable evidence, 6A enables to compel their testimony at trial

### Sentencing

* *Booker*/*Blakely* Rules - only facts admitted by a defendant or proved beyond a reasonable doubt to a jury may be used to calculate a sentence exceeding the prescribed statutory maximum sentence; if additional facts are necessary to increase a sentence, must be found by jury and not the judge
  + Failure to do so violates D's Sixth Amendment rights to jury trial

### Double Jeopardy

No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb .... - U.S. Const., amend. V.

* 5A protections against Double Jeopardy, which **prevent D from being prosecuted/punished by same sovereign for same offense twice**, are incorporated against the states by 14A
* When a D moves to dismiss a charge based on a violation of double jeopardy, she must establish she had been in jeopardy for same offense by same sovereign
* Merely being previously charged for the offense is insufficient for double jeopardy to apply; double jeopardy protections **attach when**:
  + In a jury trial, when **jury is impaneled and sworn in**
  + In a bench trial, when **first witness is sworn** and presentation of evidence commences
  + If waive right to trial and plead guilty, when court accepts the plea and enters judgment
* Exceptions - where double jeopardy protections do not apply:
  + Wavier - where D waives DJ protections; only place this really makes sense is where successfully appeal conviction and case is remanded
  + **Manifest necessity** -> retrial permitted where mistrial caused by something out of state's control (e.g., death/incapacity of judge/juror, hung jury, major procedural error), but not if result of mistrial was acquittal
  + **Dual sovereigns rule** - a D may be prosecuted for same criminal conduct by separate sovereigns
    - Each state as well as the federal government all constitute separate sovereigns; however, municipalities are not separate from states
    - Example: where significant parts of a criminal offense took place in two different states, DJ does not protect against criminal prosecutions by each state
  + **Different offenses** - even after DJ attaches, may be prosecuted in same jurisdiction so long as the crime D is charged with constitutes a separate offense
    - ***Blockburger* test** - two crimes occurring out of same conduct/transaction are considered same offense, unless **each offense requires a factual element which the other does not**
      * This means, for the purpose of DJ, a greater offense is treated as the same crime as any lesser included offense; DJ prevents being prosecuted for greater offense after being prosecuted for lesser included offense, and vice versa
        + **Exception**: when all elements for greater offense do not exist at the time of prosecution for lesser offense
* Notwithstanding the exceptions above, any disposition made on the merits -- including acquittal for any reason -- always prevents re-prosecution
  + This means prosecution can never appeal trial rulings where D has acquitted