|  |
| --- |
| **FOURTH AMENDMENT: UNREASONABLE SEARCHES AND SEIZURES** |
| **Does it apply?** | * **State action?** Yes if:
	1. Government actor (including substantial examination beyond initial private search) or
	2. Individual acting as the “instrument of the state” (consider state involvement and person’s motive)
* **Search or seizure?**
	+ **Search** = violation of D’s reasonable expectation of privacy (*Katz*) (consider place, method, and time)
	+ **Seizure** = if a reasonable person would have believed that he was no free to leave (consider number of officers, weapons, physical contact, language/tone, setting)
 |
| **Was the conduct justified?** | * **Need probable cause for searches and arrests**
	+ **Probable cause** = specific facts that lead a reasonable cop to conclude either D has committed a crime (arrests) or the item related to the crime will presently be found at the place (searches) (common sense)
		- Cop’s motive is irrelevant!
		- If relying on **informants**, then show their reliability (consider credibility & factual basis for info)
	+ Challenge by showing: (1) not enough facts, (2) stale information, (3) obtained needed info illegally
* **Need reasonable suspicion for stops and frisks**
	+ **Reasonable suspicion** = cop has particularized and objective basis for suspecting the particular person of criminal activity (stop) or suspecting the stopped person may be armed and dangerous (frisk)(*Terry*)
		- < probable cause but > unparticularized hunch (so info relied on can be less reliable, e.g. profile)
	+ **Limits:** stop ≤ time to complete investigative purpose, and frisk limited to pat down to find weapons
* **Need to balance government interest against invasion of privacy for administrative/inventory searches**
	+ **Balancing** = no need for individualized suspicion, just a reasonable regulatory scheme (not arbitrary)
		- So cop’s motive matters!
	+ Admin. searches of regulated businesses, vehicles at checkpoints, parolees, safety workers (drugs)…
	+ Inventory searches of lawfully impounded car/effects b/c protects D’s property & insures/protects cops
 |
| **Was a warrant required?**Mnemonic device for warrant exceptions:IS EPIC A | * **Search** = yes unless:
	+ Administrative or inventory search ↑
	+ Reasonable suspicion for stop and/or frisk ↑
	+ Probable cause + **exigent circumstances**
		- Getting a warrant is impracticable/risky (consider risk of flight, danger, and evidence destruction)
	+ **Plain view** = cop can seize what’s obviously contraband if he sees it while somewhere legally
	+ Search **incident to lawful custodial arrest** (*Chimel*)
		- Limited to arrestee’s person and grab-able space (including containers)
		- If in a car, then includes passenger compartment if D is unsecured/within reach or reasonable that evidence related to the crime of arrest may be found there (*Gant*)
	+ **Voluntary consent** (consider cop’s tactics, D’s vulnerabilities, location, knowledge of right to refuse)
		- 3rd party can consent if actual common authority over property (apparent authority also ok if reasonable for cop to think 3rd party had actual authority considering key, use, and relationship)
	+ Probable cause + **automobile** (b/c per se exigent) (*Acevedo*)
		- If probable cause that evidence of a crime is in the car, then can search entire car + containers
* **Arrest** = yes if nonexigent arrest in home (i.e. not hot pursuit), otherwise just need probable cause (*Payton*)
 |
| **If warrant was required, were prereqs satisfied?** | **Issuance*** Signed by detached/neutral “magistrate” + officer
* Probable cause supported by oath/affirmation
* Describes with particularity:
	+ For a search = place (can’t be facially vague) & items (must be specific unless contraband)
	+ For an arrest = person
 | **Execution*** Within 10 days and between 7am-10pm
* Scope = can search anywhere items may be
* Must knock and wait a “reasonable” time unless reasonable suspicion it would be dangerous/futile
* Ok to detain people on premises to prevent flight/harm to cops
 |
| **If the Constitution was violated, does the exclusionary rule apply?**If not, can always sue under §1983 | * **Yes, unless:**
	+ **Used for impeachment**
	+ **D lacks standing** (can only complain if his reasonable expectation of privacy was violated) (*Rakas*)
		- Consider connection to/control over the place searched
	+ ***Leon* exception** (if evidence is obtained via reasonable/good faith execution of an invalid warrant)
		- Policy: aim is to deter intentional police misconduct
* **Fruit of the poisonous tree** = rule even applies to evidence indirectly derived from the violation if:
	1. D has standing to challenge the poison, which came before the fruit he is seeking to suppress and
	2. No exceptions apply:
		+ **Attenuation** (connection too remote or doesn’t serve interest protected by const. guarantee)
			- Consider: temporal proximity, intervening circumstances (free will of W), cop misconduct
		+ **Independent source**
		+ **Inevitable discovery** (P must show item would have been discovered, e.g. ongoing investigation)
 |
| **INTERROGATIONS AND CONFESSIONS** |
| **DPC** | * **Confessions must be voluntary!** They’re not if:
	1. Police subjected D to coercive conduct and
	2. That conduct was sufficient to overcome D’s will given the totality of circumstances
		+ Consider his vulnerabilities and the conditions of the interrogation (e.g., length of detention, duration/intensity of questioning, use of trickery/threats, mistreatment, *Miranda*, access to others)
* **Involuntary confessions are excluded**
 |
|  | **FIFTH AMENDMENT** (*Miranda*) | **SIXTH AMENDMENT** (*Massiah*) |
| **Policy?** | We need a regulatory scheme to limit inherent coercion in custodial interrogations to protect 5th Am. | Right to counsel at trial is meaningless if cops can get confessions from un-counseled Ds before trial |
| **Trigger?** | 1. **“Custody”** = restraint of movement associated with formal arrest (would reasonable person have felt free to leave interrogation?) and
	* Consider: familiarity with location, cop’s behavior, duration and persons present, D’s age, police dominated atmosphere
2. **Interrogation** = cop questioning or its functional equivalent (words/actions cops *should know* are reasonably likely to elicit incriminating response)
	* Consider: cop’s behavior and intent, D’s particular susceptibilities and cop’s knowledge of them, D’s perception of psychological pressure
		+ So 5th doesn’t apply if undercover cop!
	* BUT routine booking questions ok
 | * **Adversarial judicial proceedings** and
	1. First formal hearing
	2. Formal charge
	3. Preliminary hearing
	4. Indictment (just not at grand jury)
	5. Information or
	6. Arraignment
* **Government *deliberately* elicits incriminating statements** (harder to show than 5th interrogation)
	+ About intent of cop, not D’s susceptibilities
	+ So applies to “jailhouse snitches” if anything more than a passive listener
 |
| **Requirement?** | 1. **Read adequate *Miranda* warnings** and
	* Re: right to remain silent (and effect of speaking), right to have attorney present, and right to have attorney appointed for free
2. **Knowing, intelligent and voluntary waiver**
	* Explicit or implied (silence + understanding and conduct indicating waiver)
* **What if D unambiguously invokes his rights?**
	+ If right to silence, then interrogation must cease until “significant time” passes + new warnings
	+ If right to attorney, then interrogation must cease until one is present or:
		1. 2 week break in “custody” or
		2. D himself initiates further comm.
 | * **Have counsel present** (no need to ask) or
* **Knowing, intelligent, voluntary *and intentional* waiver**
 |
| **Remedy if violated?**If not exclusion, then can always sue under §1983 | * **Confession is excluded, unless**:
	1. Used for impeachment or
	2. Public safety exception applies (objective/broad test) (*Quarles*)
* **And physical/testimonial evidence indirectly derived from the illegal confession?**
	+ Ok unless cops deliberately withheld warnings until they obtained a confession and then gave warnings (*Seibert*)
 | **Confession is excluded unless used for impeachment** |
| **OTHER INVESTIGATIVE PROCEDURES** |
| **Physical examinations** | * **4th Am. applies to body intrusions** so can’t be unreasonable & need warrant or probable cause + exception
* 5th Am. doesn’t apply b/c not testimonial, and 6th Am. doesn’t apply b/c objective without counsel present
 |
| **Eyewitness ID** | * 4th Am. doesn’t apply b/c no expectation of privacy in appearance, and 5th doesn’t apply b/c not testimonial
* **6th Am. applies to post-indictment pretrial corporeal lineups**, so lawyer must be present or waived
	+ Policy = attorney input can avoid prejudicial procedures and give D a witness
	+ Remedy for violation = exclusion + no ID at trial by affected W unless P can show independent source
* **DPC applies, so all ID procedures must be fundamentally fair**, and they are not if arranged by cops and:
	1. **Unnecessarily suggestive** (consider nature of procedure and circumstances necessitating it) and
	2. **Likely to lead to mistaken ID** (consider indicia of reliability, e.g. W’s opportunity to view D, W’s attention, accuracy of W’s prior description, W’s level of certainty, and time elapsed)
 |
| **Wiretaps** | * **4th Am. applies**
* **Title III applies**
	+ Regulates both state actors and private parties
	+ Cops need to get a court order before they intercept electronic, oral, or wire communications
		- Order must describe who/what/when and requires minimizing capture of irrelevant info
		- Cops must first establish normal investigative procedures have failed or are likely to fail
	+ Exceptions: consent, where one party to the conversation is the interceptor, business reason
	+ Remedies: civil suit, criminal prosecution, exclusion only if cops ailed to name authorizing officer, agency, or person to be intercepted
 |
| **Undercover operations and entrapment** | * **4th Am. applies to undercover cops and confidential informants**
	+ Need not tell D you are undercover/an informant b/c 4th Am. doesn’t protect wrongdoer’s misplaced belief that a person to whom he voluntarily reveals information will not reveal it… D assumed the risk!
* **Entrapment is a defense** (so available after P makes out the prima facie case)
	+ **Objective test** (minority/CA) = D must show gov. inducement (i.e. opportunity + excessive pressure)
	+ **Subjective test** (majority/feds) = D must show inducement, and then P must show D was predisposed prior to being approached by government agents
	+ **DPC** is available if government’s conduct was outrageous, but unlikely
 |
| **MISCELLANEOUS RIGHTS** |
| **DPC** | * **Selective incorporation** = most of the Bill of Rights now apply to the states as “fundamental to our scheme or ordered liberty”
* **Ad hoc DPC remains an independent check on government**
	+ Even if no other amendment is violated, the government violates the DPC when something is so “outrageous” it “shocks the conscious” and is “fundamentally unfair”
	+ Consider: nature/manner of intrusion, nature of government interest, emergency situation, historical acceptance, cop’s intent, and reliability of investigative procedure
 |
| **7th Am. right to jury trial** | * **Right to a jury in all criminal cases for non-petty offenses** (= penalty is >6 months in jail)
* Right to 12-person jury and unanimous jury verdicts not incorporated to apply to the states
 |
| **6th Am. right to counsel** | * **Right to counsel** (appointed if indigent) **if charged with a crime that threatens imprisonment**
* **When?** Attaches at the start of adversarial judicial proceedings (see ↑)
	+ Then entitled to lawyer’s presence at critical stages, which include:
		- Trial/sentencing, pretrial/post-indictment corporeal IDs, police questioning, arraignments, preliminary hearings, appeals as of right
* **Counsel’s assistance must be effective** (rare to find that it’s not)
	+ Policy = truth is best discovered is both lawyers are effective so the adversarial process really works
	+ So D can obtain relief on appeal if he shows (*Strickland*):
		1. **Counsel’s performance was deficient** (=fell below objective standard of reasonableness) and
			- Very deferential to counsel’s tactics
		2. **This** **resulted in prejudice** (=but for ineffectiveness reasonable chance result would be different)
			- Presumed if: actual/constructive denial of counsel’s assistance or actual conflict of interest
 |
| **HARMLESS ERROR** |
| * If evidence is unconstitutionally admitted in a trial that results in a conviction, then the verdict will be overturned on appeal unless P can establish beyond a reasonable doubt that the **admission didn’t contribute to the verdict** (*Chapman*; D’s preferred test)
	+ Without the tainted evidence, can P establish D committed the crime?
	+ Consider if evidence overwhelmingly against D so tainted evidence was merely cumulative (*Harrington*; P’s preferred test)
* **Some violations automatically lead to reversal** (these are structural defects, not evidentiary defects):
	+ Denial of right to an attorney at trial ○ Denial of right to a public trial
	+ Denial of right to an impartial judge ○ Purposeful racial discrimination in selection of jurors
	+ Denial of right to “beyond a reasonable doubt” jury instruction ○ Trial had highly adverse and prejudicial publicity
 |

----------------------------------------------INTRODUCTION-----------------------------------------------

If let out on stationhouse bail, then 5th applies, but 6th doesn’t (opposite if let out on bail by judge)

1. **Criminal justice process**
	1. Pre-arrest investigation
	2. Arrest (+ search incident to arrest)
		1. Kept, jailhouse bail, or let out
	3. Booking
	4. Post-arrest investigation
	5. Decision to charge by prosecutor
	6. Filing the complaint
	7. Magistrate review of arrest (ex parte)
	8. First appearance/charge (+ bail setting)
		1. If D was in custody since arrest, this must happen w/in 48 hours
	9. Preliminary hearing
	10. Grand jury review, if applicable for the crime
	11. Filing of indictment (= from grand jury) or information (= from prosecutor)
	12. Arraignment on the indictment or information
	13. Pretrial motions (ex. suppression of evidence)
	14. Guilty plea negotiation and acceptance
	15. Trial (P’s burden=guilt beyond a reasonable doubt)
	16. Sentencing
	17. Appeals
	18. Collateral remedies (ex. writ of habeas corpus)
2. **Sources of criminal procedure law**
	1. **Constitution**
		1. 4th, 5th, 6th, and DPC in this class
		2. **Do these apply to the states via DPC**?
			1. **Fundamental fairness** = incorporates rights required per fundamental fairness
			2. **Total incorporation** = DPC means all of the Bill of Rights applies to the states
			3. **Selective incorporation** (majority) = SCOTUS has incorporated most rights on a case-by-case basis as fundamental to our scheme of ordered liberty EXCEPT:

Note: if no evidence trying to be admitted, then we don’t care about Const. violation (D can sue, but that’s for a civil course)

* + - * 1. 6th Am. right to a unanimous jury verdict
				2. 3rd Am. protection against quartering soldiers
				3. 5th Am. grand jury indictment requirement
				4. 7th Am. right to a jury trial in civil cases
				5. 8th Am. prohibition on excessive fines
		1. Even after incorporation, **ad hoc DPC is an independent check on government**
			1. So even if it’s ok under the 4th, 5th and/or 6th Am., **government violates DP if act is so outrageous it shocks the conscience** (*Rochin* = violates DP when cops try to forcibly remove pills from D’s mouth but can’t so take him to the hospital to get his stomach pumped) BUT (*Lewis* = doesn’t shock the conscience for a cop to recklessly engage in a high speed chase for D, resulting in the death of civilians, so no DP violation) (*Osborne* = ok for state to impose prerequisites to grant convicted D access to biological evidence since there’s a new DNA test available b/c we’ve always said after you’re found guilty you have fewer liberty interests so fundamentally fair)
			2. **Consider**:
				1. Reliability
				2. Fairness
				3. Cop’s intent
				4. Historical acceptance
				5. Nature of intrusion (aka D’s interests)
				6. Manner of intrusion
				7. Nature of government interest
				8. Emergency situation
				9. Presence of a warrant / probable cause
		2. **NOTE: the Constitution is a floor, not a ceiling**
			1. So states can afford Ds with more rights if they want
	1. **Federal court’s supervisory powers** (but SCOTUS is reluctant to invoke these)
	2. **Inherent powers of the president**
1. **The right to a jury trial**
	1. D has a 7th Am. right to a jury **in all criminal cases for non-petty offenses** (>6 months in jail)
	2. Feds require these, but not mandated by the Constitution so states need not have them:
		1. 12-person jury (*Williams* = historical accident, not about fundamental fairness so not incorporated)
		2. Unanimous jury verdicts
2. **The right to counsel** (*appointed* counsel if you’re indigent, which is <$11k/year)
	1. **What?** D has a 6th Am. right to counsel if charged with a crime that threatens imprisonment (*Argersinger* = applies to felonies and misdemeanors) (*Gideon* = incorporated b/c this is fundamental and essential to a fair trial)
		1. Possible problem of pre-judging (can’t send him to jail if he didn’t have an attorney…)
		2. What counts as “imprisonment”?
			1. A suspended sentence counts, even though a probation violation that results in imprisonment does not (*Shelton*)
			2. But if imprisonment is just authorized and not imposed, then doesn’t count (*Scott*)
	2. **When?**
		1. The right attaches at the **start of adversarial judicial proceedings**, which can be (exemplary or exhaustive?):
			1. Initial formal hearing
			2. Formal charge
			3. Preliminary hearing
			4. Indictment (not just at a grand jury)
			5. Information
			6. Arraignment
		2. And then **entitled to lawyer’s assistance at critical stages**, which include:
			1. Trial / sentencing
			2. Pretrial corporeal IDs
			3. Police questioning
			4. Arraignments
			5. Preliminary hearings
			6. Appeal\*
		3. \*But no right to appointed counsel for appeals to a supreme court (*Douglas* = violates EPC if you keep indigent people from having counsel on appeal, but *Ross* = appeals to the supreme court are discretionary at which point function is not to adjudicate guilt but to determine if the subject matter has significant public interest, and EPC just guarantees a minimal level of equality, not that the poor get everything the rich do)
	3. **How?** This right requires that APPOINTED counsel provide effective assistance (*Cronic* = b/c truth is best discovered if both lawyers are effective so it’s a real adversarial process; here not ineffective even though real estate attorney appointed 25 days before mail fraud trial which government had 4.5 years to prepare for)
		1. So D can obtain relief on appeal if he shows (*Strickland* = not ineffective if counsel works hard but makes reasonable strategic decisions which end up not working) (*Nix* = ok to avoid something that could help D b/c you’re afraid of ethics violations, here perjury) (*Davis* = BUT ineffective for counsel to express racism to jurors b/c unnecessarily alienates them):
			1. **Counsel’s performance was deficient** = fell below an objective standard of reasonableness (need to make a reasonable investigation of law/facts) and
				1. Highly deferential to counsel’s tactics! Won’t be distorted by hindsight…
				2. Question is: could a competent attorney have done what this one did? (*Kimmelman* = total failure to conduct pretrial discovery based on implausible explanation reflecting a startling ignorance of the law is deficient)
			2. This **resulted in prejudice** = but for counsel’s ineffectiveness, there is a *reasonable probability* the result would have been different (*Glover* = but not prejudice where but for ineffective assistance, D would’ve gotten 6 months instead of 21 months)

Rare to find b/c result is expensive new trial

* + - * 1. About the result of the trial being unreliable
				2. **Presumed if**:

Actual/constructive denial of assistance of counsel altogether (either b/c attorney is absent at a critical stage or court interferes to prevent attorney from utilizing certain adversarial procedures) or

Actual conflict of interest

* + 1. **Other rights which help increase counsel’s effectiveness** (AND trial’s accuracy):
			1. Indigent D has a DPC/EPC right to trial transcripts on appeal, although P may provide alternatives if it shows such a record is sufficient (*Griffin/Mayer* = can’t price indigent Ds out of as effective an appeal as would b available to others who can pay, no matter if it’s a felony or misdemeanor case)
			2. DPC entitles indigent D to an adequate opportunity to present his claim, so if his sanity is likely to be a significant factor in his defense then can get an appointed psychologist **(*Ake*** = capital case**)**
1. **Harmless error** = if evidence unlawfully obtained is unconstitutionally admitted in a trial that results in a conviction, the verdict will be overturned unless P can establish *beyond a reasonable* *doubt* that the admission didn’t contribute to the verdict (*Chapman*) (*Fulminante* = even admitting D’s coerced confession is a harmless error if the jury would have convicted D even in the absence of it, but wasn’t here)
	1. Consider if there is overwhelming evidence against D such that the tainted evidence is merely cumulative (*Harrington*)
	2. Only **violations which automatically** **lead to reversal** **= structural defects**:
		1. Denial of the right to an attorney at trial
		2. Denial of the right to an impartial judge or public trial

Only a problem in appellate court!

* + 1. Denial of right to “beyond a reasonable doubt” jury instruction
		2. Purposeful racial discrimination in selection of jurors
		3. Trial had highly adverse and prejudicial publicity

-----------------------------------ARREST, SEARCH and SEIZURE-------------------------------------

 “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 of things to be seized.”
-US Constitution 4th Amendment

1. **Does the 4th Am. apply?** Yes if there is government action and an arrest, “search,” or “seizure”
	1. **Who must act for the 4th Am. to apply?**
		1. **Government actor** or
			1. Includes substantial government examination beyond that done initially in a private search (*Jacobsen* = box was already opened, so cops just looked in to confirm)
		2. **Private individual acting as the “instrument of the state”** (i.e., at the direction of a government agent/policy) (*Burdeau*), considering:
			1. Degree of government encouragement, knowledge and/or acquiescence (*Stapelton* = joint operation where credit card co. asked cops to arrest D in his home, then one of the credit card agents search D’s car and found fear gas) and
			2. Purpose of the private party’s action (i.e., to promote state or personal interests)
				1. Compensation?
	2. **What constitutes a “search” implicating the 4th Am.?**
		1. **Old rule** = CL trespass (required a physical intrusion)
		2. **Modern rule** = 4th protects people, not places, so it’s a search if it violates one’s reasonable expectation of privacy (*Katz* = not ok for cops to use a recording device on the outside of a public phone booth to record D b/c D had a reasonable expectation of privacy, even though they did not physically intrude)
			1. This does not replace the old rule, it merely adds to it (*Jones* = cops can’t trespass to install GPS on D’s car, but in *Karo* could put a beeper in a container before it belonged to D b/c then no violation of property rights)
			2. D must manifest a *subjective expectation* of privacy (so consider degree of risk taken) and that expectation must be *objectively reasonable* to society
				1. Note that if you tell a third party, it’s not reasonable to believe it is still private (e.g. phone records)
			3. **Things that influence a reasonable expectation of privacy:**
				1. **The place searched**

**Home** = highest expectation of privacy (doorway counts)

**Business**

**Curtilage** = moderate expectation of privacy

Consider proximity to the home, enclosures, nature of use, and steps taken by resident to protect it from observation

**Car**

**Open field/public area/jail** = no expectation of privacy (*Greenwood* = ok for cops to search through D’s garbage b/c D exposed it to the public so no expectation of privacy. Should have burned stuff) (*Cardwell* = so ok to take a paint scrap from the exterior of a car in a public parking lot)

But personal luggage is protected on public transportation (*Bond* = we expect ppl to move them, but not feel/open them)

* + - * 1. **The method and vantage point of police observation**

If observation is made from a location to which the public has lawful access (including the air), then viewing an otherwise protected area may not implicate the 4th Am. (i.e. cops need not avert their eyes) (*Ciraolo* and *Riley* = includes flying over D’s backyard since anyone could look out an airplane)

**Devices that enhance sensory abilities**:

If it merely enhances sensory perception that otherwise would be possible unaided, then 4th Am. is not implicated (e.g. flashlight, recording devices, and drug dogs) (*Jones* = can’t use GPS to track a car for a month because naked eye wouldn’t have been able to do that for that long) (*Place* = ok for dogs to sniff bags at the airport b/c not intrusive and only discloses presence of a contraband item) (*Dow* = aerial photography ok b/c not sophisticated surveillance equipment like a satellite)

BUT 4th Am. is triggered if you employ a device not in general public use to explore details of a home that would previously have been unknowable without physical intrusion (*Kyllo* = cops can’t use a thermal imager to see if D is growing pot in his house)

* + - * 1. **The time of the search**
	1. **What constitutes a “seizure” (aka stop) implicating the 4th Am.?**
		1. = when an officer, by means of physical force or show of authority, has in some way restrained the liberty of the subject
			1. So if cop is in pursuit, there has been no seizure (even though D believes he is not free to leave) (*Hodari* = D fled when he saw a cop car and threw away drugs; drugs are admissible since he abandoned them. Not the fruit of an illegal seizure since there was no seizure—neither force nor submission to assertion of authority since he just ran)
		2. **Objective test**: a person is seized only if, in view of all the circumstances (i.e. this is an ad hoc inquiry based on the facts), a reasonable person would have believed that he was not free to leave (*Brendlin* = so if cop stops car, seizes driver and passengers), considering:
			1. Threatening presence of several officers
			2. Display of a weapon by an officer
			3. Physical touching of the person
			4. Use of language or tone of voice indicating compliance might be compelled
			5. Setting in which the police conduct occurs (*Drayton* = cops on a bus asking if they can check bags is ok)
1. **The justification required when the 4th applies** (if not presence, then 4th is violated)
	1. **Introduction**
		1. All about balancing the level of intrusion with the governmental interest
		2. It’s a spectrum!
			1. E.g., what starts as a stop can become an arrest and require additional justification
	2. **Probable cause**
		1. **Required *before* searches and arrests**
		2. **Standard** = specific and concrete facts that lead a reasonable COP to conclude either (1) D *has* committed a crime (for an arrest) or (2) the specific items related to the crime will *presently* be found at a particular place (for a search; more problems with staleness b/c items can be moved)
			1. Proof beyond a reasonable doubt > probable cause > a hunch
		3. **D can challenge by showing:**
			1. Not enough facts
			2. Stale info for searches (unlikely if ongoing investigation)
			3. Had probable cause, but obtained it illegally (then you have a standing problem)
		4. Information relied on may include personal observations as well as other sources which are shown to be reliable, considering the *Aguilar/Spinelli* test:
			1. **Credibility of informant** and
				1. Need not disclose informant’s ID (*McCray*)
				2. Consider:

Admission against self-interest

Independent corroboration by police (even if things seemed innocent before the tip)

A history of reliability as an informant

But if witness is the victim, then not required

Particularity of information

* + - 1. **Factual basis of informant’s knowledge** (personal knowledge is enough)
			2. Note: this is a totality of the circumstances test, so a strong showing in one prong or other indicia of reliability can make up for a deficiency in the other (*Gates* = ok to use anonymous letter sent to cops detailing D’s drug operation to get a warrant b/c cops corroborated things in the letter and it was accurate about predictions of D’s future acts)
				1. THE TEST = just need a **practical, common sense showing** there’s a fair probability (*Pringle* = traffic stop of D + 2 friends 🡪 D consented to a search of his car 🡪 cop found money and cocaine. Ok for cop to infer a common enterprise given the quantity of drugs and cash and the fact no one claimed ownership, so probable cause to arrest all 3)
		1. If probable cause is required, the cop’s motive is irrelevant so pretext is ok (*Whren* = so ok for cops to follow a suspicious car until it makes an illegal turn so they can stop it, and which point they saw drugs)
			1. If D wants to claim cop was being racist, that’s about the EPC, not the 4th Am.
	1. **Reasonable suspicion**
		1. **Required *before* investigative stops and frisks**
			1. **Policy** = crime prevention/investigation and officer safety
		2. **Standard** = given the totality of circumstances, the detaining officer has a particularized and objective basis for either (1) suspecting the particular person stopped of criminal activity (for a stop) or (2) suspecting the particular person lawfully stopped may be armed and dangerous (for a frisk, aka a “protective search”) (*Terry* = cop saw D casing a store in the afternoon so confronted him and patted his breast to feel a pistol, since likely that if it was a daylight robbery he would be armed)
			1. *Considerably less* than proof by a preponderance of the evidence, but considerably more than an inchoate and unparticularized hunch
				1. Just need a legitimate expectation of investigatory results (*Cortez*)
			2. Need not have reason to believe a crime *has been* committed; enough if there is reason to believe a crime is *about to be* committed (i.e. is “afoot”)
			3. **Consider:** D’s behavior, time/place, cop’s information, patterns of lawbreakers, seriousness of suspected crime
		3. Information relied upon may include that from an **informant**, but need not carry all of the indicia of reliability required in probable cause analysis
			1. So can even be based on an anonymous phone tip so long as cops can corroborate it to show it is at all credible (*JL* = not enough to stop D b/c anonymous caller said young black man at bus stop had a gun)
			2. And if D meets enough red flags from a **criminal profile**, then that can be enough to amount to reasonable suspicion that criminal activity is afoot b/c it’s “pooling common cop experiences” (*Sokolow*) (*Wardlow* = ok to stop D just because cop was in a high crime area and D ran when he saw him)
		4. **Limits**
			1. **Both stops and frisks are limited by the exigencies that justify them**
				1. At some point stops morph into arrests and frisks into searches requiring probable cause (use common sense)
			2. **Limits on stops**
				1. Duration must not exceed the time necessary to complete the investigative purpose of the stop

So if it’s a traffic stop, can demand ID and even ask for immigration status or have a dog sniff the exterior of the carso long as it does not measurable extend the lawful stop (*Everett*)

Can briefly detain personal effects suspected of containing contraband or evidence of a crime since the governmental interest outweighs the minimal intrusion to the owner

And can prevent a suspect from entering his home without a police officer if they believe he will destroy evidence while a cop goes for a search warrant (*McArthur*)

* + - * 1. Also consider the degree of intrusion/force
			1. **Limits on frisks**:
				1. Restricted to what is necessary to discover weapons (e.g. an initial pat-down of D’s clothing, followed by a reach into pockets if the pat down presents probable cause for contraband)
	1. **Balancing**
		1. **Required *before* an administrative search**
			1. = one for a non-criminal purpose (ex. housing code inspection)
			2. But NOTE: even though original purpose is non-criminal, contraband or incriminating evidence discovered *may be admitted in a criminal trial*
		2. **Standard** =balance public interest in administrative objective against invasion of privacy
			1. It’s an open-ended test of *reasonableness*
				1. NOT ABOUT INDIVIDUALIZED SUSPICION
			2. **Privacy concerns include**:
				1. Scope and degree of intrusion
				2. Degree of discretion allowed to official and

Generally need reasonable legislative or administrative standards for conducting the inspection instead of leaving it to the discretion of the official

* + - * 1. Degree of expectation of privacy—regulated vs. non-regulated business
		1. **Searches where balancing has been applied**:
			1. Inspections of **pervasively regulated businesses** (b/c you chose to enter that field so lower expectation of privacy) (*Camara* = need a warrant for safety inspections of houses)
			2. Arson investigations
			3. Fixed vehicle or sobriety checkpoints
				1. Usually to look for illegal immigrants, DUIs, or to obtain info from motorists about a past crime in the area/c then addressing a public problem, not necessarily a criminal one, and there’s no discretion
			4. **Inventory searches** of D’s lawfully impounded car and personal effects upon lawful arrest (*Bertine* = D was arrested for drunk driving, so ok to search the car for inventory purposes per police regulations even if there’s a less intrusive alternative)
				1. **Policy:** strong government interests (cops can inventory to protect D’s property, insure against claims of lost property, and guard cops from danger) and diminished expectation of privacy once impounded
				2. Must be following protocol and not “investigating” (*Wells*)
			5. Suspicionless searches of parolees where it is a mandatory condition of release (*Samson* = low expectation of privacy because on parolee and agreed to this, plus high interest in public safety since parolees have incentive to conceal weapons)
			6. Mandatory drug testing of security and safety workers (*Earls* = even of kids who sign up for extracurriculars b/c they volunteered so lower expectation of privacy)
			7. **Special needs** beyond the normal need for law enforcement that make the warrant and probable cause requirement impracticable (ex. principal searching student’s purse for drugs)
				1. But here also need particularized reasonable suspicion (*TLO* = can search student if reasonable grounds for suspecting it will turn up evidence he’s violating the law/school rules) (*Safford* = but can’t strip search a student looking for pain killers if no indication she’s keeping them in her underwear)
		2. **Policy:** all about ensuring evenhandedness, avoiding arbitrary/selective enforcement, and preventing the use of the inspection as pretext for an investigation while still acknowledging the lesser expectation of privacy
			1. So can’t have pretext! NO PRETEXT!
1. **Warrants for searches, seizures and arrests**
	1. = judicial authorization for police action to search a particular place or arrest a particular person
		1. **Purpose**: interpose a disinterested magistrate to ensure sufficient justification and confine the scope of the intrusion
		2. Note: third party search warrants and search warrants re: press are ok (*Zurcher*)
	2. **Requirements**:
		1. Issued by a **detached and neutral magistrate** (can’t magistrate shop after 1st denial)
			1. Need not be a judge or even a lawyer, but must be part of the judicial apparatus and not associated with the cops or prosecutor (*Coolidge* = so can’t: have chief investigator issue warrants, pay justice to issue them not but if he refuses them, or have judge merely be a rubber stamp without reading them)
			2. Must have sufficient training to assess the probable cause showing (*Shadwick*)
			3. Cannot accompany cops to execute the warrant b/c then not detached
		2. **Probable cause** supported by an oath/affirmation (usually in the form of an affidavit or sworn oral testimony over the phone from a cop) and
			1. D can challenge the warrant for lack of probable cause on its face, or for relying on cop’s knowingly/recklessly false facts in the affidavit in order to find probable cause
		3. **Describe with particularity** the place to be searched and/or items/person to be seized
			1. **For places to be searched**:
				1. Cop executing the warrant must, with reasonable effort, be able to ascertain and ID the place intended (so minor errors/inconsistencies ok) (*Groh* = not enough for affidavit to be facially ok if warrant isn’t b/c then no written assurance judge approved everything in the affidavit)
				2. If not facially vague but proves inadequate upon arrival, ok so long as no real doubts (e.g. if cop had other info to help him)
			2. **For items to be seized**:
				1. Description must leave nothing to the discretion of the cops executing the warrant UNLESS the items are readily identifiable as contraband (*Coolidge* = warrant said proceeds of the robbery but they only found illegal guns, but ok to seize)
				2. We don’t want them fishing for anything once they get inside! (*Bradley* = but ok to authorize seizure of all business records where evidence of fraud with many customers made it probable there was pervasive fraud in the company)
			3. **For persons to be arrested**:
				1. Must ID him by name of with a sufficiently specific description so that the officers may locate him with reasonable effort
		4. **Signed by judge and officer** (if missing, then bad on its face so *Leon* can’t save it!)
	3. **Search warrants**
		1. **Execution**
			1. **When**
				1. Must be executed within a certain amount of time (CA/FRCP = 10 days)

Otherwise the information may be stale so no probable cause

* + - * 1. Must be during the day unless otherwise authorized (CA = 7am-10pm)
			1. **Where**
				1. Can search all parts of the premises where the items described might be concealed (and then must stop when the items are found)
			2. **How**
				1. Cops must **knock and announce** themselves when executing a search warrant

Then must wait a “reasonable” amount of time before entering, but what is reasonable depends on the circumstances (*Banks* = whether it reasonable appears that an occupant had time to get to the door—but wait time is longer is no reason to suspect an immediate risk of frustration/futility in waiting)

BUT exclusionary remedy doesn’t apply to knock-and-announce violations! (*Hudson* = cops knocked and waited 3-5 seconds, which violated 4th Am. But not excluded after weighing huge social costs [constant flood of arguing over wait time] with minimal deterrence benefits)

And **no-knock** is ok if cops have reasonable suspicion that knocking would be dangerous or futile/inhibit the effective investigation of the crime (*Richards* = ok to force entry once reasonable to believe D knew who they were b/c of the disposable nature of drugs, but not per se exigent—still fact based!)

* + - * 1. **Dealing with people:**

Ok to detain people on the premises during the search since it’s less intrusive than the approved search (*Summers* = interest in preventing flight and harm to cops)

But can’t search people just because you have a warrant to search the place (*Ybarra* = search warrant for a tavern b/c you’ve seen the bartender with heroin doesn’t give you probable cause to search patrons)

* + - * 1. Must deliver the warrant per FRCP 41(d) (not required by 4th Am.)
		1. **Special search warrants**
			1. **Sneak and peek warrants** = ok to let cops go in and look around without leaving notice if reasonable necessity for the delay of advance/contemporaneous notice
			2. **Administrative search warrants** ok upon a showing that location to be inspected was chosen according to a prescribed plan that relies on neutral criteria (*Camara* )
			3. **Anticipatory search warrants** ok upon a showing that seizable items will be at the place to be searched at a specified time in the very near future
				1. And if conditioned on an event, there must be a probable cause showing the triggering event will occur (*Grubbs*)
	1. **Arrest warrants**
		1. **Only need a warrant to arrest if: a nonexigent arrest occurs in a home!** (*Payton* = can’t go in to D’s house and arrest him without an arrest warrant, even if they have probable cause)
			1. Arrest warrants implicitly carry the authority to enter D’s dwelling and search for him, but need a search warrant to find him in anyone else’s home
				1. And an arrest warrant doesn’t give you permission to search the house!
			2. **Exigent if:** cops are in hot pursuit such that there’s a threat to the public (*Welsh* = not present if they follow a DUI suspect home b/c he’s no longer driving)
		2. They do not go stale like search warrants
		3. **Note:** may be unreasonable under the 4th Am. to use deadly force to arrest a fleeing D if he poses no immediate threat to others (*Garner*)
1. **Warrantless arrests**
	1. It’s actually more common to arrest someone without a warrant than with one
		1. Although still technically a judicial preference for them
	2. **Warrantless arrests ok if**: occurs in a public place (i.e. not D’s home) and probable cause to believe D committed a crime (*Watson* = so if a cop sees a crime he has probable cause and can arrest)
		1. Even if there is sufficient time to seek an arrest warrant and no practice impediment to doing so!
2. **Warrantless searches and seizures**
	1. **Searches conducted outside the warrant process are presumptively unlawful**, but multiple categorical exceptions if too impracticable and/or reduced expectation of privacy
		1. Note: all searches without prior judicial approval are strictly circumscribed by the necessities of the moment
	2. **Exceptions that require probable cause**:
		1. **Emergencies** (aka “exigent circumstances”) (never per-se exigent unless there’s a car, and exigencies shouldn’t exist very often since warrants are so easy to get)
			1. **Warrantless searches ok if sufficiently compelling urgency** and *probable cause*, considering:
				1. Gravity of the crime (no warrantless home entry for minor offenses) (*Mincey* = if cops summoned to scene for homicide, then can’t stay longer just because of the gravity of the crime but it’s a factor)
				2. Imminent risk of destruction of evidence (*King* = cops saw D enter a breezeway and disappear, then smelled pot coming from the apartment on the left so knocked and then heard destruction of evidence so ok to enter arrest for drugs even though D was in apartment on the right)

So can detain Ds while a search warrant is issued (*McArthur* and *Segura*)

* + - * 1. Imminent risk suspect will escape (*Chrisman* = needed to follow D into his dorm room to get his ID, but then saw pot so ok to seize it)
				2. Imminent risk of danger to cop or others (ex. need to enter to help injured)
				3. Some other consequence improperly frustrating legitimate law enforcement efforts
			1. **Scope of search is strictly limited by the exigencies upon which it is based**
				1. Ex. hot pursuit into a dwelling is limited to where suspect or weapons may be hidden (can’t be a general search); and can’t search a murder scene without a warrant after victims removed and area secured
			2. **Policy:** exigencies mean resort to warrant process is impracticable and risky
				1. Government’s burden to show warrant couldn’t be secured in time (in some jx could easily get a telephonic warrant…)
		1. **Search incident to arrest**
			1. **Warrantless searches of** **arrestee and the immediate surrounding area** are ok
				1. Underlying arrest must be lawful, i.e.:

Based on *probable cause* to believe suspect has committed a crime

And if arrest takes place in a private building, there must be a valid arrest warrant

* + - * 1. Arrest should precede search, but ok if it doesn’t so long as there was probable cause to arrest and cop merely delayed the formal announcement

But there must be a custodial arrest! Can’t do a search incident to arrest if cop only issues a citation b/c then a non-custodial arrest (*Knowles*)

Note: cop can arrest (and therefore do a search incident to arrest) even for misdemeanors that are punishable only be a fine!! (*Atwater* = so can arrest and then search just b/c not wearing a seatbelt)

* + - * 1. Search must be **substantially contemporaneous with arrest**

Once the arrestee is securely in custody, the exigencies disappear and so too does the excuse for circumventing the warrant process

But can sometimes search property that was on D at time of arrest later (*Edwards*)

Container doctrine = this does not apply to containers (i.e., can only search containers contemporaneous with arrest), because there is a higher expectation of privacy in closed suitcases, bags and packages than in clothes and purses

* + - 1. **Scope of search is limited to:**
				1. **Arrestee’s person** (including pockets)
				2. **Grab-able space** from which arrestee could reach weapons or evidence (*Chimel* = cops had an arrest warrant so went to D’s house and arrested him, then searched the entire house. Court said could only search him and the area within his immediate control [to prevent him from concealing or destroying evidence or grabbing a weapon and hurting the cops])
				3. **Containers** (*Robinson* = arrested D for driving without a license, then found a cigarette box in his pocket which contained heroin and is admissible)

Even if unlikely a weapon or evidence of the suspected crime would be hidden within (b/c the court just wanted a bright line rule to help cops making quick, ad hoc judgments and the arrest is lawful so there’s a reduced expectation of privacy anyway)

CA says this includes a search of your phone

* + - * 1. If it’s an arrest of a person stopped in a car, then the **entire interior of the passenger compartment, including containers** (*Belton* = if a cop lawfully arrests occupants of a car, then can contemporaneously search the passenger compartment and even luggage inside of it, but not the trunk) so long as:

Arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search (*Gant* = D arrested for driving with a suspended license then handcuffed and put in the cop car while cops searched him, so can’t search the car): or

It’s reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle (*Thornton* )

* + - * 1. **If it’s an arrest in a home, then can also do a “protective sweep”** of areas in the immediate vicinity of the arrest from which an attack could be launched against cops (*Buie* = arrest for violent crime in D’s house, so ok to check for hidden attackers…but need some objective evidence to worry in order to do a protective sweep!) (*Giacalone* = ok to look into dresser to check for weapons when arrested D was about to open it to put on clothes so they could take him to the station)

If reasonable suspicion to believe they are in danger from accomplices elsewhere can make a cursory sweep, but may last no longer than necessary to dispel that suspicion

* + - 1. **But can be unreasonable** (*Lafayette* = can’t make D disrobe in the street) (*Paulino*  = can’t search D’s butt for drugs at the car wash—need to limit the public from viewing the search)
			2. **Policy:** obvious danger that arrestee may violently resist and use any weapon on his person or within reach or try to destroy evidence, and it’s impractical to obtain a search warrant in the heat of an arrest
		1. **Search of a car on the road and the container doctrine**
			1. **Warrantless search of entire car** is ok if there’s *probable cause* to believe there is contraband or other evidence of criminal activity *anywhere*  in the vehicle (*Acevedo* = cops saw D put package they believed contain pot into his car’s trunk. Ok to stop him and open the trunk and search the bag b/c cars are per se exigent) (*Chambers* = but need to have probable cause for a particular item b/c otherwise search can’t be limited in scope)
				1. So long as probable cause existed on the road, can delay the search until the car has been seized
				2. Note: this exception has also be applied to other moving vehicles like boats and airplanes, and even a mobile home parked in a lot but not fixed to the ground (*Carney* = saw youth leave mobile home and he confessed that D sold him pot so ok to enter, see the pot, and arrest D b/c more like a car than a house since capable of use and not parked in residential curtilage)
			2. **Scope of search is broad!**
				1. Can search *entire* vehicle (even the trunk and glove compartment)
				2. And can search all containers found within it (even closed luggage), limited only by the size and nature of the items for which there is probable cause to search (*Ross* = don’t otherwise distinguish between types of containers)

Doesn’t matter if the container is known to the cop to be property of a passenger not suspected of criminal activity since reduced expectation of privacy with regard to property transported in cars (*Houghton*) (*Di Re* = but probable cause to search the car for contraband isn’t enough to justify a body search of a passenger)

* + - 1. **Policy:** impracticable to obtain a warrant to search a car stopped by cops on the open road, and citizens have considerably less privacy expectation in their automobiles since they travel open roads and *are subject to license and regulation*
				1. Originally b/c cars are mobile (i.e. can easily be moved while cops seek a warrant) (*Ross*), but now no exigencies are required for the automobile exception to apply, just probable cause (*Dyson*)
	1. **Exceptions that require reasonable suspicion** = s**top-and-frisk and investigative detentions** (see reasonable suspicion ↑)
	2. **Exceptions that require balancing = administrative and inventory searches** (see balancing ↑)
	3. **Exceptions that require no justification** (i.e. 4th Am. isn’t implicated):
		1. **Consent** (aka WAIVER)
			1. **Warrantless search ok if voluntary consent**
				1. **Voluntary** = not coerced, based on the totality of the circumstances, considering (*Schneckloth*  = cop stopped a car with a headlight out and driver didn’t have a license so cop asked if he could search and he said yes and even helped by opening the trunk):

Tactics used by cop(s) to secure consent (threats, pressure, intimidation, or harassment?) (*DiModica* = ok to lie and say wife has been badly injured to get D to let him in)

Mere submission to overpowering authority ≠ consent (*Bumper* = if cop says he has a warrant, then no consent)

Ok to lie about being an undercover agent/informer (see ↓)

Particular vulnerabilities of the subject (ex. age, intelligence, education, emotional state)

Whether D was under arrest or not

Location

Knowledge of the right to refuse (merely a factor—not determinative)

Waiver need not be knowing and intelligent (unlike 5th and 6th Am. rights, which *affect the fundamental fairness of the criminal trial*)

But if cops do inform D, then particularly persuasive that consent was voluntary

* + - * 1. It’s about **whether a reasonable \*innocent\* person in D’s position would have felt free to decline the cop’s request**
			1. **Who can consent?**
				1. Person whose property is searched or
				2. **Third party who shares common authority over/access to the property**

About having mutual use such that D assumed the risk the third party would permit the search (*Frazier* = D let B borrow and use his bag, so can consent to its search)

Just having legal authority to enter isn’t enough (*Stoner* = so hotel clerk can’t waive D’s right to privacy in his hotel room)

And landlords can’t consent for tenants

Examples:

Spouses can consent to a search of entire house

Parents can consent to a search of kid’s room

Manage can give consent to search business

If third party only has **apparent authority**, then still valid if it was reasonable for the cop to think she had actual authority (*Rodriquez* = gf told cops she would unlock “our” apartment for them, so reasonable for them to believe she had common authority even though she had moved out and D didn’t know she had a key)

But if D is present and objects, third party can’t consent (*Randolph* = there is no hierarchy among co-tenants, so if one objects, then another’s permission doesn’t suffice)

* + - 1. **Scope** of search is proscribed only by whatever limits the consenting individual delineates (*Jimeno* = cop said he was searching for drugs, so reasonable to let him search only where drugs could be)
			2. **Policy:** D can waive 4th Am. protection and allow cops to proceed uninhibited by its requirements
		1. **Plain view/touch doctrine** (b/c D assumed the risk!)
			1. **Warrantless *seizure* of incriminating items** ok if cop comes upon them while otherwise engaged in a lawful arrest, entry or search (*Coolidge*)
				1. **Requirements**:

Cop’s **original intrusion must be lawful**

So if cop sees drugs in home’s window, can’t seize it b/c can’t enter without a warrant or exigent circumstances

Item must be observed while cop is confining his activities to the permissible **scope of that intrusion** (aka must have lawful right of access to the object itself) and

So if you have a warrant looking for a gun, can’t open small containers and seize the drugs you find

Must be **immediately apparent the item is contraband** or evidence of a crime (*Hicks* = in house to investigate shots fired; can’t move stereo equipment to see serial numbers to see if it’s stolen b/c not obviously contraband)

* + - 1. **Note:** CA doesn’t accept “plain smell” but feds do
			2. **Policy:** once an item has been spotted in plain view, it’s ridiculous to insist on the delay and inconvenience of a warrant since there is little benefit to D as “the cat is already out of the bag”
1. **Exclusionary rule** (note: CA’s Prop 8/In Re Lance bring CA’s remedial/procedural laws in line with federal laws, but substantive laws can remain different [although judges tend to follow feds])
	1. = requires the **suppression of evidence** obtained in violation of D’s constitutional rights
		1. Not in the Constitution! Judicially created remedy for 4th Am. violations (*Weeks*)
		2. Applies to BOTH state and federal prosecutions (*Mapp* = all evidence obtained by searches/searches in violation of the 4th Am. is inadmissible in any court or else the 4th Am. has no teeth)
		3. **Policy**: deters *police* misconduct and upholds judicial integrity
			1. So don’t just automatically exclude stuff (b/c that’s a big social cost)! Always weigh social costs with culpability of cops & possibility of deterrence
	2. **Fruit-of-the-poisonous-tree doctrine** = evidence obtained as a direct result of a 4th Am. violation is excluded, but so is evidence indirectly derived from the violation
		1. D must have standing to challenge the poison, and poisons must come before fruit
			1. So whether you call something a fruit or a poison matters!
		2. **Exceptions**:
			1. **Attenuation** , where either:
				1. **The causation connection is too remote** (*Wong Sun*  = unlawful arrest of T 🡪 T made statement implicating Y 🡪 Y arrested and place searched 🡪 drugs found and Y implicated W 🡪 W arrested, then released, then days later confessed…what is admissible against T? Not T’s statements (b/c direct result of illegality) or Y’s statements/drugs (b/c cops only got there because of info obtained illegally from T), but W’s statements are ok (b/c connection to initial illegality is too attenuated). But W can’t challenge Y’s drugs b/c not a fruit since his poison came after, and not a poison against him b/c no standing)

**Consider:**

Temporal proximity (*Crews* = in-court ID admissible b/c too attenuated from illegal arrest, even if photo array and pre-trial lineup must be excluded)

Intervening circumstances

Purpose/flagrancy of official misconduct (*Brown* = *Miranda* warnings 2 hours after unlawful arrest where cops were on a fishing expedition is not enough to purge the taint, so confession is suppressed)

Note: a live witness willing to testify requires a closer, more direct link to the illegality in order to justify suppression than physical evidence does (*Ceccolini* = W’s exercise of free will in deciding to testify is a significant intervening act that breaks chain of causation; W testifies voluntarily so long as pressure doesn’t turn into compulsion)

* + - * 1. **Suppression would not serve the interest protected by the constitutional guarantee violated** (*Hudson* = the seizure of evidence has nothing to do with the concerns about violence underlying the rule against entering unannounced, so need not apply the exclusionary remedy) (*Harris* = D was unlawfully arrested in his home without a warrant in violation of *Payton*, then taken outside and read *Miranda* rights. Confession is admissible b/c did have probable cause to arrest, so not illegally “in custody” at time of confession)
			1. **Independent source**, because then it’s the fruit of a perfectly good tree (burden is clear and convincing)
			2. **Inevitable discovery** of physical evidence (*Nix* = Christian burial speech violated 6th Am. and led cops to the victim’s body, but would have found it anyway because the search party that was already out would have gotten there shortly) (burden is preponderance)
				1. Government must show the evidence *would* have been discovered legally, not just that it could have been discovered legally (and as such the poison just hurried the fruit along)
				2. Helps to show an ongoing investigation!
	1. **Limits** (based on weighing the minimal deterrent effect against the cost of keeping relevant information out)
		1. **Standing** = only those who are actual victims of the alleged violation have “standing” to challenge admissibility (ex. if A’s house is illegally searched and they find things that incriminate B, B can’t complain b/c no reasonable expectation of privacy)
			1. **So the procedural standing question is merged with the substantive 4th Am. analysis, but still do it first** (*Rakas* = no standing where no expectation of privacy, so passengers can’t complain about drugs found under front seat and in locked glove compartment since passengers have no legitimate expectation of privacy in those areas b/c no access/control)

4th Am. = personal rights which can’t be vicariously asserted

* + - * 1. Note: if it’s a possessory offense, incriminatory admission at a suppression hearing can’t be used against D at trial, aka D has use immunity (used to just get automatic standing) (*Salvucci*)
			1. **Either need to own or have some close connection to/control over *place searched*** (*Jones* = D didn’t own apartment, but had permission and a key to be there alone and kept stuff there, so standing) (*Olson* = overnight guest w/out key who was never alone still had standing b/c society recognizes a guest’s expectation of privacy in host’s home in such a situation) (*Alderman* = so also have standing to challenge electronically overheard conversation in your house even if you weren’t present)
				1. **Some factors include**:

**Property used for commercial purposes** (*Carter* = no standing when went to someone’s apartment for the first time for the sole purpose of packaging cocaine for 2 hours…not just social guests) BUT (*O’Connor* = worker has standing to challenge things found in his personal office space)

**Claim of ownership over thing found** (*Rawlings* = no standing when D put drugs in companion’s purse b/c barely knew her, had never used the purse before, no right to exclude others from it, precipitous, and admitted no subjective expectation purse would be free from governmental intrusion)

Still 3rd party standing for:

* Title III
* CA if person was coerced
	+ - 1. **D also gets standing if evidence offered is the fruit-of-a-poison directed at D** (*Brendlin* = stop of car was illegal, so passengers have standing to challenge evidence obtained in the search of the car even though no expectation of privacy if stop had been legal)
				1. So if D can challenge the initial illegality (and had standing in the fruit at the time of that illegality), can also challenge the use of evidence derived from that illegality
		1. **Criminal trials only** = evidence unlawfully obtained is only suppressed in criminal trials
		2. **Good faith exception** (supervisory powers) = evidence obtained via invalid search/arrest warrant isn’t excluded in P’s case-in-chief if cop acted reasonably and in good faith
			1. **Policy:** the exclusionary rule is all about deterring cops, and deterrence doesn’t work if the cop’s violation is an honest mistake
				1. So cops get a second crack if the warrant is bad!

But execution has to be reasonable (although we’re more lenient with execution when the warrant is good)

* + - * 1. **Does it apply to warrantless searches?**

Only those conducted pursuant to a statute later declared unconstitutional (*Krull* = so ok to do an administrative search performed in good faith reliance on a statute later declared unconstitutional since we’re not into deterring legislators)

* + - 1. **Good faith exception applies if there’s a bad warrant b/c:**
				1. **The judge screws up** (*Leon* = The warrant appeared valid on its face even though it was later found to lack probable cause, but cop acted in reasonable reliance on a detached and neutral magistrate so ok) (*Sheppard* = The judge promised to modify the narcotics warrant form to a murder one, but didn’t, so cop’s reliance was reasonable [ok to believe a judge!] even though warrant listed narcotics not the murder weapon as search object)
				2. **A court employee screws up** (*Evans* = an arrest warrant was entered erroneously by a court employee, but reasonable for cop to think it was proper so evidence found pursuant to search after arrest is not excluded)
				3. **The police acted negligently, rather than deliberately** (*Herring* = Another police department negligently said there was an outstanding arrest warrant, but can only deter deliberate conduct so evidence found is ok)
			2. **BUT does not apply if:**
				1. **Cops misled the judge** in their warrant application
				2. **Judge was not neutral** or detached or
				3. **Warrant was obviously invalid** **on its face** such that it was not reasonable for cop to rely on it, either because:

No probable cause or

Fails to particularize the place to be searched or things to be seized (*Groh*  = while the warrant application described the things to be seized, the warrant left that part completely blank so not reasonable to rely on it… compare to *Sheppard* ↑ where mistake was held to be objectively reasonable)

* + 1. **Impeachment exception** = evidence unlawfully obtained can be used in criminal trials to impeach D’s testimony (because we hate perjury)
	1. **D’s remedy if exclusion is not mandated?** Sue cops under 42 USC 1983 (but they have a good faith defense)

------------------------------INTERROGATIONS AND CONFESSIONS-------------------------------

1. **DPC**
	1. Confessions must be voluntary (or else they’re excluded)
	2. Test:
		1. **The police subjected D to coercive conduct** (*Connelly* = so if mentally ill D comes up to cop on the street and confesses, it’s ok b/c not the product of overreaching by the cops) and
			1. In CA only need to show police deception/misrepresentation
		2. **That conduct was sufficient to overcome D’s will given the TOC**, considering:
			1. **D’s vulnerabilities** (age, education, sobriety, familiarity with system…) and
			2. **Conditions of the interrogation**, considering:
				1. Length of detention
				2. Duration and intensity of questioning
				3. Use of trickery, deception, threats or promises of leniency
				4. Deprivation of access to others or nourishment
				5. Physical or psychological mistreatment
				6. Whether D was read his *Miranda* rights
	3. Can lead to “he said/she said” since so fact specific/ad hoc and interrogations are often private
	4. **Partially eclipsed by *Miranda* and *Massiah***
		1. But still useful if *Miranda* is not available (*Fulminante* = D challenged confession made to fellow inmate who was a CI and played off his fear of other inmates and promised protection; Miranda not available because no interrogation, but involuntary so inadmissible)
		2. And even if *Miranda* has been complied with, involuntary statements can always be suppressed under the DPC, so ALWAYS CHECK!
2. **5th Am. (*Miranda*)**
	1. **5th Am.** = no person shall be compelled in any criminal case to be a witness against himself
		1. Note: *Andresen* = 5th Am. doesn’t protect papers seized b/c D was not asked to say anything; he had voluntarily committed those thoughts to writing
	2. **Policy of *Miranda*:** custodial interrogation exacts a heavy toll on individual liberty and trades on the weaknesses of individuals, so we need a regulatory scheme to limit inherent coercion and abuses in order to protect the 5th Am. right against self-incrimination
		1. *Miranda* warnings are thought to neutralize the pressures of custodial interrogations
	3. **Authority:** constitutional basis, so cannot be overturned by Congress (*Dickerson* = in 2000, held that Congress can’t overrule *Miranda* b/c it’s a constitutional decision)
		1. But SCOTUS has decline to overrule cases that limited *Miranda* on the theory that it was based on the Court’s supervisory powers, and not the Constitution
	4. **Rule:**
		1. If in **“custody”**
			1. = formal arrest or restraint on freedom of movement of the degree associated with a formal arrest, considering:
				1. **Whether a reasonable person would have felt at liberty to terminate the interrogation and leave** (*Mathiason* = so if D comes to the police station voluntarily and freedom to depart is not restricted, then not custodial) (*Beheler* = and if D is accompanied to police station by cops but goes voluntarily and is informed he’s not under arrest, then not custodial) and

Consider (fact-specific/ad hoc):

D’s familiarity with location (*Howes* = prisoner moved to a secure conference room and questioned about crimes outside of prison not “in custody” because not an unfamiliar/uncomfortable setting even though in jail)

If cop asked to talk to you about a crime, trend is to find he was just being polite

Duration and persons present (only law enforcement?)

Cop’s behavior/clothes/words/gun

D’s age (*JDB* = 13 y/o taken out of classroom by cop and taken to a closed-door conference room and questioned for 45 minutes not ok b/c need to consider age)

Cop’s motive doesn’t matter unless communicated to D

* + - * 1. **Atmosphere of the interrogation** (*Berkemer* = don’t need warnings for roadside stops because those are routine and not police dominated)

So can be stopped/seized without being “in custody”

* + 1. And **interrogated**
			1. = questioning initiated by law enforcement officers or its functional equivalent, aka **any words or actions that police should know are reasonably likely to elicit an incriminating response from D** (*Innis* = no interrogation when cops transporting D talk about the missing gun and say “God forbid one of the kids might find it and hurt themselves,” at which point D volunteers its location. Subtle compulsion ≠ interrogation)
				1. Consider:

Cop’s question/conduct/intent

D’s particular susceptibilities and cops’ knowledge of them

D’s perception that he is being subjected to psychological pressure (*Perkins* = talking to an undercover agent posing as a prisoner in D’s cell is not an interrogation because D had no reason to think the listener had official power over him) (*Mauro* = ok for cops to accede to request of D’s wife to speak with D with a tape recorder in plain sight, since legitimate reasons not related to securing incriminating statements)

* + - 1. But routine background questions asked for administration/booking are ok (*Muniz* = responses to carefully scripted instructions typically part of field sobriety tests do not require *Miranda* warnings, but the question “*Do you know the date of your 6th birthday*?” does because it is incriminating in the content of the answer [which is testimonial], not just the slurred delivery [which is not testimonial]) (*Hiibel* = asking D on the street to ID himself doesn’t trigger the 5th Am. because no reasonable danger of incrimination)

Only qs SCOTUS has found to be interrogation

* + - * 1. Policy: not investigatory and not likely to elicit an incriminating response
		1. Then D must be **read certain warnings** (UNLIKE 6th where you actually have a right to an attorney without asking, not just a warning)
			1. **Substance**:
				1. Right to remain silent
				2. Anything said can be used against him in court
				3. Right to have an attorney present during questioning
				4. Right to have attorney appointed by the state for free if he can’t afford one
			2. **Adequacy**:
				1. Must always be given, even if D already knows them (we don’t want to pause to inquire in individual cases whether D really did…)
				2. But need not be exact language—just in the totality need to reasonably convey the substance of the rights (*Duckworth*)
		2. And then **waive his rights**
			1. P has a heavy burden to demonstrate **knowing, intelligent, & voluntary waiver**
				1. **Knowing/intelligent** = P must show D understood his rights and had a minimal understanding of the consequences of forgoing his rights (*Spring* = D doesn’t need to know all the possible subjects of interrogation in advance)

Assumed in absence of evidence to the contrary (*Berghuis* = so long as he was given a copy of the warnings, can read English, and had time to read)

Only the warnings need to be disclosed to D (*Burbine* = cops failed to tell D his relatives had gotten him a lawyer who was trying to see him, but no one cares b/c events occurring outside of D’s presence have no bearing on his capacity to comprehend and knowingly waive his rights) (*Spring* = don’t need to tell D about all the possible subjects of questioning in advance)

Doesn’t matter if D fails to understand the effect of what he’s admitting (*McKnight* = D just needs to know his options; we don’t care if he’s stupid and makes an irrational choice)

Can focus on the specific D!

* + - * 1. **Voluntary** = like the DP standard above
			1. **Explicit waiver** = best to get D to sign a written waiver form
			2. **Implied waiver**
				1. Waiver will not be presumed simply from D’s silence after the warnings or from the fact that a confession was obtained
				2. BUT silence + an understanding of his rights and a course of conduct indicating waiver is enough (*Butler* = D given warnings and said he understood his rights, but refused to sign the written waiver form, but agreed to talk and confess so ok)

TOC approach, considering D’s background/experience & conduct

* + - 1. **Waiver after D invoked his rights**
				1. **If D invokes his right to remain silent**, then interrogation must immediately cease (cops need to “scrupulously honor” this right)

Invocation must be unambiguous (can’t just remain silent)

**How long does invocation last**?

Interrogation may resume after the passage of a “significant amount of time” and with new warnings (*Mosley* = ok to interrogate him about another crime 2 hours after he invoked right with new warnings)

* + - * 1. **If D invokes his right to request an attorney**, then interrogation must cease until one is present (mere consultation isn’t enough)

Invocation must be unambiguous (*Davis* = “maybe I should talk to a lawyer” isn’t enough for cop to know it’s a request for an attoreny)

**How long does invocation last**? Until:

D himself initiates further communication (*Edwards* = can’t just wait 24 hrs & give new warnings b/c we value 6th Am. more) or

Routine questions (ex. for water) don’t count, but “what’s going to happen to me” does (*Bradshaw*)

Doesn’t matter if cops want to talk about a different crime (*Roberson*)

There has been a 2-week break in “custody” (*Shatzer* = b/c then coercive influence has dissipated; prisoner’s return to general population counts)

* + 1. Or else **remedy = exclusion of D’s statements**
	1. **Limits on *Miranda***
		1. **Impeachment exception** (*Harris*)
			1. Statements obtained in violation of *Miranda* can be used to impeach D at trial
			2. UNLESS they are involuntary or coerced, then inadmissible for all purposes
		2. **Public safety exception** (*Quarles* = rape suspect armed with a gun was caught and frisked in a supermarket. When they didn’t find the gun they asked where it was and he said “over there.” Ok even though no *Miranda* warnings b/c accomplices or others could use it)
			1. Viewed broadly (even though exceptions should be viewed narrowly…)
			2. Objective test, so doesn’t matter why the cop actually interrogated D
			3. UNLESS they are involuntary or coerced, then inadmissible for all purposes
		3. **Fruits of the poisonous tree?**
			1. Statements obtained directly in violation of *Miranda* can’t be used (unless taint is purged…), but indirect evidence is admissible, ex:
				1. **Testimonial evidence** derived from inadmissible statements (*Elstad* = when first confession is given without proper *Miranda* warnings, but then a more detailed confession is given after proper warnings, the second confession is admissible even though derived from the first, which is not)
				2. **Physical evidence** derived from inadmissible statements (*Patane* = gun found after D made statements without good *Miranda* warnings is admissible even though the statements aren’t since the 5th Am. isn’t implicated by the admission of physical evidence since it’s non-testimonial)
			2. UNLESS:
				1. The **evidence is involuntary or coerced**, at which point all fruits (indirect and direct) must be suppressed
				2. The cops **deliberately withheld the warnings until they obtained a confession, then gave warnings** in order to use a repeated confession (*Seibert* = upon hearing warnings only in the aftermath of interrogation and just after making a confession, D hardly thinks he has a genuine right to remain silent, so the warnings are inadequate and subsequent statements are inadmissible)

Consider: completeness/details of first round of questions, overlapping content of two statements, timing and setting of both, continuity of police personnel, and degree to which cop’s questions treated the second round as continuous with the first

1. **6th Am. (*Massiah*)**
	1. **6th Am.** = criminal defendants shall enjoy the right to have the assistance of counsel
	2. **Policy of *Massiah***(and *Williams*, which reaffirmed *Massiah* after *Miranda* = D was arraigned in X for a murder in Y, where his lawyer was waiting for him. Cop drove him 160 miles back, and, knowing D was religious, gave the “Christian burial speech” hoping to find out where D put the body, which caused D to confess. Held that this violated D’s 6th Am. right to counsel since D didn’t waive b/c kept saying would only talk once got to his lawyer)
		1. The right to assistance of counsel at trial would be meaningless if the prosecution could obtain incriminating statements from an un-counseled D prior to trial
	3. **Rule:**
		1. If **adversarial judicial proceedings** have commenced (*Rothgery* = after D’s initial appearance before a judicial officer the right attaches and he gets an attorney at all critical stages)
			1. D doesn’t have to be in “custody”
			2. What counts?
				1. Indictment
				2. Information
				3. Arraignment
				4. Preliminary hearing
			3. So 6th Am. is offense-specific! (*McNeil* = if charged for one crime and then questioned [with a *Miranda* waiver] about another without an attorney, no 6th Am. violation since right hasn’t attached to that offense yet b/c no adversarial judicial proceedings)
				1. And “offense” is defined narrowly (*Cobb* = arrested for burglary then questioned about the murder of the homeowner without counsel; ok b/c murder had not been charged even though factually closely related to the burglary)
		2. And the **government deliberately elicits incriminating statements** (= harder to show than “interrogation” under the 5th)
			1. D doesn’t have to be subject to interrogation or the functional equivalent thereof
				1. It’s about the intentional nature of the cop’s efforts, not D’s susceptibilities
			2. UNLIKE 5th, applies to “jailhouse snitches” and undercover cops if P is anything more than a passive listener (*Henry* = can’t stimulate conversations with D designed to produce incriminating admissions) (*Khulman* = but where informant just sat there and listened, it’s ok)
		3. Then D must **have counsel present or waive his rights**
			1. Waiver must be knowing, intelligent and voluntary AND INTENTIONAL
				1. If D has been advised of, understood, and voluntarily waived his *Miranda* rights, then also waives his 6th Am. rights
		4. Or else **remedy = exclusion of D’s statements**
			1. But can be used for impeachment (*Ventris*)

-----------------------------OTHER INVESTIGATIVE PROCEDURES--------------------------------

1. **Physical Examinations**
	1. **4th Am. applies** to intrusions into the body
		1. So cops need a warrant unless they have probable cause + an exception (*Schmerber* = ok to get blood test to test BAC of D since there’s a risk it will go down if they wait for a warrant, and it’s routine and harmless)
		2. And major intrusions are unreasonable under the 4th Am. (*Winston* = can’t make D undergo surgery to remove a bullet…weigh the government’s need with the risk of surgery) (BUT *Florence* = in jail anything goes, so can search genitals of all prisoners even if not arrested for drugs)
			1. So weigh nature of intrusion with crime/need for object
	2. **5th Am. doesn’t apply** because not testimonial
	3. **6th Am. doesn’t apply** because science is objective enough without counsel present
	4. **DPC applies, so all examinations must not “shock the conscience”** (see ↑)
2. **Wiretaps**
	1. **4th Am. applies** (see ↑)
	2. **Title III applies**
		1. Regulates both state actors and private parties (and provides third party standing)
		2. **Cops must procure a court order authorizing interception** of any electronic communications over a wire affecting interstate commerce (*Goldman* = ok to use a microphone to record D talking on the phone in the next room since not a communication by wire)
			1. Intercept = aural acquisition of the contents of a communication (*Turk* = ok for cops to play previously recorded tapes they found)
			2. If issued, the order must describe with particularity the persons targeted, the nature of the communications to be intercepted, and the duration of the authorization
				1. Issued only if:

Cops have established that normal investigative procedures have failed or are reasonable unlikely to succeed

Case involves a particular crime

* + - * 1. Cops must minimize the overhearing of irrelevant conversations (*Scott* = tapped a phone for a month but only 40% of the calls were related to narcotics. Still, reasonable b/c most of the non-related calls were short/hard to tell before it was over)
			1. If issued, permits covert entry to install a bug
		1. **Also prohibits use or disclosure** of information known to be obtained through illegal interception (*Bartnicki* = but radio station that plays anonymous tape of union official is ok b/c info of public importance)
		2. **Exceptions**
			1. Where one party to the conversation is himself the interceptor
			2. Consent
			3. Business reason (*Deal* = can monitor calls in your business)
		3. **Remedies**
			1. Civil suit
			2. Criminal prosecution
			3. Exclusion if case involved wire or oral communications (not “electronic” ones)
				1. Only required if cops failed to: (1) name the authorizing officer, (2) ID the agency, (3) ID the person to be intercepted
1. **Undercover**
	1. Both undercover cops and confidential informers (who work for cops) are covered by 4th Am.
	2. Need not tell D you are undercover/an informer (*Hoffa* = D thought CI was his friend so let him in to his hotel where he listened to incriminating statements; failure to disclose role as a CI does not vitiate consent)
		1. 4th Am. doesn’t protect wrongdoer’s misplaced believe that a person to whom he voluntarily confides a crime will not reveal it
		2. D assumed the risk!
	3. And wearing a wire doesn’t make it a 4th Am. search (*White* = just like a CI without one, but with more accurate and reliable evidence) (*Longoria* = even if English CI records Spanish in front of him, b/c no expectation based on listener’s ability to comprehend a foreign language)
2. **Entrapment**
	1. D can raise a **CL defense of entrapment** (resulting in a complete bar to prosecution) where:
		1. **Objective test** (minority/CA)
			1. D has burden to show **government inducement** (*Sherman* = inducement where informer kept running into D after their AA meetings and asking for drugs until finally D gave in and got him some for cost…so no profit!)
				1. Inducement = opportunity + excessive pressure
			2. Focus solely on government’s conduct, not D’s characteristics
				1. Did they make the crime “unusually attractive”? Did they do everything?
		2. **Subjective test** (majority/feds)
			1. D has burden to show government inducement and
			2. P has burden to show **D was predisposed** (i.e. ready and willing) to commit the offense prior to first being approached by government agents (*Jacobsen* = D’s prosecution for receiving child pornography was the result of 2.5 years of government correspondence encouraging him, so entrapment defense is successful) (*Hampton* = when D concedes he was predisposed, then can’t win just b/c cops sold him the drugs that he sold to CI)
				1. Ok for cops to induce D to commit a crime sooner rather than later…
				2. Consider D’s prior conduct, willingness/reluctance, and reputation
	2. D can also raise a **DPC defense** to bar prosecution if the government’s conduct is outrageous
		1. SCOTUS has yet to be swayed by it, but some courts have (*Twigg* = prosecution is barred where government informant proposed to S to set up a drug lab, supplied all the equipment, materials, and the site, and then maintained exclusive control over the manufacturing process since D didn’t know how to)
		2. More government-involvement ok if crime is harder than normal to detect (ex. drugs)
3. **Eyewitness Identification**
	1. **4th Am. doesn’t apply** because D’s physical appearance is on public display so no reasonable expectation of privacy
	2. **5th Am. doesn’t apply** because D is not being compelled to testify
		1. Even providing voice or handwriting exemplars for the purposes of identification is not testimonial
	3. **6th Am.** **applies to post-indictment pretrial corporeal lineups**, so need a lawyer PRESENT or waiver (*Wade* = potential reliability problems with corporeal and vocal eyewitness ID procedures, so it’s a critical stage) (*Gilbert* = same with providing a handwriting exemplar)
		1. **Policy**: attorney input can avoid prejudice in the procedure and act as a witness
		2. **But does not apply to**:
			1. Pre-indictment lineups (b/c 6th Am. is only implicated once adversarial judicial proceedings commence) (*Kirby*)
				1. Note: CA does apply *Wade* to pre-indictment hearings!
			2. Photographic arrays (D isn’t there, so why should attorney be there?) (*Ash*)
		3. **Remedy** = exclusion and no ID at trial by affected W, unless P can show independent source to purge the taint (EASY), considering:
			1. What W saw of the crime
			2. Discrepancies between pre-lineup descriptions and D
			3. Any ID prior to lineup
			4. Failure to ID D on a prior occasion
			5. Lapse of time
	4. **DPC applies, so all ID procedures must be “fundamentally fair”** (just b/c attorney was present, may not have been given access to change procedures so can still violated DPC)
		1. **TOC test** = was the procedure:
			1. **Arranged by the cops** (*Perry* = cops asked neighbor to describe robber and she pointed at the guy in the distance by the cop car; not police-orchestrated, so ok),
			2. **Unnecessarily suggestive** and
				1. Consider the nature of the procedure and the circumstances that necessitated resort to it (*Stovall* = handcuffed D was brought to stabbing V’s hospital room; court said one-on-one confrontations are suggestive, but this one is not unnecessarily so because victim may have died so needed to act quickly)
			3. **Likely to lead to a mistaken identification**?
				1. Consider indicia of reliability (*Brathwaite* = not necessarily suggestive to show a single photograph; need to consider reliability factors):

Opportunity of W to view D at the time of the crime

W’s degree of attention

Accuracy of W’s prior description of D (if any)

Level of certainty demonstrated by W and

Time elapsed between crime and the confrontation

* + 1. **Note: courts rarely find a DPC violation!**
	1. **Remedy for violation = exclusion**
		1. Pretrial ID is suppressed
		2. In-court ID by same W is also inadmissible UNLESS P can establish it was based on an independent source (ex. original observations made at the time of crime)