I. Defense Counsel

A. Right to Appointed Counsel → 6th Amendment
[Right attached when “accused”, i.e. adversarial process begins — Kirby v III (1972) → goal is to “protect the unaided layman at critical confrontations with his adversary — Gouveia (1984)].

1. Powell v Ala (1932) → DUE PROCESS → capital case with illiterate/feebleminded ∆.
2. Johnson v Zerbst (1938) → 6th amendment requires federal courts to supply counsel in all felony cases.
3. Brady v Betts (1942) → Johnson n/a to the states via 14th amendment, case by case to look for fundamental unfair trial.
4. Gideon v Wainwright (1963) → overrules Betts. 14th applies, states must make must make counsel available to all felony ∆. If denied assistance of counsel, “cannot be assured a fair trial.”
5. Argersinger v Hamlin (1972) → Gideon applicable to all indigent misdemeanor ∆ who are sentenced to a jail term.
7. Baldasar v II (1980) → If denied counsel and convicted to non-prison punishment, conviction cannot later be used for sentence enhancement.

B. Proceeding Pro Se

1. Johnson v Zerbst (1938) → strong presumption 6th amendment right has not been waived.
2. Carnley v Cochran (1962) → can presume waiver from silent record.
3. Faretta v Cal (1975) → ∆ has an affirmative right to represent himself.
   (a) No inquiry necessary.
   (b) Cf dissent (Rehnquist, Burger), in majority of cases, ∆ will be better off → can’t be balm for frustrated ∆, subverted for political purposes.
4. Godinez v Moran (1993) → competency standard for waiving right to counsel, pleading guilty, is not higher than std for standing trial.
5. McKaskle v Wiggins (1984) → 6th amendment right is not violated when judge appoints a standby counsel, over objections, to relieve judge of explaining protocol → If denied self-represent, must reverse → usually hurts ∆, thus not amenable to harmless error analysis.

C. Effective Assistance of Counsel

   (a) 2-PRONGED TEST for ineffective assistance of counsel:
      (1) counsel’s performance = deficient
      (2) deficiency prejudiced the case.
   [Benchmark = “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result” → less than 50% certainty of different result, look at totality of circumstances → thus, innocent people have strongest case].
   (b) Marshall, Dissent: More emphasis on process → if ineffective, then 6th am and has been abridged → very hard to identify prejudice when incompetence likely lead to an incomplete record. PROBLEM = leads to lots of second-guessing, ↑ administration costs.
   (c) Cf. Powell and Gideon → purpose of counsel is to ensure proper function of judicial, adversarial process.

2. US v Cronic (1984) REAL ESTATE LAWYER → cannot infer prejudice by surrounding circumstances, e.g. < time, inexperience, seriousness, complexity of defense, witnesses avail → actual prejudice.

D. Equal Protection and the Right to Counsel

1. Douglas v Cal (1963) → ∆ has DP and EP right to counsel in preparing an appellate brief (Ct reviewed transcript, then denied counsel, since unlikely to make a difference) → unclear which part of 14th amendment relied upon → poor/rich same access!
   (a) Wealth not a suspect class under EP cl.
   (b) ∆ is aggressor on appeal; at trial, he is subject of state action.
3. Ake v Oklahoma (1985) → DUE PROCESS ∆ was incompetent, later competent if sedated; lacked resources to contend insanity, esp. at sentencing → due process required access to psychiatric assistance.
   (a) ∆ entitled to “raw materials integral to the building of an effective defense” → lower courts interpret as virtual necessity
   (b) EP collapsed only into DP → not trying to level playing field anymore.
4. Anders v Cal (1967) → must submit letting saying appeal is wholly frivolous and requesting withdrawal, also raising best
argument. Ct. reviews, if possible merit, then new counsel appointed.

(a) *McCoy v Ct of App of WI* (1988) ⇒ State can require that counsel’s *Anders’* brief also include reasons why appeal has no merit.

(b) High std. of *Anders* means less resources for other indigents w/ better case.

(c) *Jones v Barnes* (1983) ⇒ Counsel need not argue all non-frivolous points at urging of Δ can’t abandon non-frivolous appeal, but can abandon a non-frivolous issue.

II. Pretrial Release and Detention

A. **Bail System ⇒ FACTS and EVOLUTION**

1. **Statutory scheme** for bail (rather than constitutional) necessary if we want to augment funding.
   (a) Consider contingency fees and free choice of PD by indigent clients.
   
2. **Three systems** to consider:
   (1) *Public Defender Programs* ⇒ public or non-profit ⇒ prevalent in urban areas.
   (2) *Assigned Counsel* ⇒ use by 60% of jurisdiction, reimbursed by statute or fee schedule
   (3) *Contract Attorneys* ⇒ used in small jurisdictions w/ small demand (e.g. local bar association).
   
(c) **Benchmarks** = acquittals, ineffective assistance of counsel, caseload, standards, resources, specialization.

2. **Vera Study** to present day ⇒ more people released now. Poor being denied bail may be function of who is committing crimes rather than defect in sorting mechanism

<table>
<thead>
<tr>
<th>Costs Relevant to Bail</th>
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<tbody>
<tr>
<td><strong>Costs to Δ</strong></td>
</tr>
<tr>
<td>1. Preparation of own defense; investigation.</td>
</tr>
<tr>
<td>2. Lose jobs, disrupt family life</td>
</tr>
<tr>
<td>3. More likely to get convicted</td>
</tr>
<tr>
<td>4. Greater stigma which &lt; presumption of innocence</td>
</tr>
<tr>
<td>5. Jail conditions bad ⇒ 8th amendment doesn’t apply to them.</td>
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</table>

3. *Smith v Boyle* (1951) ⇒ *BAIL UNDER THE 8TH AMEND* ⇒ “Bail must be not more than that reasonable calculated to assure the Δ’s appearance in court.”

(a) TM: sets forth no workable standard
(b) Applies to states through the 14th adm.
(c) Non-capital will get bail to unhampers defense, no pre-conviction punishment.
(d) *Bandy v US* (1960) ⇒ possible EP violation if rich can meet bail but poor cannot ⇒ [get around by case-by-case analysis].
(e) *US v Patriarca* (1st 1991) ⇒ may be EP violation to allow rich Δ to pay for his own surveillance equipment.

4. *Pugh v Rainwater* (5th Cir 1977) ⇒ In Florida Bail system, “EP standards are not satisfied unless the judge is required to consider less financially onerous forms of release before he imposes money bail” ⇒ unconstitutional as applied.

B. **Bail Reform Act**

1. **Bail Reform Act of 1984** — §§3141-3150 ⇒ changes bail system from raising bails to point where Δ can’t meet $$, thus stays in jail; §§3142 — Release or detention pending trial
   (a) **Four possibilities** — release on own recognizance; release on conditions; temporary detainment to permit revocation of conditions; detention ⇒ least restrictive to ensure presence.
   
(b) Cannot purposeful impose a bail which a Δ can’t meet.
   
(c) **Detention may apply if**, by **clear and convincing** evidence:
   (1) crime of violence
   (2) offense punishable by death or life in prison
   (3) offense >10 or more yrs under Controlled Substances Act.
   (4) Might flee
   (5) Might obstruct justice (e.g. witness tamper).
   
(d) **Factors to be weighed**:
   (1) nature and circumstances of offense
   (2) weight of evidence
   (3) history / character of Δ: family, employment, $$, community ties, past conduct, hx related to drugs or alcohol, crim record.
   (4) If on probation, other charges pending.
   
(e) **STATUTORY ⇒** TM: Money bail is confinement w/o affording process. Bail Reform Act is a better system. *Stack v Boyle* is an impossible test to apply. Info + condition = prevailing trend.

2. *US v Salerno* (1984) — PREVENTATIVE DETENTION — Mob boss denied bail based on potential dangerous activities ⇒ facial attack on Bail Act
(a) Bail Act of 1984 is constitutional
   (1) Regulatory in nature rather than punitive → done in response to crime while on bail → cf. war exceptions, mentally unstable.
   (2) Not substantive due process violation, done w/o too much incursion on individual liberties.
   (3) Procedural due process → clear & convincing + written justification.
(b) Preventative detentions okay → no absolute right to bail
   (1) Pugh v Gerstein → 48 hour detention okay w/o hearing on PC
   (2) KS v Hendricks → Post-conviction/sentence okay.
   (3) Schall v Martin → can detain juveniles pre-trial.
(c) Marshall, Dissent: This is punishment for perceived future crimes; incarceration = punishment.
(d) Steven, Dissent: Won’t close door on preventative incarceration, but this case doesn’t pass constitutional muster due to future criminality rationality
3. TM: Separate Policy & Constitutionality → McMartin!

III. Prosecutorial Screening

[TM: Section is NOT CONSTITUTIONAL LAW → STATUTORY and policy oriented → screening positively or negatively → POLICE are a huge part of this process].

A. Overview of Prosecutor’s Discretion;
   1. Three types of Declination policies:
      (a) General = Standards → based on totality of circumstances
         (1) Level of offense
         (2) prior charges
         (3) restitution
         (4) ability to pay
         (5) prior convictions
         (6) personal / family situation
      (b) Specific = Rules → tries to anticipates circumstances in order to bleed out invidious aspects of discrimination → eviscerates mercy potential in process. (e.g. no thief < $50 will be prosecuted).
      (c) Procedural → Set forth uniform list of factors to be considered, require a written record to explain charging and declination decisions.
   2. Mandatory Prosecution → domestic violence
      (a) Counteracts institutional bias
      (b) No EP problems since everything is in the open → but POLICE discretion → MN = mandatory arrests, holistic policy.
   (c) But conflicts with resource restraints
   (d) Also ignores victim preference → might be good, takes it out of her hands → State is the bad guy.
3. Diversion terminated, proper std = parole → Morrissey v Brewer (1972) NDAA pros stds.
   (a) written notice of violation
   (b) disclosure of evidence against
   (c) opportunity to be heard and present opposing evidence
   (d) right to confront and cross-examine
   (e) neutral and detached hearing body.
   (f) written statement by fact-finder as to reasons of revocation.
4. Statistical Disparities among various parties being charged.
   (a) LEVEL-UP → McClesky suggest that executing more would solve problem.
   (b) Political failures in getting prosecutors to utilize better guidelines.

B. BLACKLETTER on Charge Selection
   1. [prosecutor’s have wide discretion, usually default to more specific offense → AUSA = more serious]
   2. Inmates of Attica Facility v Rockefeller (2nd Cir 1973) — DEFER to EXEC BRANCH — Civil rights violations in aftermath of riot. Court refuses to substitute judgement for prosecutors, lest become super-prosecutors. (a) Separation of powers
      (b) π would need files of GJ, prosecut, thus in camera not workable.
   3. US v Cox (5th 1965) — PREPARE but not SIGN — US Attorney refused to sign indictment after GJ found probable cause. Rule 7 → must sign indictment → in some jurisdictions, can precede without prosecutors signature.
   4. Unnamed Petitioners v Connors (WI 1987) → No compulsion to prosecute if have probable cause, low probability of getting conviction → Sep of Pow if courts interfere
   5. FRCrimP 48 → requires leave of court to dismiss criminal complaint → US v Wellborn (5th 1988) → Can be withheld only if “clearly indicates a betrayal of the public interest.”
   6. Johnson v Pataki (NY 1997) → Governor can take control of prosecution if prosecutor publically states no death penalty, lest legislative will be frustrated.
   7. Private Prosecutions in some jurisdictions if open and notorious → but see People v Mun Ct (Cal App 1972) → encroaches on Sep of Pow; Due Process since prosecutor serves as uniform screening device for all.
8. **US v Batchelder** (1979) → TWO CRIMES -- Prosecutor free to choose more severe of two crimes as long as not to discriminate against any class of Δ.
   (a) Cf. *Hutcherson v US* (DC 1965) → prosecution charge with felony when misdemeanor avail. Dissent = “this is sentencing choice”.
9. **Blackledge v Perry** (1974) → VINDICT Δ exercised right to new trial de novo, prosecutor † charge. Vindictiveness = DUE PROCESS.
10. **US v Goodwin** (1982) → JURY TRIAL request for misdemeanor, transferred to fed court, † to felony charges. No presumption of vindictiveness in pretrial setting
11. **Hawkins** → (Cal 1978) STRICT SCRUTINY to proceed by GJ instead of prelim. hearing.
    (a) 6th amendment issues
    (b) Delay and publicity are not good reasons.
    (a) EP of 5th Amd if decision to pros. based on unjustifiable std. like race, religion, other arbitrary class.
    (b) Δ must present clear and convincing evidence to rebut presumption of no EP violation.
    (c) Rational Basis if no protected class.
    (d) Strict scrutiny only if fundamental right is at state. Cf *Shapiro* → right to travel affect by differential in welfare payment
13. **Santobello v New York** (1971) → BROKEN PROMISE → Promise of sentencing recommendation must be followed when used to induce guilty plea
    (a) required by DUE PROCESS.
    (b) Cf *People v Navarroli* (Ill 1988) → not DP violation if Δ has not plead guilty in reliance on problem.
    (c) **US v Bethea** (4th 1973) DIVERSION → can break diversion agreement since no charges, thus no plea.
    (d) **US v Garcia** (9th 1973) → Delayed prosecution agreement, 0 pros if dealer produce in 90 day. Charges filed after 150 (no dealer) → can’t since Δ waive right to speedy trial.
15. **US v Aguilar** (9th Cir 1989) → SIMILARLY SITUATED → political group that smuggled aliens prosecuted, but not farmers and ranchers.
   (a) No EQUAL PROTECTION prob because all distinctions extraneous to 1st amendment not removed.
   (b) Cf. **US v Robinson** (W D Mo 1969) → EQUAL PROTECTION violation when private investigators charged but not gov’t official. Implicit = no invidious motive.
   (c) Rational-basis if no protected class involved.
   (d) Strict-scrutiny if protected class requires factual inquiry.
16. **US v Elliott** (SDNY 1967) → DESUETUDE → rejection of desuetude doctrine just because no one had been prosecuted under law since its inception in 1917.

IV. Preliminary Hearings and Grand Jury

A. **Comparison**

1. **Grand Jury** → Investigatory body, but also Screens for propriety of charges.
   (a) thus possible conflicting role (active versus detached).
   (b) Rule 6 = supposed to be non-adversarial
2. **Preliminary hearings** → adversarial, in front of a neutral magistrate, can confront witnesses. Can be waived, exp. in plea barg.
   (a) Also can serve to check that conditions of bail are no excessive
   (b) Can require reduction of excessive charges (to counter prosecutorial overcharging) in preparation for plea bargaining.
3. **Problem** → if similarly situated get different outcome, very hard to challenge → GJ documents may not be discoverable unless prima facie case
4. **Why keep it?** Historical context huge. Important screening function against arbitrary exercise of gov’t power.
   (a) Originalist thus might think PH are better, thus can chuck.
   (b) TM: But GJ still can be structural mechanism to check discretion → screening function keeps them from going wild on investigatory power. Power can be akin to jury nullification.

(c) **Possible reforms:**
   (1) require ct. to inform GJ of their independent authority
   (2) giving target right to testify
   (3) Prosecutor required to present all exculpatory evidence
   (4) no inadmissible evidence
   (5) Limited use of hearsay
   (6) post-indictment pre-trial hearing to
check for procedural errors.

5. **Investigatory powers** = consider issues of subpoena duces tecum vs. search warrant.

<table>
<thead>
<tr>
<th>Grand Jury</th>
<th>Preliminary Hearing</th>
</tr>
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<tbody>
<tr>
<td>1. Jury of your peers</td>
<td>1. neutral magistrate</td>
</tr>
<tr>
<td>2. usually no lawyer</td>
<td>2. lawyer</td>
</tr>
<tr>
<td>3. usually ≠ not present</td>
<td>3. ≠ present, can testify</td>
</tr>
<tr>
<td>4. non-adversarial</td>
<td>4. cross-exam + some disc.</td>
</tr>
<tr>
<td>5. secret → less stigma</td>
<td>4. public → possible stigma</td>
</tr>
</tbody>
</table>

B. **BLACKLETTER — GJ Investigation and 4th amend**

[Need not be particularized, unlike search warrant → just plainly relevant to ongoing investigation, probative in ID, not for harassment, minimally invasive if no risk of pain → blood, saliva, hair and fingerprints okay.]

1. *Hurtado v Cal* (1884) — INFO versus GJ indictment passes 14th DUE PROCESS clause

2. *Boyd v US* (1886) — 4th and 5th merged in GJ context — ≠ cannot be compelled to produce incriminating documents → just like breaking into home and searching papers → NO LONGER GOOD LAW.

3. *Hale v Henkel* (1904) — OVERBREADTH DOCTRINE — Subpoena duces tecum has to comply with particularity requirement often found in search warrants.

(a) Cf. *Horowitz* (2nd 1973, Friendly, J), *Hale* might be better grounded in DUE PROCESS CLAUSE.

(b) Now requires 3 things:

   (1) commands only production of documents relevant to investigation

   (2) documents named with “reasonable particularity.”

   (3) whether documents produced cover only a reasonable period of time.

4. *Costello v US* (1956) — HEARSAY — indictment can occur even when only evidence is hearsay.

(a) indictments shouldn’t be hampered by procedural / evidentiary rules.

(b) Even if not a 5th Amendment, court could curtail under supervisory powers

5. COOPERATION with GJ —

(a) *Schmerber v Cal* (1966) → BLOOD SAMPLE is not a due process, 4th or 5th amendment violation. Not unreasonable.

(b) *Davis v Miss* (1969) → Police may get FINGERPRINTS w/o trad. showing of PC (ind susp) Distinguished by *Dionsio*

(c) *US v Dionsio* (1973) — VOICE

   (1) Initial compulsion of a person to appear before a grand jury; and

   (2) subsequent directive to give voice

exemplar not 4th amd violation.

3. No reasonableness inquiry necess. with voice exemplar unless another const. violation at issue

4. Marshall dissent: OPENS DOOR TO GET INFO thru GJ that would otherwise be unobtainable.

(d) *US v Mara* (1973) — HANDWRITING samples to GJ not 4th amd violation.


(a) Dicta suggests that it would be okay to issue an indictment based on unconstitutionally obtained evidence.


<table>
<thead>
<tr>
<th>Police Searches</th>
<th>Grand Jury Investigations</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Fingerprints -- need reasonable suspicion or PC</td>
<td>2. No showing for voice, handwriting, blood.</td>
</tr>
<tr>
<td>2. Done to target</td>
<td>2. No necessarily target</td>
</tr>
<tr>
<td>3. public</td>
<td>3. Secret</td>
</tr>
</tbody>
</table>

C. **BLACKLETTER — Investigation and 5th Amend (Self-Incrimination).**

1. [GJ can be a discovery mechanism → though usually only in high-profile cases.

(a) 5th Amd = produce documents, but gov’t must figure out what is incriminating.

(b) Protects information in your mind.

(c) Physical evid = non-testimon = permiss.]

2. *Counselman v Hitchcock* (1892) — 5th amendment applies in Grand Jury setting

3. *Hoffman v US* (1951) — LINK of EVID — 5th amendment applies to any answer where an injurious disclosure may occur.

4. *Rogers v US* (1951) — WAIVER — disclose of incriminating fact waives the privilege as to the details

5. *Murphy v Waterfront Comm* (1964) — Separate Sovereign Limitation n/a when ≠ is prosecuted for one crime in state / fed, but compelling testimony would whipsaw ≠ for subsequent prosecution in other jurisdiction.

(a) *US v Balsys* (1999) limitation applied to foreign countries (e.g Nazi war crimes).

(b) 7 Policy values underlying 5th Amend, quoted in Doe II:

   (1) Cruel trilemma of self-accusation, perjury, or contempt.

   (2) accusatorial system, where gov’t shoulder the load.
(3) Fear that methods for self-incrim. will be cruel & inhumane
(4) Gov’t should leave individual alone until good cause exists to disturb him – otherwise, charge first fishing expedition.
(5) Protect the privacy enclave of the mind.
(6) Distrust of self-deprecatory state.
(7) While sometimes a shelter to the guilty, may protect the innocent.

6. Schmerber v Cal (1966) → BLOOD SAMPLE is not a due process, 4th or 5th amendment violation. Not testimonial, not unreasonable.


8. US v Mandujano (1976) — MIRANDA’s No right to Miranda’s when witness is called before GJ for a crime he might be involved in, arguably defacto a.
   (a) No deterrence rationale.
   (b) No criminal proceeding against him → no 6th amendment right to counsel →
   (1) [but AG manual does allow “reasonable opportunity” to leave room and consult w/ lawyer → might be after every quest] TM: institutional structure may be sufficient safeguard here anyway.]
   (2) Some states have statutes permitting counsel w/i GJ room
   (3) People v Ianniello (NY 1968) → can go in/out for obvious strategy.
   (c) Brennan, Concur: Forbid practice if accused rather than independent witness
   (1) Close nexus of 5th and 6th, thus counsel should be available
   (2) If PC by an objective std, then must get waiver → practiced by some states.

9. US v Washington (1977) — GJ TARGET — witness need not be warned that he is a target.
   (a) Often GJ doesn’t know who target is.
   (b) [AG manual advise attorney to notify targets unless possible fear of jury tamp]

D. BLACKLETTER → Subpoena Duces Tecum
1. Fisher v US (1976) → Written documents must be TESTIMONIAL → a got documents from accountant related to tax offense, gave to his attorney. Attorney refused to produce on 5th and grounds. Couch (1973) = Accountant
   (a) 5th only applicable if involves testimonial self-incrimination.
   (b) No zone of privacy now on written doc.
   (c) Brennan, Marshall concur: nature of papers subpoenaed is what case turns on → if private, can’t do it. (KATZ)

2. Doe II (1988) → ACT of PRODUCTION → if the act of production is in any way testimonial, then 5th amendment right applies.
   (a) Must be attempt to obtain mind’s content
   (b) 4th amend / due process safeguards
   (c) Avoid trilemma → self-accuse, perjure, contempt. If accounts don’t exist, no problem!
   (d) Steven, Dissent: authorization requires a to disclose info no obtainable in any other way. METAPHOR:
      (1) Relinquish key to strong box okay
      (2) But not combo to wall safe.
   (e) Doe Immunity → act of production can verify existence and authenticity.

3. ACT of PRODUCTION is protected under the 5th Amendment if production reveals:
   (a) Documents exists
   (b) Or they belong to the a
   (c) [Thus, Katz-like reasonable expectation of privacy creeps into analysis].

V. Discovery and Speedy Trial — 6th Amend

A. SPEEDY TRIAL
   [Right cuts both ways. Policy to advocate on exam: If a promptly demanded / asserted right, the prejudice should be presumed; If a is slow to assert right, the court should presumptively assume non-prejudice → lest defendant play both sides].
   1. Klopfer v NC (1967) — 14th imposes Sixth amendment right to speedy trial on states.
   2. Smith v Hooey (1969) — PRISON INMATE still has 6th amendment right. Otherwise:
      (a) loses chance of concurrent sentencing
      (b) may adversely affect prison term, worse treatment, keep in prison longer
      (c) Ability to prepare defense compromised.
   3. Barker v Wingo (1972) — SPEEDY TRIAL BALANCING under 6th Amendment
      (a) Case by case with Four factors:
         (1) Length of Delay
         (2) reason for delay
         (3) a’s assertion of the right
         (4) Prejudice to the a.
      (b) Speedy trial right is unique: violation doesn’t necessarily prejudice a, may help; dismissal is draconian but only remedy; demand waiver rule, waiver is less of an issue.
      (c) [TM: minimum required to get dismissal = a demanded trial, a’s case was prejudiced, and the reasons give some sort of basis for rebuttal].
   4. US v Lovasco (1977) — PRE-INDICTMENT DELAY — Not a DUE PROCESS problem to prosecute a following investigative delay, even if defense somewhat prejudiced by delay
(a) *Marion* (1971) — pre-indictment delay does not trigger Speedy Trial Clause. Proof of prejudice is necessary but not sufficient element of due process claim.

(b) Due process must not violate fundamental system of fair play and decency. If have PC, can still wait for sufficient evidence for BRD std.

(c) TM: Marshall is concerned about both prejudice to and prejudice to the state.

(d) TM: Consider Vernier problem (sex abuse)

(1) Due Process clause is like a flexible statute of limitations.

(2) Nature and seriousness also affect outcome cf. *Doggett* (drug crime = victimless crime).

5. *US v Strunk* (1982) — DISMISSAL ONLY REMEDY — can’t give credit from time served between indictment and arraignment. TM LIKES original 7th Cir ruling.


(a) dismissal only remedy;

(b) major difference with *Barker* is time "presumptively compromises the reliability of a trial in ways that neither party can prove or identify".

B. DISCOVERY for the DEFENSE

1. Boilerplate arguments against:

(a) Fabricate evid. to counter prosecution

(b) would intimidate witnesses

(c) 5th amend makes discovery one way street (but what about GI)?


3. *Brady v MD* (1963) — DUE PROCESS — "suppression by the prosecution of evidence favorable to upon request violates due process where the evidence is material either to guilt or punishment."

4. *US v Bagley* (1985) — *Brady* -- DUTY TO DISCLOSE — Evidence is material and must be disclosed to the if there is a reasonable likelihood that, had the evidence been disclosed to, out would be different.

(a) *Giglio* (1972) — No distinction b/t impeachment evidence and exculpatory evidence. Both need showing of materiality under *Brady*.

(b) *Agurs* (1976) -- unless deprived of fair trial, no constitutional violation requiring that verdict be set aside.

(c) Adopting *Strickland*’s undermine the outcome test.

(d) Totality of circumstances test applies to no request, general request, and specific request.

(e) White concurring: test for materiality does not depend on specificity of request.

(f) Marshall, dissent: presumption of materiality should be adopted, rebut showing harmless error BRD.

(g) Stevens Dissent: constitutional duty to volunteer obviously exculpatory evid. Suppression different than non-disclosure.

5. NEW EVIDENCE std must show that would likely have been acquitted.

6. HARMLESS ERROR prosecution has burden of showing harmless error:

(a) Anything that might be favorable to

(b) Automatic trial unless pros. can demo.

7. UNDERMINE OUTCOME must be favorable and material such that would undermine outcome (undercuts BRD).

<table>
<thead>
<tr>
<th>Bagley Chart on DUE PROCESS (showing to get new trial)</th>
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<tbody>
<tr>
<td><strong>Court (favorable &amp; material)</strong></td>
</tr>
<tr>
<td>Perjury</td>
</tr>
<tr>
<td>spec request</td>
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<tr>
<td>gen request</td>
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<tr>
<td>no request</td>
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</table>

8. Harmless Error seems to invite boring over prosecutors files. Hard to know what is, is not exculpatory pushes toward open file policy, though not work product.


(a) emphasis on fair trial, no poss. acquittal

(b) Weighing unnecessary (inculp - exculp)

(c) In const. error, no harmless error review

(d) Focus is cumulative effect, no piecemeal


(a) [TM: Cf. *Barker* Ct only willing to dismiss charge for serious offense if bad faith]

(b) distinguishes *Trombetta* used evidence of breath-analyzer in case-in-chief without preserving sample.
(c) Cf. *Brady*, where inquiry into due process not contingent on finding of good or bad faith → irrelevant there.

d) Here, only negligent.

e) Steven concur: okay b/c trial judge gave instruction for PERMISSIVE INFRINGEMENT against State arising from lost or destroyed evidence.

(f) Blackmun/Brennan/Marshall dissent: “Where no comparable evidence is likely to be available to Δ, police must preserve physical evidence” this is of type that could conclusively exonerate Δ.”

(g) STATE COURT sometimes use instead:

1. Degree of negligence
2. Importance of evidence
3. Sufficiency of remaining evidence

11. *US v Gleason* (SDNY 1967) → prosecutor has duty to identify to defense exculpatory witness if he as reason to believe that defense is unaware of them. Min. prosecutor obligat.

C. DISCOVERY for the PROSECUTION


(a) Black Dissent: But disclosure may ultimately be unnecessary

1. But State may get access to more damaging evidence.
2. May intimidate Δ witnesses

(b) *Wardius v OR* (1973) — State gives NO RECIPROCITY, thus law struck down.

(c) *Brooks v Tenn* (1972) — Δ GOING 1ST Unconstitutional for state to require Δ to stake the stand first before witnesses

(d) Rationale of accelerated disclosure → access to prosecutions files permits Δ to make a decision on an informed basis.

2. *US v Noble* (1975) — WITNESS STATEMENTS okay to compel production of, in addition to witness list. (at TRIAL → would it extend to pretrial?).

(a) Fact that 3rd party statements were prepared for Δ does not convert them to personal communications

(b) 5th and privilege is personal, adhering to person rather than information.

(c) Consider work product and effective assistance of counsel claims.

(d) *Izazaga v Sup Ct* (Cal 1991) → timing of disclosure is irrelevant to 5th amendment analysis → disclosure was non-testimonial

(e) Cf. *State v Wingo* (NJ 1978) → state conditioned access to robber’s note on expert’s report, though expert would not be testifying at trial → violated Δ’s 6th and right to effective assist of counsel.

(f) *US v Byers* (DC 1984) → Δ w/ insanity defense must submit to psychiatric exam

3. *Taylor v Ill* (1988) — NO WITNESS AS DISCOVERY SANCTION — Defense witness has been interviewed, but his existence not divulged to prosecution until just before trial.

(a) As sanction, trial court wouldn’t allow use of witness.

(b) Δ claimed denial of Compulsory Process Clause. Affirmed.

(c) May be explained by willfulness of Δ.

D. SUPERVISORY POWER

1. *Jencks* (1957) and Jencks Act → supervisory powers, No DUE PROCESS.

(a) Gov’t must turn over all prior statements of witnesses following testimony → (may be in camera review). Δ counsel must request it.

(b) Cf. Due Process = exculpatory and impeachment → prosecution must turn over at moment of inconsistency → failure to correct, otherwise.

2. Work product has no constitutional basis → thus court can curtail it to “opinion” work. *Izazaga v Sup Ct* (Cal 1991).
VI. Plea Bargains

A. Constitutional Rules and Pleas

   (a) Knowing and intelligent
   (b) Free from threats, misrepresentation, or improper promises.
   (c) Must be done with counsel present.

2. *Bordenkircher v Hayes* (1978) ➔ HARD
   BARGAINING NOT DP VIOLATION ➔
   prosecutor tried to convince Δ to plead guilty for bad check violation in exchange for 5 yr. sent, refusal = habitual offender act w/ life sentence. Δ declines, convicted, challenged plea bargain was DP violation.
   (a) Held: Pros can attempt to get assent to plea bargain by informing Δ of specter of more severe charges is no bargain is struck. Δ given NOTICE.
      (1) *Boykin v Alabama* (1969) ➔ need public record to verify that plea was knowing and voluntary made.
      (2) Distinguished *Blackledge* and *Pearce* (vindicative / DP violations) because plea bargaining involves “give-and-take” TM: these cases undermined by ruling ➔ just about right to appeal?
   (b) Dissent, Blackmun, Marshall, Brennan: Here sole motivation of prosecutor was to keep Δ from exercising his 6th amd. right to a trial.
      (1) Initial charge is public ➔ better safeguard if “prosecutor is required to lay his cards on the table with an indictment of public record at the beginning of the process, rather than making use of unrecorded verbal warnings of more serious indictments yet to come.”
      (2) Thus political chk on overcharging
      (3) Possible GJ not informed of prac.
      (4) TM: presumes Δ guilt, getting brk.
   (c) Dissent, Powell: Discretion used to deter the exercise of constitutional rights is not constitutionally permissible. Discretion must be reasonable.

3. *Hutto v Ross* (1976) — CONFESSION w/ PLEA NOT COERCED — Δ plea bargained, confessed, withdrew plea, argued that confession can’t be use because it couldn’t have occurred “but for” plea bargain ➔ plea deemed voluntary.


5. COERCION ➔ Schulhofer ➔ a sentence differential could be so great that it could induce a risk adverse person to plead guilty.

6. Consider legislating the plea differential ➔ does this mitigate coercion?
   (a) Legislative enacted plea differential available to everyone.
   (b) Cf. *Jackson* (1968) with *Corbit* (1978)
      (1) *Jackson* involved death penalty
      a) (if plead may, if trial must)
      (2) *Corbit* did not involve case where more severe punishment reserved exclusively for those wanting trial.
      a) (if plead may, if trial may).
      b) No discretion ➔ thus, no ‘give-and-take’ under *Bordenkircher*
      c) however, just coerces Δ to go to trial which is constitutional

B. Plea Bargain as a Contract

1. *Dillon v US* (9th Cir 1962) promise to ask for leniency when no opportunity possible = illusory promise, voiding agreement.

   (a) If plea rests substantially on promise of pros, then promise must be fulfilled.
   (b) Remedy:
      (1) Specific performance = sentencing in front of a new judge;
      (2) Recission = Δ can withdrawal plea.

3. *US v Nuckols* (5th 1979) — 3rd PARTY — Okay to plead guilty in exchange for not prosecuting of wife or fiancee.


5. *US v Harvey* (4th 1986) ➔ ambiguity in plea agreements covered by K law. “both constitutional and supervisory concerns require holding the gov’t to a greater degree of responsibility that Δ for impressions or ambiguities in plea agreement.”

6. If Defendant deceives in formation, K void:
   (a) *Hamlin v Barrett* (Miss 1976) ➔ Δ lied about prior robbery conviction
   (b) *State v Pascall* (Ohio App 1972) ➔ Δ engaged in crime in interim.

C. Factual Basis of Guilty Plea

1. *Boykin v Alabama* (1969) ➔ need public
record to verify that plea was knowing and voluntary made.

2. **NC v Alford** (1970) — Defendant plead guilty to 2nd degree murder though told judge that he was merely pleading guilty to avoid death penalty.
   
   a. **Hudson v US** (1926) → constitutional to impose punishment upon a plea of nolo contendere.
   
   b. “In light of substantial factual basis for plea, TC did not commit const. error.”

3. Some pleas are impossible based on fact of case. E.g. breaking and entering at night, during day → manslaughter, attempted manslaughter.

D. **Collateral Challenges to Guilty Plea**

1. **Mabry v Johnson** (1984) — LIMITED — “a voluntary and intelligent plea of guilt made by an accused person, who has been advised by competent counsel, may not be collaterally attacked” by reference to procedural errors that occurred prior to the entry of the plea.
   
   a. **McMann v Richardson** (1970) — even if coerced confession was misassessed → counsel subject to good faith mistakes.
   
   b. **Tollett v Henderson** (1973) → racial discrimination in GJ selection where counsel failed to challenge.

2. **Hill v Lockhart** (1985) — Strickland two-prong test applies to challenges to guilty pleas based on ineffective assistance of counsel.

3. **Menna v NY** (1975) DOUBLE JEOPARDY -- guilty plea not valid if prosecution would be barred due to double jeopardy.

4. **Blackledge v Perry** (1974) — DUE PROCESS vindicativeness in prosecuting for felony, subsequent guilty plea → can still be collaterally attacked since it deals with “right not to be haled into court at all upon the felony charge.”

5. **US v Broce** (1989) Recission of guilty plea only possible where state’s lack of authority to bring the charge is apparent on the face of the record. [Can’t expand it → at trial other co-conspirators go 2nd conspiracy dismissed.]

6. **Broussley v US** (1998) — INTELLIGENT → Subsequent Court decision interpreting statute changed element of crime to which a plead guilty → since record showed that a, counsel, and court did not understand statute, “guilty plea would be unintelligent” and thus “constitutionally invalid.”

E. **The Plea Bargain Debate**

1. **Problem of Disparity** — ↑ sentences of parties who assert right to trial suggest that exercise of their right comes at a price

   a. Must consider **uncertainty** which discounts imposition of sentence

   b. Compares convicted with acquitted and those who plead guilty → should be **ex ante analysis**

2. **Standard Discount** → to get rid of equal bargaining and excessive leniency.

   a. curb opportunity to abuse charging power

   b. stress systematic sentencing criteria and information

   c. illegally obtained evid would have no sway (motion to suppress heard at trial)

   d. discourage pretrial tactics which waste courts resources

   e. benefits / costs would be clear to a

   f. tend to equalize tactical positions of rich and poor.

3. Cf. Market system (Easterbrook) → case by case which allow state to get “maximum deterrence punch out of whatever resources committed to crime control”

4. **Accurate and Fair Results** — Plea Bargaining means only close cases go to jury → if all went to trial, jurors more skeptical of a.

5. **Cost Bargaining** = resources allocation

   a. Agency problems with a attorney worried about being adequately compensated, docket being overburden

   b. Prosecutors rely on pleading out cases lest their office come to a stand still

6. **Odds Bargaining**:

   a. Defendants wants:

      1. lighter sentence

      2. avoid public scrutiny

   b. Prosecutor want to get conviction, a off the street.

7. **Alaska’ experience** showed → disparity in sentences b/t guilty pleads and trials dismissed but did not disappear → guilty pleas did not dramatically decline (bargaining with bench) → Charge bargaining became more common → Prosecutors become more selective in bringing charges in first instance.

VII. **Jury Trial and Jury Selection**

A. **Availability of Jury Trials**

1. **Duncan v Louisiana** (1968) — 6TH AMD APPLIES To STATES — White → “trial by jury ... reflects a fundamental decision about the exercise of official power — a reluctance to entrust plenary power over the life and liberty of the citizen to one judge or to a group of judges.” → strongest in crim context
(b) Better promote BRD
(c) representative
(d) civic responsibility
(e) promote fairness perception
(f) Nullification → check against bad laws, judicial system, desuetude.
(g) Forces full discussion of issues.

3. Dobson → Judges smart, wise, education; jurors are ignorant, capricious, and prejudiced. Proposed:
(a) Two judges, 1-1, or 0-2 = acquittal.
(b) 3rd judge deals with evidence

4. Punishment time and juries.
(a) Baldwin v NY (1970) — SIX MONTHS "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."
(b) Blanton v City of North Las Vegas (1989) — SIX MONTHS NOT EQUAL TO PETTY — Shift burden to a to prove that crime (maximum sentence plus other sanctions) is a SERIOUS one. Legislature determines if a crime is a serious one.
(c) Lewis v US (1996) — NO AGGREG. of petty offenses to trigger right to a jury. Dishonor of multiple petty crimes less than dishonor of one serious crime.

5. Size of jury:
(a) Williams v Florida (1970) — SIX PERSON JURY OKAY.
(b) Ballew v Georgia (1978) — FIVE PERSON JURY NOT ENOUGH — Blackmun, "progressively smaller groups are less likely to foster effective group deliberation."
(c) Burch v Louisiana (1979) — FIVE / SIX IS NOT OKAY — benefits of non-unanimous 6-member jury saves time is speculative at best.

6. Unanimity
(a) Apodaca v Oregon (1972) (plurality) NO UNANIMITY REQUIRED →11-1 & 10-2 pass muster. PLURALITY.
(1) unanimity not needed for BRD.
(2) unanimity not necessary for cross section rationale.
(3) Douglas, dissent: "The diminution of verdict reliability flows from the fact that non-unanimous juries need not debate and deliberate as fully as must unanimous juries."
   a) Kalven and Zeisel → evid that pros will be much better off under this proposal. 3.67 ration compared to 2:1 under unanimous jury verdicts.
(b) Johnson v Louisiana (1972) — 9-3 OKAY UNDER DP and EP — tried before Duncan, so 6th amendment not applicable.
   (1) Dissent, Stewart, Brennan, and Marshall — Nothing in this opinion to restrain states from resorting to a 7-5 system.

7. Trial de novo:
(a) Ludwig v. Massachusetts (1976) — TWO - TIER OKAY — nothing unconstitutionally burdensome about potential for two trials, with only the second with a right to a jury.
   (1) Additional expense not an issue; can go right to step two through admission of certain facts.
   (2) Callan v Wilson distinguishable → DC case based on article III, §2, Cl. 3.

8. Jury Nullification:
(a) US v Dougherty (DC 1972) — NO INSTRUCTION ON NULLIFICATION — juries hear of this possibility through other means. Occasional medicine is good, but disastrous as a daily diet.
   (1) Dissent → serves an important service in criminal justice system.
(b) BUTLER → Race of a is sometimes legally and morally appropriate factor for jurors to consider in reaching a verdict of not guilty.
(c) US v Trujillo (11th Cir 1983) → counsel cannot argue for nullification
(d) State v Mayo (NH 1984) → can make argument, no instruction, however.

9. Fact or Law:
(a) US v Gaudin (1995) — JURY RULES ON ULTIMATE FACT — judge reversed for telling jury that a 's statements were material statements, as that was an element of the crime.

10. Sentencing:
(a) Spaziano v FL (1984) — JUDGE CAN SENTENCE, effectively disregarding recommendations of jury following conviction of crime.
(b) Dissent, Brennan, Marshall, and Stevens — “right of have an authentic representative of the community apply its lay perspective to the determination that must precede a deprivation of liberty — applies with special force to the determination that must precede a deprivation of life.”

11. Waiver:
(a) Singer v US (1965) — NO RIGHT TO A NON-JURY TRIAL — judge or gov’t
can insist on a jury trial. Waiver is not affirmative right to a bench trial.

B. Jury Selection

1. 2 - important functions
   (a) elicit information which would establish a basis for challenges for cause.
   (b) acquire information to afford an intelligent exercise of peremptories
   (c) But Consider: [May also serve to indoctrinate jurors — illegitimate]

2. Often use extensive questionnaires, but discovery is rarely allowed.

3. Challenges -- 28 USC §1867(f) gives access to papers of commission / clerk in connection with jury selection process.

4. Fed R Crim P 24(a) — court have discretion to conduct exam itself, or lets counsel do it.
   (a) Followed by 13 states
   (b) 17, judges quest, lawyers suggest
   (c) 20 give counsel primary control

C. Jury Pools

1. Taylor v Louisiana (1975) — CAN’T EXCLUDE La had a statute prohibited women from jury duty unless they requested.
   (a) Exclusion of a segment of society from jury duty is sufficient to establish a per se violation of a’s 6th amd. jury trial.
      (1) Peter v Kiff (1972) — white a denied fair trial, blacks were systematic exclude from system.
      (2) FL v Hoyt (1961) excluding women not DP or EP violation
      (3) Ballard v US (1946) cross-section required in in federal cases.
   (b) Rehnquist Dissent: cross section = “only posit a flavor, a distinct quality.”

2. Duren v Missouri (1979) — 6th Amd. CROSS SECTION -- prima facie cross-section violation established, burden switches to show why necessary for a significant state interest.
   (a) three pronged analysis:
      (1) group excluded is distinctive group
      (2) that rep unreasonable relative to population it is drawn from.
      (3) under-representation is due to systematic exclusion mechanism.
   (b) Strauder v W.Va (1880) — trying black a when black jurors were excluded is DP violation. Also Neal v DE (1881).
   (c) Norris v Alabama (1935) burden shift to prosecution after prima facie showing
      (1) Eubanks v Louisiana (1958) -- Can’t be met purely by gov’t testimony than not discriminatory

D. Jury Selection For Cause = DUE PROCESS

1. Dennis v US (1950) — GOV’T EMPLOYEE not challengeable for cause just by employ
   (a) US v Boyd (5th Cir 1971) must show actual bias by gov’t employee.
   (b) Split on employ of bank that was robbed

2. US v Salamone (3rd Cir 1986) — NRA can’t exclude based on their ass’n. Slippery slope NAAACP, NOW, moral majority.

3. Witherspoon v Illinois (1968) — DEATH PENALTY can’t impose death penalty if jury which convicted / imposed was chosen by excluding people with objection to it. “State crossed the line of neutrality and produced a jury uncommonly willing to condemn a man to die.”
   (a) Cf. Buchanan v KY (1987) this applies only to exclusion for cause.
   (b) Ross v OK (1988) CURE use of peremptory because court erroneously failed to grant Witherspoon motion is not const error. Peremptory is in essence to cure trial courts errors.

4. US v Olano (1993) — ALTERNATE JURORS — presence of alternate juror during deliberations with explicit a permission is not “inherently prejudicial” despite going against Hill v Texas (1942) — violation = key man didn’t know any blacks.

5. Ham v South Carolina (1973) — QUESTIONING FOR RACIAL BIAS — Rehnquist 14th and was to cure racial discrim, may be appropriate to ask specific questions to probe underlying racial motives.
   (a) “Requires judge in this case to interrogate the jurors upon the subject of racial prejudice.”
   (b) Beards not covered.
   (c) Cf. Ristaino v Ross (1976) — QUALIFIES HAM — “Ham did not announce a requirement of universal applicability” special factors.
      (1) But courts would be wiser to propound a’s questions
E. **Jury Selection / Preemptories.**

1. **Three Methods**
   (a) **Tender Method** → back and forth until all are satisfied.
   (b) **Whole panel questioning** → everyone gets asked for cause at once.
   (c) **12 in a Box** → swear them as they are not struck, more added → [TM more indeterminacy, mediocre jururs].

   (a) No lack of fair trial. Defense had ability to question jurors personally.
   (b) Also, this was a non-capital case.
   (c) If exclude b/c past exp., no logic stop pt.

3. **Batson v Kentucky** (1986) — EQUAL PROTECTION / PEREMPTORY -- pros can’t use perempt to keep members of the ∆’s race off the jury b/c he thinks won’t impartial
   (a) Reexamines **Swain v Ala** (1965), had † burden of discriminatory intent.
      (1) Had to produce historical pattern.
      (2) “Single invidious act is not immunized by the absence of such discrimination in the making of other comparable decisions.”
      (3) NOT RIGHT that several must suffer before one can object.
   (b) Prima Facie case →
      (1) Member of cognizable racial class, pros used his challenges to strike
      (2) Peremptory gave opportunity to act on discriminatory intent.
      (3) PLUS all other relevant circum.
   (c) Burden shifting: after prima facie, burden shifts for neutral explanation → can’t be rebutted by conclusory statement of good faith.
   (d) **Peremptory are not a constitutionally-based right**, but subject to EP clause.
   (e) Marshall concurring: Peremptory challenges offer such a great potential for abuse that they should be abolished in the criminal justice system entirely → can be entirely pre-textual.

(f) **Rehnquist and Burger, Dissent** → peremptory are essential and historical
   (1) Neutral explanation is a nightmare to administer → not enough for cause, thus potential that all preemp = “arbitrary & capricious.”
   (2) Rehnquist → it is equal, each race free to exclude jurors of other race
   (g) TM: remedy difficult → how to administer harmless error? auto-reverse?

4. **Purkett v Elem** (1995) — 3- Step Process:
   (a) Prima facie
   (b) Neutral explanation
   (c) whether opponent of strike has proven purposeful discrimination. OPPONENT STILL BEARS BURDEN OF PROOF.

5. **Power v Ohio** (1991) — KENNEDY → White can object to striking of black jury members. Gov’t has 3rd party standing to challenge.
   (a) **Edmondson** (1991) → EP civil litig can’t use preemptories to racially discrim.
   (b) **Georgia v McCollum** (1992) — Whites assaulting black can’t use pre-emptories to systematically strike black jurors.


7. **State v Davis** (Minn. 1993) — RELIGION — Black venireman struck through peremptories; okay because he was a Jehovah Witness

8. **Hernandez v NY** (1991) — LANGUAGE— Okay for prosecutor to strike bi-lingual or Spanish-speaking jurors because they felt that might have problems with understdg testimon → disproportionately on Latinos can’t support discriminatory intent (no clearly erroneous)

9. **Ward v Village of Monroeville** (1972) — JUDGES -- Mayor and judge, where convictions lead to † in city coffers, is a due process violation → for cause removal
   (a) Some states give ∆ single peremptory challenge to trial judge.

VIII. **Aspects of Criminal Trial**

A. **The Defendant, PRESENCE**

1. **Illinois v Allen** (1970) — DEFENDANT NOT PRESENT — After repeated outbursts, the ∆ was removed from the trial, convicted. Can forfeit 6th and right to be present.
   (a) Three options here were unavailing:
      (1) bind and gag him → prejudicial
      (2) cite him for contempt → doesn’t care
      (3) take him out until he agree to conduct himself properly → unavailing.
   (b) Avoid at all costs, since ability to
communicate with counsel if very imp.
(c) Don’t want to benefit from DELAY.
(d) Brennan, concur → mitigate thru tech
(a) But cf. *Crosby v US* — CAN’T BEGIN W/O → Language, history, and logic of FRCrImP 43 says necessary to start.

(a) No 6th amd b/c no evid, wit presented to trier of facts → Determination of competency is ongoing → confir = cross.
(b) Need showing of prejudice.
(c) Dissent, Marshall, Brennan, and Steven: We can’t speculate what could have communicated to attorney, helped him.


6. *US v Watkins* (7th 1992) — Waiver of Rt. to be present must be knowing and intelligent → But cf. *Taylor*, where their was no inquiry.

**B. The Defendant, RIGHT TO SILENCE**

1. *Griffin v California* (1965) — COMMENT RULE — 5th Amendment self-incrimination clause implicitly forbids comment by the prosecution on an accused’s failure to testify, or instructions by the court that such failure is evidence of guilt.
   (a) “Cuts down on the privilege by making its assertion costly.” Cf. FRE 404 + 600.
   (b) 5th Amendment applies to the states via *Malloy v Hogan* (1964).
   (c) Comment is remnant of inquisit. system.
   (d) Dissent, Stewart and White: Compulsion should be focus of this inquiry.


4. *Lockett v Ohio* (1978) — AMBIGUOUS COMMENT — constitutionally permissible to say “unrefuted”, “uncontradicted” after defense lawyer had promised the jurors a defense and testimony by the ‘
   (a) *US v Robinson* (1988) — must be examined in context in this case, the ‘ was saying “never given chance”

5. *Brooks v Tenn* (1972) — CAN’T REQUIRE TESTIMONY FIRST — 6th amendment

**C. Arguments**

1. *Darden v Wainwright* (1986) — IMPROPER STATEMENT — prosecution made inflammatory statements in closing argument. No comments about the exercise of rights → overturn only if so unfair to violate DP.
   (a) Dissent, Blackmun: Prosecution in this case offered personal opinions as to guilt, injected broader issues into trial, tried to inflame passions → trial unfair, thus DUE PROCESS VIOLATION.

2. **TM viewpoint:**
   (a) Threshold is very high → must be egregious, continuous, uninvited, not cured by judge, w/ overwhelming evidence of guilt.
   (b) Then harmless error.

3. **TM’s Schematic:**
   (a) Inflame the jury
      (1) Not chesterfieldian → polite, no appeal to emotion.
      (2) Comment supporting bias
   (b) Vouching, “in all days as pros.”
      (1) Comments on silence
      (2) Comments on presence.

**IX. Race and Crime and Sentencing**

**A. Statistic and death penalty**

1. *McKlesky* (1987) ‘ presented evidence that statistically, parties that killed whites were much more likely to get the death penalty. Baldus = 4.5x after dis-aggregating data.
   (a) 14th (std = intentional discrimination in PARTICULAR CASE);
   (b) 8th amendment (std = arbitrary and capricious IN PARTICULAR CASE, which seems like the same showing necessary).
   (c) Large amount of facts → jurors, prosecutors.
   (d) Brennan’s dissent: History should long standing practice of discriminatory punishment in GA.
      (1) TM: Different std proof for geogr.
   (e) TM → Court has conflated 8th and 14th amendment. Afraid of slippery slope of applying to other areas → Must be stupid juror and stupid prosecutor for reversal.

2. Cf. Statute and statistical outcome (*McClesky*) → Capital offense to kill a white person.
   (a) One solution is to have mandatory

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death penalty according to particular crimes but see Roberts v LA, must be able to consider mitigating factors.
(b) Mandatory charging, sentencing left to jury.
(c) Prosecutorial discretion power to give mercy is the power to discriminate.

B. Statistics Arrests differ from Convictions

1. Berk and Campbell Federal crack prosecutions in LA have a racial distribution different from the racial distributions for arrest documents disparity but can’t explain it.
   (a) 17.7:1 in arrest data
   (b) infinity in prosecutions (none).
   (c) TM: may be explained by nature of crime, aggravating factors.
2. Freddie Stephens v State (Ga 1995) 2 strikes your out. 14 out of 14 sentenced to life were black. 10% of county is AA. 98+% statewide. Of eligible under statute 1% white, 16% black.
   (a) Follows McClesky: Need individualized intent; must be to county level, which filters down to prosecutorial discretion.
   (b) Data not specific enough.
   (c) Dissent: Treat like Batson, prima facie showing, with racial neutral burden. Only prosecutor involved!

C. Summary

1. Procedure versus Socio-economic Bkg.
   (a) Cases deal only with procedural rights, but background conditions can be observed e.g. right to counsel (but how effective)?
   (b) Cf. Needs-based model with procedural based model.
      (1) Procedure: Powell in McClesky “if this is EP violation, then it has no bounds” reason why courts are conservative institutions though so say Constitution = anti-majority. Level up is danger to correct EP.
      (2) Needs-based: no emphasis on bill of rights needs more important than rights in determining just outcome less choice, more protections and equality.
2. Cf. Selective prosecution and Vindicative prosecution:
   (a) Selective Prosecution = EP:
      (1) Similarly situated people are generally not prosecuted;
      (2) selection of claimant intentional

I. Defense Counsel ................. 1

Right to Appointed Counsel 6th Amendment (1)
Powell v Ala (1932)
Johnson v Zerbst (1938)
Brady v Betts (1942)
Gideon v Wainwright (1963)
Argersinger v Hamlin (1972)
Scott v Ill (1979)
Baldasar v IL (1980)

Proceeding Pro Se (1)
Johnson v Zerbst (1938)
Carnley v Cochran (1962)
Faretta v Cal (1975)
Godinez v Moran (1993)
McKaskle v Wiggins (1984)
Effective Assistance of Counsel (1)
IV. Preliminary Hearings and Grand Jury . . . 4

Comparison (4)

Grand Jury
Preliminary hearings
Investigatory powers = consider issues of subpoena duces tecum vs. search warrant

BLACKLETTER — GJ Investigation and 4th amend (5)

Hurtado v Cal (1884)
Boyd v US (1886)
Hale v Henkel (1904)
  Cf. Horowitz (2nd 1973, Friendly, J)
Now requires 3 things:
Costello v US (1956)
COOPERATION with GJ
  Schmerber v Cal (1966)
  Davis v Miss (1969)
  US v Dionisio (1973)
  US v Mara (1973)
US v Williams (1992)

BLACKLETTER — Investigation and 5th Amend (Self-Incrimination) (5)

Counselman v Hitchcock (1892)
Hoffman v US (1951)
Rogers v US (1951)
Murphy v Waterfront Comm (1964)
  US v Balsys (1999)
  7 Policy values underlying 5th Amend
Schmerber v Cal (1966)
Kastigar v US (1972)
US v Mandujano (1976)
  Brennan, Concur
US v Washington (1977)

BLACKLETTER — Subpoena Duces Tecum (6)

Fisher v US (1976)
  Brennan, Marshall concur
Doe II (1988)
  Steven, Dissent
ACT of PRODUCTION

V. Discovery and Speedy Trial — 6th Amend

............................................. 6

SPEEDY TRIAL (6)

Klopfer v NC (1967)
Smith v Hooey (1969)
Barker v Wingo (1972)
US v Lovasco (1977)
  Marion (1971)
Doggett v US (1992)

DISCOVERY for the DEFENSE (7)

Mooney v Holohan (1935)
Brady v MD (1963)
US v Bagley (1985)
  Giglio (1972)
  Agurs (1976)
  Adopting Strickland’s
Totality of circumstances test
White concurring
Marshall, dissent
Stevens Dissent
NEW EVIDENCE std
HARMLESS ERROR
UNDERMINE OUTCOME
Kyles v Whitley (1995)
Arizona v Youngblood (1988)
Trombetta
Cf. Brady
Steven concur
Blackmun/Brennan/Marshall dissent
STATE COURT
US v Gleason (SDNY 1967)
DISCOVERY for the PROSECUTION (8)
Williams v FL (1970)
Black Dissent
Wardius v OR (1973)
Brooks v Tenn (1972)
US v Noble (1975)
Izazaga v Sup Ct (Cal 1991)
Cf. State v Wingo (NJ 1978)
US v Byers (DC 1984)
Taylor v Ill (1988)
SUPervisory Power (8)
Jencks (1957) and Jencks Act
Izazaga v Sup Ct (Cal 1991)

VI. Plea Bargains

Constitutional Rules and Pleas (9)
Brady v US (1970)
Bordenkircher v Hayes (1978)
Dissent, Blackmun, Marshall, Brennan
Dissent, Powell
Hutto v Ross (1976)
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