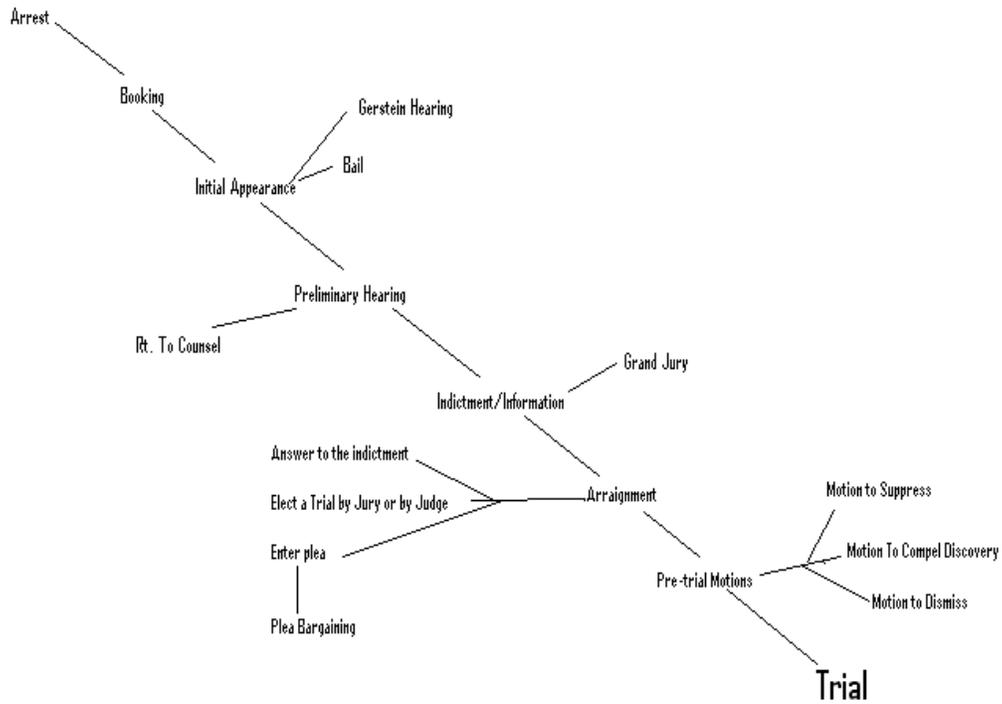


CRIMINAL PROCEDURE OUTLINE SPRING 2008

	Absolute certainty
Conviction	Beyond a Reasonable Doubt (trial Std)
Arrest	Probable Cause
Detention	Reasonable Articulate Suspicion
	Suspicion (ok to investigate but not arrest)
	Hunch

Pre-Trial Procedures



FOURTH AMENDMENT: people and places are protected from unreasonable police action when it comes to searches and seizures. Key words: seizure, reasonable, search.

ARREST

1. Custody: When the individual, in the presence of a law enforcement officer, is not free to leave, and is thus deprived of his freedom of action in a significant way.
2. Arrest: When a person is taken into custody for the purpose of commencing a criminal action, an arrest has occurred. More than a stop-and-frisk is required.
3. Probable Cause is required for an arrest
 - a. Vantage point of a trained police officer
 - b. Taking into account the TOTAL CIRCUMSTANCES
 - c. Whether a prudent officer would have good reason to believe that a crime has been committed and that THIS person did it.
 - d. Hearsay: is the declaration from the witness that someone told the witness for the truth of the statement. Hearsay IS admissible for Prob Cause.
4. Illegal arrests
 - a. An unlawful arrest is no defense to a subsequent conviction of the crime charged.
 - b. If arrested w/o PC then can sue for false imprisonment.

WARRANTS

1. Ways for an arrest to occur
 - a. With a warrant
 - i. Common law: officer must have reasonable belief that crime was committed and by this person.
 - b. Without a warrant
 - i. Felony
 1. when committed in the officer's presence
 2. when not committed in the officer's presence where the officer has reasonable grounds to believe the person committed the felony.
 - ii. Misdemeanor
 1. where the crime is committed in the presence
 2. when it amounts to a breach of the peace
 3. need a warrant if not committed in the presence of a police officer
2. Aguilar-Spinelli Test (Two-prong Test)
 - a. Reliable and Credible (the hearsay provider)
 - i. Does not apply to neighbors and victims of crime; only applies to paid informants
 - b. Base of knowledge of the informant: How does he know and Why is he reliable.
 - i. If don't pass then don't have probable cause.

3. Gates
 - a. Abandoned the two-prong test and went back to Draper's TOTALITY OF THE CIRCUMSTANCES
 - i. Time
 - ii. Place
 - iii. Everything the officer knows
 - iv. Description of the criminals
 - b. Draper does not mention How informant got the info.
4. Affidavits: a sworn statement submitted to the judge to show probable cause.
 - a. 4 Corners rule: anything not in the document cannot be used to establish Probable Cause
 - b. Must state facts that amount to PC
 - c. Magistrate looks to see if PC
 - d. Prosecutor must initial first
 - e. Have to put exact address and what part
 - f. Informants
 - i. Professional Tipster: reliability determined by on a number of occasions the person has provided information found to be true. Usually paid.
 - ii. Citizen Informant: ordinary citizen whose reliability is found through nature of report, what was seen and heard of the crime, and what was verified by the police to be true.
5. Arrest Warrants: place, signed by judge/mag, order to arrest, then given a number
 - a. Citizens can get warrants if they go through prosecutor for help
 - b. Arrest warrants don't go bad
 - c. On the back is the RETURN: statement of everything taken; what was searched and what was found.
6. Search Warrants
 - a. Search warrants go stale after 10 DAYS
 - b. Execution of a warrant
 - i. Before entering police must Knock and Announce
 - ii. Must wait a reasonable time: balance what is reasonable time to wait against what is going on inside.
 - iii. If no admittance entry may be forced; police can go in even if people aren't home because it was court ordered.
7. Evidence
 - a. Instruments of a crime: something used or done in the course of the crime
 - b. Fruits of a crime: proceeds
 - c. Contraband: private citizens not allowed to have under any circumstances
 - d. Particular evidence: ex: clothing described on the suspect
8. Payton Doctrine: 4th Amendment prohibits police, absent exigent circumstances, from making a warrantless and nonconsensual entry into a suspects home to make a ROUTINE felony arrest.

9. Good Faith Rule:
 - a. A finding that a warrant is invalid because it is not supported by probable cause will not entitle a defendant to exclude the evidence obtained under the warrant. Evidence obtained by police in a reasonable reliance on a facially valid warrant may be used by the prosecution despite the fact that the warrant was not supported by probable cause.

SEARCH

1. Exclusionary rule: evidence of all materials seized in violation of the 4th amendment is inadmissible in a criminal proceeding.
2. Fruit of a poisonous tree: any additional evidence acquired either directly or indirectly from the illegal arrest, search, or seizure must also be excluded as tainted fruit of the poisonous tree.
3. Probable Cause:
 - a. from the vantage point of a trained police officer
 - b. looking at the totality of the circumstances
 - c. whether a reasonable person could find that a crime has been committed by this person
 - d. the evidence of the crime is in the place the search is wanted
5. Types of searches without warrants
 - a. Protective Sweep (incident to arrest/ arrest warrant): quick look at the premises for the safety of the officers
 - b. Protective Search (Terry Stop): a non-invasive search. Only for officer's protection.
 - c. Full Search: (incident to arrest/arrest warrant): Must have PC and a full seizure of the person. May include cavity searches and strip searches.
6. Exceptions to the Search Warrant requirement
 - a. Search incident to a lawful arrest
 - i. Search incident to a lawful arrest:
 1. Reasons: destruction of evidence, escape of arrestee, and protection of the officer.
 2. Arrestee's wingspan
 - a. Car: can search glove department any space arrestee can lunge or grab at.
 - b. Home: the room the arrestee was in; including closets and spaces that the arrestee can launch into.
 3. Once the arrestee has been taken out of the car or room; that space can no longer be searched until a search warrant is issued.
 4. A companion of the arrestee may be subject to search.
 - ii. Stop and Frisk:
 1. Where a police officer has reasonable and articulable suspicion that a suspect is armed and dangerous he may,

without probable cause, perform a pat-down search for concealed weapons.

2. Stop: temporary seizure (not arrest: long, going into system)
 3. Frisk: Reasonable articulable suspicion of criminal activity afoot of danger. Looks at (1) experience of the officer; (2) total circumstances; and (3) reasonable suspicion of danger.
 - a. Can be for weapon ONLY
 - b. Suspicion based on hearsay is sufficient
 - c. Permitted if suspect of involvement of a past crime
- iii. Plain View:
1. The police must be lawfully positioned and it must be immediately apparent that the evidence is incriminating.
 2. Plainview itself doesn't justify a seizure, but can provide PC to act; still may not be able to enter.
 3. Limitations?
 - a. Plain feel: just a pat down..fine
 - b. Flashlight ok
 - c. Binoculars courts are split
 - d. Cordless phone conversations no reasonable expectation of privacy
 - e. Overhead (satellite helicopters) ok
 - f. Thermal imaging NO this is a search
 - g. View must not be enhanced in such a way that vision wouldn't have been able to see otherwise.
- iv. Vehicle Exception:
1. Vehicle: anything that will carry a person or thing from one place to another.
 2. Motor vehicle: those things propelled or other power by land, sea or air.
 3. This exception doesn't have to be motor vehicles; warrantless search in vehicles.
 4. Need PC to arrest and PC to search
 5. Arguably police should "freeze" the car get a warrant then search, but the courts reject this because danger, potential mobility and less expectation of privacy than a home.
 6. CONTAINER RULE: If you have PC to search the container then you have no more and no less to search the container. If what you're looking for fits then can look; if it can't fit in the container then can't look there.
- v. Consent:
1. A search is proper without a warrant or pc where effective consent is given. To be effective, the D's consent must be voluntary and intelligent decision made without coercion.
 - a. Voluntariness is determined by the totality of the circumstances.

2. Invalid consent
 - a. If stop is invalid then consent is invalid
 - b. Deception
 - c. A false assertion that the officers have a present right to search
 - d. Threats or violence
 - e. Illegal arrest
3. Third Party: when one or more person has an interest in real or personal property and a warrantless search is valid if based on the consent of one of the person who possesses common authority over the property.
 - a. landlord can not give consent to search the apartment
 - b. university can not consent to a search of a dorm room
 - c. Those with Authority
 - i. Parent/Child: depends on age of the child and reasonable expectation of privacy. Child who pays rent to parent does not have authority.
 - ii. Apparent authority: babysitter can let police in
 - iii. Shared Authority: Shared authority to consent to a specific area shared by both parties; like roommates
- vi. Hot Pursuit
 1. A warrantless search is lawful when police are pursuing a dangerous suspect to apprehend him, and they may seize “mere” evidence as well as any contraband they find.
 2. Police may enter and search a private dwelling while in reasonable pursuit.
- vii. Exigent Circumstances
 1. in certain emergency circumstances where evidence may be lost or destroyed before a warrant can be obtained, a warrantless search and seizure is permitted.
 2. when it comes to residences police cannot generally enter on a nonemergency case w/o a warrant.
 3. will allow entry when an emergency w/o a warrant when:
 - a. hostage situation
 - b. hot pursuit
 - c. crime scene response
 - d. fast moving criminal investigation
7. Other Searches
 - a. Abandoned property
 - i. When a person has abandoned property, the police can search or seize that property without violating the Fourth Amendment rights.

- ii. Police may conduct warrantless search and seizures of garbage discarded in public areas because there is no expectancy of privacy.
- iii. Must balance reasonable person ; reasonable expectation of privacy versus police authority.
- b. Inventory Search
 - i. An officer is permitted to inventory all effects lawfully in police possession.
 - ii. Reasons for search: preserving property; guarding against claims of theft, vandalism, or police negligence; averting danger to the police or others; and so police don't give the owner an opportunity for others to safeguard the property.
- c. Administrative Searches
 - i. Administrative warrants are generally issued upon a lesser showing of probable cause. Periodic inspections regarding building codes and health regulations are permitted where reasonable, so as not to foster selective enforcement.
 - ii. Don't need PC.
 - iii. Not a focus of suspicion on a particular people, it's done for protection of the community.
 - iv. This is not a criminal search; routinely done to everyone not just one person target. Ct house, the hill, airplane security

SEIZURE

1. Seizure: freedom of movement as viewed by a reasonable person as caused by a police officer is restrained so as you're not free to go; show of authority or physical restraint as causation.

ADMISSIONS AND CONFESSIONS

1. Confession: A person is accepting responsibility for committing the crime; must be voluntary and authentic.
2. Admission: An incriminating statement; doesn't say you committed the crime.
3. Admissible: excluded all together
4. Weight: Jury considers and decides whether to believe it.
5. Voluntariness: Whether under the totality of the circumstances a reasonable person would believe consent was voluntarily granted.
 - a. Judge determines first then jury would determine
 - b. Anything not voluntary is coerced.
 - c. Common law
 - i. Condition of the suspect
 - language of the person
 - intoxication
 - mentally impaired
 - ii. Condition of the interrogation: was the suspect restricted from eating and drinking?

- iii. Tactic of interrogators
 - physical marks
 - mental duress
- 6. Standards over time
 - a. Voluntary is the test with Total Circumstance as the measure. Some are best tested here even with Miranda Rule.
 - b. New approach: FRCrim Pro #5: a person should be taken with unnecessary delay to a judicial person.
 - c. Miranda 1966

Custody Warning	Interrogation Waiver
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- d. Police start: Warn, Waive, Custody, Interrogation
- e. Lawyers start: Custody, Interrogated, Warn, Waive

MIRANDA WARNINGS

1. When an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way, he must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in the court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires, he may waive these rights. Unless both the above warnings and a knowing and intelligent waiver of rights are demonstrated by the prosecution, no evidence obtained as a result of a subsequent interrogation can be admitted against an accused.
2. Custody
 - a. MUST have custody to apply Miranda
 - b. Miranda not required for Terry Stop questioning
 - c. Comes in between Terry Stop and Arrest
 - d. Beckwith: no custody but there was interrogation: Miranda not required
3. Interrogation
 - a. MUST have interrogation for Miranda
 - b. If the gesture, questions, or what is directed at the suspect is likely to elicit an incriminating response than that can be called interrogation.
 - c. If statements are volunteered, then it is not an interrogation
 - d. Interrogation is usually custodial at a police station; but at homes or businesses it is considered a FAIMIAL SURROUNDING and no custody.
4. Warning
 - a. Just because arrested does not mean you need Miranda warnings, the minute the officer starts asking questions Miranda is needed.
 - b. The warning can be in any form so the arrestee understands
 - c. Must have the following:
 - i. you're under arrest
 - ii. right to remain silent (5th amendment)

- iii. right to a lawyer (6th amendment) if can't afford one will be provided
 - iv. anything you say can be used against you in court of law
 - v. you can stop talking at any time
 - d. The warning does not have to include the specific crime under investigation
5. Waiver
- a. Due Process Clause works for the defendant
 - b. Whenever the accused confronts the government offering a statement used against him; if the statement arose out of custodial interrogation before that statement can be used the police officer must warn the person and let know rights and that person must KNOWINGLY, VOLUNTARILY, and INTELLIGENTLY be waived.
 - c. If D asks for a lawyer, officers cannot come back and interrogate until that officer is there. If D wants to remain silent and does not ask for a lawyer, the police can come back and question.
 - d. Officers must wait a reasonable time between questioning
 - e. Silence will not suffice as waiver to rights; however, silence coupled with an understanding and conduct indicating waiver may serve as a valid waiver.
6. Four approaches to exclude statements and confessions
- a. Voluntariness Approach: to be admissible a statement must be voluntarily made based on the totality of the circumstances.
 - b. Miranda Standard: statements made during custodial interrogation are inadmissible in the absence of Miranda Warnings
 - c. Right to Counsel Approach: statements made during any critical stage of a criminal proceeding are inadmissible unless the defendant is afforded the right to counsel
 - d. Fruits of Illegal Conduct: even voluntary statements obtained as fruits of prior illegal searches and seizures are inadmissible.

IDENTIFICATION

- 1) Pre-indictment Identifications
- a) Any line-up, showup, or photo identification will be inadmissible as violative of due process where the identification is unnecessarily suggestive and conducive to irreparable mistaken identification.
 - i) Look at what line-up is or what is said
 - ii) Look at surrounding circumstances to make sure
 - b) Reliability: where an identification is both suggestive and unnecessary, it can still be admissible if it is reliable based on a totality of the circumstances approach; with the following factors considered:
 - i) The opportunity to view the criminal at the scene
 - ii) The witness degree of attention
 - iii) The accuracy of the witness' descriptions
 - iv) The degree of certainty of the witness
 - v) The time interval between the crime and the identification

- c) If identification is based on faulty procedure then can strike the evidence, witness testimony, and may be anything underneath.
- 2) Line-up (? Procedure)
 - a) Does not cause self-incrimination
 - b) No right to counsel exists at police lineups conducted BEFORE the accused is indicted.
 - c) You have min of and max of 8 in a line where the witness tries to determine if the culprit is within the line.
 - d) Don't fix the line-up because it gets rid of motion to suppress. Wait until the picture of the line-up is done and transcript is made; then fix it in court.
- 3) Photo Array (Police Procedure)
 - a) Witness is given a number or photographs and has to identify the culprit from the photos.
- 4) Show-up or ride-by (police procedure)
 - a) Victim drives by with police to try to find person at the scene of the crime to identify.
 - b) OR when the suspect is shown to the witness shortly after the crime (within the hour).
- 5) Second Showing (Not procedure)
 - a) Randomly seeing the person or seeing the person for a second time after the crime had been committed.
- 6) In Court Identification (Procedure; mostly a formality)
 - a) When a witness identifies the culprit in court
 - b) The inadmissibility of a previous out-of-court identification made at a lineup does not bar the witness from making an in-court identification of the accused at trial where the prosecution can clearly and convincingly show that the subsequent identification stemmed from an independent, "purging" source.
- 7) Independent Origin
 - a) When you don't need something to identify because you see all the time
 - i) Type A: see so often that don't need procedures to make valid identification
 - ii) Type B: 11 factors; close contact; with wrongdoer for a long period of time (ex: hostage)
 - b) Govt has one last escape: if line-up is flawed and person has independent origin (IO); then the jury can determine whether the IO is enough
- 8) TV Viewings (not procedure) and Composite Drawing (not necessarily procedure)
- 9) Post-Indictment lineups:
 - a) After formal charges have been filed the defendant has the right to the presence of an attorney at a lineup.
- 10) Self incrimination does NOT apply to line-ups, fingerprints, handwriting samples, blood tests, DNA samples, or voice samples; the only self incrimination is brought on by testimonial evidence.

PRE-TRIAL PROCEDURES

Time Line

Arrest	Booking	Initial App/ Bail	Prelim Hearing	Indictment/Info Grand Jury	Pre-trial motion	Arraignment	Trial
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- 1) Booking:
 - a. Administrative procedure
 - b. Certain identifications and evidentiary tests are performed
 - c. Neither the right to counsel nor the privilege against self-incrimination apply to protect the defendant during these preliminary tests.
- 2) Initial Hearing/Appearance/Bail
 - a. D is given formal notice of the charges against them and advised of rights, including appointment of counsel.
 - b. What occurs at hearing
 - i. Tell D what charge is and give a copy to D's attorney
 - ii. If more time is needed to get an attorney postponement is made, but someone has to step in
 - iii. If a lineup is ordered then the judge will sign that order here
 - iv. If D seems incompetent then either side can motion for mental exam
 - v. Pre-trial release "bail"
 - c. Bail
 - i. Bail bondsmen are agents for insurance basically
 - ii. Norm: before trial, pretrial detention is acceptable
 - iii. Two questions to ask:
 1. Is D a danger to the community?
 - a. Nature of crime; look at the warrant
 - b. Nature of injury to victim; circumstances known
 - c. Pre-trial hearing govt puts on evidence
 2. Is the person likely to reappear or flee?
 - a. Ties to the community
 - b. Employment
 3. Miscellaneous
 - a. Did the person test positively at arrest for drugs/alcohol
 - b. Mental impairment
 - iv. Bail Reform Act: Allows to put conditions in upon release
 1. If global; turn in passport
 2. drug tests on a regular basis
 3. reports to pre-trial agency regularly
- 3) Gerstein Hearing (Misdemeanors)
 - a. In situations where a defendant is arrested without a warrant or a prior indictment; there exists a 4th amendment right to a hearing to determine probable cause to detain.
 - b. This right only arises where significant restraints on the defendant's liberty are present.
 - c. This is similar to but not the same as a preliminary hearing.
 - d. No right to counsel exists and hearsay evidence is allowed.
- 4) Preliminary Hearing (Felonies)

- a. This is a screening device; not a trial; only takes about 15 mins.
 - b. Used to determine PC to prosecute; presentation of evidence is allowed by both sides and the D may assert any defenses.
 - c. D has a right to counsel at this stage
 - d. Defendant looks for:
 - i. Fatal Weakness: P leaves out one element; would be basis for dismissal
 - ii. Discovery: both formal and informal, is there enough?
 - iii. Impeachment: the witness has made an earlier inconsistent statement and opposing counsel will prove it.
 - iv. Most prosecutors would charge one out of the several because you can pick up the rest in Grand Jury
- 5) **Grand Jury Original**
- a. This occurs when nothing has happened before and this is the first step after arrest.
 - b. Indictment will be summons to appear (presentment) where D pleads guilty or not guilty.
 - c. Ex: Libby, Barry Bonds, Gov of NY, and Mayor of Detroit
- 6) Grand Jury/Indictment/Information
- a. INDICTMENT: a written accusation of charges against the F which a grand jury reviews to determine if the prosecution's evidence justifies a trial.
 - b. Prosecutor then determines whether to prosecute.
 - c. A federal grand jury is composed of between 16 and 23 persons, 12 of whom must agree to issue an indictment. They operate in secret.
 - d. D is not required to testify and D's attorney is not present.
 - e. GJ can ask questions, everyone leaves when done, and the GJ will decide indictment or IGNORAMUS
 - f. GJ must be told
 - i. Options: indict or not indict
 - ii. Standard for charges: Whether there was PC that each D committed those offenses.
 - g. If decide to do more than one charge that arise out of the same transaction then it is called JOINDER. GJ will hear evidence to pick up the others.
 - h. INFORMATION: An information is a written accusation of charges filed in the name of the state by a prosecutor on the basis of information submitted by police or private citizens.
 - i. Used where a jury indictment is not required or is waived; more common than indictment in felony cases and almost always used in misdemeanors.
- 7) Pre-Trial Motions
- a. Most motions are for the defense; if missed then there is waiver
 - b. Motion to Dismiss:
 - i. Constitutional Issue
 - ii. Lack of Jurisdiction
 - iii. Double Jeopardy

- iv. Lack of Speedy Trial
 - c. Motion to Suppress
 - i. Search and Seizure issues
 - ii. Miranda
 - iii. Identification
 - d. Motion for change of Venue and other Miscellaneous motions
- 8) Arraignment/ Pleas
- a. Once have presentment (arraignment) start to get ready for trial
 - b. At this stage the D is called upon to answer the indictment, elect a trial by judge or jury, and enter plea.
 - c. The Jencks Acts: discovery protection allows D to see all documents, all witness testimony, and gets to see what was said in GJ.
 - i. GJ proceedings are meant to be confidential until D has been charged in open court. If there is a leak the person who leaked can be held in contempt.
 - d. Pleas:
 - i. If D does not plead a not guilty, then a plea will be entered for them.
 - ii. Guilty
 - 1. MUST be VOLUNTARY, KNOWING and INTELLIGENT
 - 2. The judge must be personally certain that the defendant understands the following:
 - a. Right not to plead guilty
 - b. That by pleading guilty, the right to a jury trial is waived
 - c. Right to a lawyer
 - d. The nature of the charge
 - e. The maximum possible sentence and any mandatory minimum penalty
 - f. Any promises?
 - 3. Must have a FACTUAL basis for a guilty plea
 - 4. Withdraw Guilty Plea
 - a. Before Sentencing: “fair and just” easier than after
 - b. After Sentencing: Manifest injustice; it is unjust not to allow withdraw of plea.
 - c. “boomerang effect”: once you put in guilty plea it is hard to get out of it.
 - iii. Alford Plea
 - 1. This is a guilty plea and an exception to the general rule
 - 2. D is allowed to pled to an offense and say not guilty in order to except a lesser charge than what is faced.
 - a. Has to be factual basis for charge
 - b. Can claim innocence
 - c. But plead guilty for lesser charge

3. If no other crimes and say not guilty then you go on that charge; some still say it is an Alford plea when there is only a single charge and the person insists that not guilty when factual basis does exist.
 4. Usually for instances when there is a greater charge that can be brought down.
 - iv. Not Guilty
 - v. No Contest (nolo contendere): By pleading no contest a defendant can forego a trial without admitting guilt. This plea is admissible to prove guilt both in subsequent criminal and civil cases.
 - vi. Conditional Plea
 1. A defendant can enter a conditional plea of guilty or nolo contendere only with the consent of the court and with conditions.
- 9) Pre-Trial Rights
- a. Plea agreement
 - i. It's similar to a settlement
 - ii. Judge's clerk would make entry because judge wouldn't be present
 - iii. When evidence is overwhelming you can guess the result
 1. but when not sure of result you have to determine risk/benefits/uncertainties and when evidence is really lacking then result is non-sufficient for a charge.
 - b. DOUBLE JEOPARDY:
 - i. DJ only applies when the hearing will determine guilt or innocence; doesn't apply at prelim hearing, Gerstein, or Grand Jury
 - ii. Trial must go to conclusion
 - iii. The D and Prosecutor, but mainly D, has a vested right in the jury that is chosen.
 - iv. Jeopardy ATTACHES:
 1. Non-jury trial: when the first witness is sworn and the court begins to hear the evidence jeopardy attaches
 2. jury trial: when the jury is impaneled and sworn
 - v. If Interruption:
 1. can't find witnesses and so charge gets dropped = DJ
 2. judge wants to play golf and try case later = DJ
 3. at close of govt's case insufficient so case dismissed = DJ
 4. Ct house blew up = No DJ
 5. MANIFEST NECESSITY if grave reason that it is stopped= NO DJ
 6. Hung Jury = No DJ
 7. Ct Room outburst: No DJ
 - vi. If judge makes trial error/procedural error this does not bar retrial=No DJ
 - vii. Insufficient evidence ends the case and bars reprosecution = DJ

- viii. If you do get a new trial; typically the judge can't give more than first trial gave for punishment. Not considered DJ.
- c. Blockburger Test
 - i. If D is charged with multiple charges but two or more may be the same charge with a different name; have to look to avoid Double Jeopardy.
 - ii. Is there a proof of a fact of an element that the second offense does not have and the second offense have proof of a fact of an element that the first offense does not have. HAS TO GO BOTH WAYS.
 - iii. Doubts go in favor of the defendant
 - iv. Examples to look at
 - 1. Assault with a dangerous weapon and carrying a dangerous weapon (two separate offenses)
 - 2. Forgery and Uttering (two separate offenses)
 - 3. Larceny and Unauthorized Use of a Vehicle
 - 4. Possession of a firearm and Carrying a deadly weapon
 - 5. Assault with a dangerous weapon and Simple Assault (LIO)
- d. Lesser Included Offenses (LIO)
 - i. Once you have stated the greater crime you don't have to state the lesser crime.
 - ii. Many crimes that Don't pass the Blockburger Test are LIOs
- e. Dual Sovereignty
 - i. Some states have statutes that say once federal has prosecuted then the state won't. However, some states don't follow this.
 - ii. On the Federal level they will prosecute something even if states have prosecuted it already.
- f. Nonconstitutional Dismissal
 - i. Government has not been prompt in presenting the case for trial.
 - ii. Balance the faults
 - iii. DWP= dismissed for want of prosecution
 - 1. without prejudice
 - 2. with prejudice = ends the case
 - 3. Standard of Review = Abuse of Discretion
- g. SPEEDY TRIAL
 - i. The sixth amendment guarantees a criminal defendant the right to a speedy trial. Violation of the right results in a complete dismissal of the charges.
 - ii. ATTACHES once the defendant has become an accused such as upon arrest or filing charges.
 - iii. History:
 - 1. formula demand & waiver if no demand then it was waived
 - 2. New approach: statutory approach; lead with the nonconstitutional dismissal then go for this.
 - iv. Must look at the nature of the charge; only when have major charge is Barker applied.

- v. **Barker v. WINGO: The Balance Test**
 - 1. Length of delay: when did prosecution begin up to point where trial to begin
 - 2. Causes for delay: mutual, defendant, or govt continuance or an institutional delay (the court) “not reached” court not ready.
 - 3. Assertion of the right: D says let the record show we assert right to speedy trial
 - 4. Prejudice: How has D been harmed by the delay
- vi. Every time D makes a continuance this takes away from argument for D to dismiss for delay.
- vii. An institutional delay is weighed the least.
- viii. **LOVASCO RULE**
 - 1. Even if his defense is somewhat prejudiced by the lapse of time between commission of the crimes and the initiation of prosecution, prosecuting a defendant following investigative delay does not deprive him of due process. Proof of actual prejudice is a necessary prerequisite to and makes a due process claim concrete and ripe for adjudication, but it does not make the claim automatically valid.

TRIAL

- 1) **Timeline**
 - a. Jury Array (Voire Dire)
 - b. Jury Panel
 - c. Opening Statement
 - d. Witness
 - i. Govt
 - ii. Defendant
 - e. Close of evidence and Closing Arguments
 - f. Jury Instruction
 - g. Deliberations
- 2) **Allocations of Criminal Burden**
 - a. Presumption of evidence: starts at the beginning of trial; it is up to the GOVT to overcome the presumption of evidence
 - b. Inference: JURY has choice to draw inference or not; ex: person charged with recent possession of stolen property, the jury may infer that the person also stole it.
 - c. Burden of Persuasion: GOVT has the burden to prove beyond a reasonable doubt.
 - d. Burden of Proceeding: For an affirmative defense the DEFENSE have to raise and put on evidence
 - e. These burdens NEVER shift.
 - f. The defendant has options: can do general denial depending on the weakness of the case or an affirmative defense

APPEAL

- 1) There is no guaranteed right to an appeal. However, states can provide for the right by a statute.
- 2) Good reasons for appeal
 - a. Judge erroneously allows confession from a Miranda violation
 - b. Error in sufficiency judgment
 - c. JNOV was in error
- 3) Effect of Reversal on appeal
 - a. Following a reversal of a conviction on appeal, a defendant can be retried; however, on retrial it is prejudicial error and a violation of both due process and double jeopardy to be tried for any crime more serious than the crime for which D was convicted.

Critical Stages
<ol style="list-style-type: none">1. Custodial Interrogation: Miranda2. Initial Hearing3. Post-Indictment line-ups (Pretrial)4. Preliminary Hearing5. Arraignment6. Pre-trial motions7. Pleas8. Felony Trials9. Misdemeanors where imprisonment is actually imposed10. Sentencing11. Appeals as a matter of right

Non-Critical Stages
<ol style="list-style-type: none">1. Terry-Stop/ Street Encounters2. Booking3. Preliminary Identification procedures4. Pre-Indictment Line-ups5. Gerstein Hearings (have to be asked for)6. Non-adversarial detention hearings7. Grand Jury/ Original Grand Jury8. Discretionary Appeals9. Probation and Parole Revocation10. Habeas Corpus Proceedings