Criminal Procedure I, Spring 2013 (5th and 6th A materials) OUTLINE 1 of 2

**JURISPRUDENCE**

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| **STATE COURT** | **FEDERAL COURT** |
| **Residual Due Process/Due Process Standing Alone** | |
| 14th A (1867)  (Each state may have its own history of what comports with its own ethos or state constitution.) | 5th A (1791)  DP can call for different things in different contexts (what is “due” in a search is different than what is “due” in an eyewitness id parade or an interrogation. |
| **Bill of Rights (4th, 5th S/I, 6th R/C)** | |
| Indirect via 14th A (incorporation in the 1960’s)  Once incorporated to the States, these rights apply the same way to State officers and Federal officers. | Direct |

Circs where review of officer’s subjective intent is allowed highlighted in green;

**Fruit of the Poisonous Tree Doctrine** is a “but for” actual causation doctrine. But for the “poisonous tree” [constitutional violation] would the police have had the “fruit” [evidence in its current state and form] that they did? **[see OUTLINE 2 of 2 on 4th A]**

**TOPIC and CASE CHART**

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| **ENTRAPMENT DEFENSE (4TH A- related)**  This is a statutory defense (due process arguments for this defense never go anywhere).  Not all jurisdictions allow this defense. US Courts do. | Entrapment defense has two principal versions:   * Subjective test: looks at D’s “predisposition” to commit the crime—if no evidence that they were otherwise predisposed before induced by police. (Burden on prosecution to show predisposition. A factual matter for jury.) [Federal courts apply this test—this was a Federal Q case, so Federal statutory intent was applied] * Objective test: looks at police conduct; did police offer inducements that are enough or of a sort to induce normally law-abiding citizens to break the law? (Burden on D to show inducement, usu. by a preponderance of evidence. Judge determines if D has met the burden to raise the defense.) [To find police responsible under this test, conduct would have to be much more outrageous than it was in Jacobson.] |
| **Jacobson** v US, 1992  (Purchased porn by mail before it was illegal; then gov’t solicited to purchase child porn thru mail after it was illegal to do so. Two years later, he bought. | Court (J. White) applied the subjective test—government had to prove beyond a reasonable doubt that Jacobson was predisposed to commit the crime before they made multiple solicitations over a period of a couple years.  Dissent (O’Connor, Rehnquist, Kennedy and Scalia): Court errs in not distinguishing between preliminary government contact and inducing contact—so that government’s establishing contact with D is the same, essentially, as suggesting that D commit the crime. Although dissent doesn’t say they are applying the objective test, they are focused very much on the action of the police, rather than the predisposition of the D. |
| **CONFESSIONS** | There are three ways to challenge confessions:   1. Due Process 2. 5th A protection against self-incrimination  * Miranda  1. 6th A right to counsel (R/C) |
| **EYEWITNESS ID**  Two protections apply: Residual DP and 6th A R/C (if after start of formal proceedings)  (Not 4th—no reasonable expectation of privacy for the physical appearance we routinely expose; not 5th—our appearance is not “testimony.”)  Fed courts apply Constitutional rights analysis to Eyewitness ID challenges. Oregon has passed statute giving greater protections (trying to minimize false IDs). | **Two types of ID**  **ID made out of court:** evidence suppressed if made in violation of 6th A [RULE]  **ID made in court:** *Fruit of poisonous tree*→ If 6A violated out of court, but witness IDs D again IN COURT, evidence suppressed unless State meets burden of proof of showing there is clear and convincing evidence of an independent basis for the in court ID [STANDARD]  Residual DP applies to all ID processes (including photo throw downs)  Burden on D to show DP violated in an eyewitness id event (must show **unnecessarily suggestive** id process—2 standards to apply).   * Necessary: if victim is dying in hospital, Court has allowed that a suggestive id viewing was allowable * Suggestive: [assess on precise facts]   If D convinces judge it was an unnecessarily suggestive id process, must show that the process resulted in a **very substantial likelihood of misidentification** (for an out-of-court ID).  Even if the out-of-court ID is excluded, the in-court id is allowed unless the out-of-court process was so bad that it leads to an **irreparable misidentification.**  Hard to sort out “substantial likelihood” from “irreparable.” Court looks at the circs at the time of the crime and the nature of the ID proceeding to determine if there was a substantial likelihood (how well lit was the crime scene, how long duration, how frightening). If there was subst likelihood, then assess if it is reparable (can repeat a photo throwdown with a different image of D, etc)?  Only 1 case where eyewitness ID thrown out. |
| **Perry** v NH, 2012  Car break-ins reported, police respond and talk to subject in parking lot. Officer talks with apartment-dwelling caller who spontaneously looks out her window and id’s subject (only African-American civilian standing with a couple of officers). 1 month later, witness could not id subject in a photo throw down.  (In Oregon, burden on Prosecution to show it was fair, then to Defense to show it wasn’t) | Where the suggestive circumstances of an eyewitness identification are not arranged by the police, should there be a pre-trial screening to ensure there is no substantial likelihood of misidentification? Burden on Defense to start.  Court found that purpose of the protection was to inhibit bad police action, not to exclude otherwise reliable evidence from the jury. (Ginsburg: Due Process exists to protect us from the government, not to ensure factual accuracy at trial.) Also, concerns about creating such a precedent, which would invalidate many/ most informal eyewitness ids. “Out of court identifications volunteered by witnesses are also likely to involve suggestive circumstances.”  Sotomayor’s dissent view is that Due Process should prevent substantial likelihood of misidentification (accuracy concerns). |
| **DUE PROCESS STANDING ALONE (Residual Due Process)**  Mostly the same for State and Fed actors, but not always. Example: Fed courts require 12 of 12 jury votes for verdict; some states (OR and LA) allow 10 of 12. | There’s no rule or standard about residual dp that applies to all contexts. It’s a question: what process is due to a subject in this particular set of circumstances?  In interrogations, the question was whether actual coercion (physical abuse) was used or psychological coercion of such an extent that “the will of the suspect was overborne.”  4 strands of thinking about what “Due Process” means:   * Rule of Law: Transparent law (not too vague), applied the same way to everyone * Bill of Rights: Due process seen as incorporating the rights set out in the Bill of Rights (emphasis of the Warren Court’s hey-days—1960s) * Accurate Procedures: punish the right people, not the wrong people (no mob trials, no counsel appointed day of trial; no confessions from torture; no racial exclusion from jury) * Fundamental Fairness: the sort of practice any free society ought to provide; whether right is so fundamental in DP that a refusal of that right is a denial of DP; does the conduct in question “shock the conscience of the Court”?   Courts use these on an ad-hoc basis to discuss where there has or hasn’t been a violation of DP. Hard to predict which lens they’ll apply.  4 approaches to Constitutional interpretation (what is “DP”?): Ethos, Prudential, Textual, Structural (out of **Hurtado**, below) |
| **Hurtado** v California, 1884  D charged with felony under state law; no grand jury; contended 14th A DP violated (lost on this argument—which is still good law) | Meaning of Due Process  4 approaches to DP (each examined by the Court):   * Ethos: the values and traditions of our system of law; natural law; civilized society * Prudential: practical wisdom of using the courts one way vs. another; practicalities of effect of doing things this way; DP may not be a fixed standard, may change over time * Textual: language of the document, constitution or statute (5th A and 14th A use the same terminology) * Structural: federalism/sep of powers; relationship of citizens to govt; States retain the power to design and administer their own systems of justice with the due process clause functioning as a practical restraint to acceptable procedures |
| **Duncan** v Louisiana, 1968 | Trial by jury required in state criminal trials. LA had had law that criminal trials were punishment was less than some period (two years) did not get a jury.  Supreme Court held that trial by jury was a fundamental right—required by the ethos of our legal system. |
| **Medina** v California, 1992  (what matters for us is how stand-alone DP is treated, not the specifics of the case—determination of competency)  After this case, a different test for residual DP is applied in criminal vs. civil contexts. | Court view historical practices as probative (ethos argument) and applies caselaw of **Patterson** v NY a criminal case (not the civil case D wanted applied). Substantial deference to legislative judgments and no weight to what would benefit D (D’s interests). Unless the history is on the D’s side, the legislative decision is likely to be upheld.  DP provides basic safeguards only. DP doesn’t allow proscription of detailed procedures to the courts (as in the civil case the Defense wanted to apply)  Kennedy dissent sees very little DP outside of the Bill of Rights (i.e., very little residual DP) |
| **5TH AMENDMENT**  **RIGHT AGAINST SELF-INCRIMINATION (IMMUNITY)**  Always applied to Federal government. Incorporated to the states in 1964 (Malloy v Hogan)  5th A is *NOT offense-specific*  5th A is about **coercion**, not custody  For Actual Coercion, the rules and standards are the same as for Due Process | **Self-Incrimination** claim must meet three elements: 1) compulsion, 2) incrimination (link in the chain), and 3) testimony (witness against self). Privilege must be explicitly claimed.  Notes: Immunity must be either “transactional” (no prosecution for matters to which immunized/compelled testimony relates), or “Use and derivative use” (no prosecution based on the compelled/immunized testimony or any evidence derived therefrom). Any lesser immunity violates the 5th A Self-Incrim protection (“use” only immunity not adequate to comply with 5th A). A person cannot decline immunity.  Incrimination need not be in the course of a particular trial. Can be any link in the chain that might lead to criminal sanction.  Testimony is questions or internal information you provide about yourself; it’s more than providing physical evidence (including records), or allowing view of that which is obvious (eyewitness line up), or providing booking information (name, dob, address, etc.). Spoken questions with spoken answers (where D has to figure out if should lie or confess or refuse and face sanctions—the “cruel trilemma”). |
| **Counselman** v Hitchcock, 1892 | IMMUNITY case: 5th A protection against S/I is not limited to trial testimony in a criminal case against himself. In this case, person seeking to invoke the right was testifying in front of a grand jury (not at trial) in a criminal case against him. If testimony is to be compelled, full-scope immunity must be offered. (Statutory immunity in this case wasn’t broad enough.) |
| **Brown** v Walker, 1896 | IMMUNITY case: Transactional immunity statute upheld. (Much broader than in previous case.) Lots of stuff about even if you are ashamed, must testify if immunized.  Dicta: immunity from Federal prosecution would also extend to state immunity on the matters testified about. |
| **Ullman** v US, 1956 | IMMUNITY case: 5th A right against S/I may be removed if an immunity grant is given. That is, even if a testifier doesn’t want to testify, he can be forced to provided that he is properly immunized (whether he likes it or not) against prosecution. Fact that he will be embarrassed or lose his job as a result of his testimony is not enough to allow him to invoke 5th A right against S/I (right to silence). |
| **Kastigar** v US, 1972 | IMMUNITY case: Use and derivative use immunity upheld (narrower than transactional, but broader than use-only immunity). It’s enough to satisfy the 5th A right against S/I. If prosecuted later, burden on the prosecution to prove that the evidence it uses is legitimate and “wholly independent” from the immunized/ compelled testimony. |
| US v **North**, 1990 | IMMUNITY case: Oliver testifying before Senate (on live TV) with immunity about Iran-Contra. Subsequent prosecution took great pains to keep his staff from seeing any of the immunized testimony and made no direct use of it. Trial witnesses were found to have been exposed to it, though, so appeals court ordered district court to insure that each line of the prosecution’s case was analyzed to make sure that content and source were not derived from the televised immunized testimony. Impossible to achieve so prosecution dropped. And the damn jackass is on talk radio and tv now. |
| US v **Helmsley**, 1991 | IMMUNITY case: reporter hearing about Leona’s immunized testimony in a state case got interested in her, and began investigative reporting on whether she had used corporate money for her own use. At least partly as a result of the article on this topic, she was prosecuted for tax fraud by the Feds. She claimed immunity in state case should extend to the Federal prosecution. Court of appeals found the connection too attenuated to allow immunity to transfer from one case to the other. |
| US v **Balsys**, 1998 | IMMUNITY case: 5th A does not extend to protect against the risk of prosecution in a foreign country |
| **Griffen** v CA, 1965 | COMPULSION case: Prosecutor not allowed to comment on D’s decision not to take the stand |
| **Carter** v KY, 1981 | COMPULSION case: D who chooses not to testify is entitled to jury instruction that they may *not* draw inferences from his lack of testimony |
| **Garrity** v NJ, 1967 | COMPULSION case: State employees (police) required by state law to testify about taking bribes in course of an internal investigation. Would be terminated for not participating fully in the investigation. Court held that potential job loss was compulsion. |
| **Williams** v Florida, 1970 | COMPULSION case: State law requiring D to give notice of alibi defense prior to trial was not compulsion (pressure no different than is generally involved in a criminal trial) |
| OH Adult Parole Authority v **Woodward**, 1998 | COMPULSION case: Voluntary inmate interview requirement for clemency/parole process not compulsion (like **Williams** v Florida). |
| **McKune** v Lile, 2002 | COMPULSION case: Sex offender offered treatment while in state custody was required to provide detailed information of sexual history, including undisclosed crimes. Failure to do so would remove him from program, including program perks (better visiting and tv). This requirement was not compulsion under the 5th A. [A parallel case in the 9th C was decided the opposite way in 2005] |
| **Hoffman** v US, 1951 | INCRIMINATION case: coined the phrase defining incrimination as “that which would furnish a link in the chain of evidence needed to prosecute the claimant.” [Still the formulation used.]  Privilege available if it be “evident from the implications of the question, in the setting in which it is asked, that a responsive answer... or an explanation of why it cannot be answered might be dangerous b/c injurious disclosure could result.” [No longer seen as applicable in such sweeping terms.] |
| **Hibel** v 6th Judicial District Court of Nevada, 2004 | INCRIMINATION case: **Hoffman’s** broad sweep of applicability seemingly limited a bit. Now privilege does not include “imaginary and unsubstantial risks that no reasonable man would credit.” |
| US v **Ward**, 1980 | INCRIMINATION case: How to tell a “criminal” sanction from a “civil” one? (5th A doesn’t protect against civil penalties.) It’s more than which code the prohibition appears in or how it is labeled. An excessive “civil” penalty could be “criminal” for purposes of 5th A.  Court used 7 factors it had developed in an earlier case (KY v **Mendoza-Martinez**). “Whether sanction involves an affirmative disability or restraint; whether has been historically regarded as punishment; whether it comes into play only in a finding of scienter *[mens rea]*; whether it will promote traditional aims of punishment—retribution or deterrence; whether the behavior to which the sanction applies is already a crime; whether [something I don’t understand]; whether sanction appears excessive in relation to what it is supposed to accomplish.” [modifications from the original] |
| **Schmerber** v California, 1966  (See also 4th A material from 2nd half of the term) | TESTIMONY case: Blood taken from D for blood-alcohol test was not “testimonial.” |
| **Doe** v US, 1988 | TESTIMONY case: Court held that banking records were not “testimonial” so D could be obligated to sign a release for unspecified (i.e., he wasn’t asked to name the banks he used) account records.  Stevens dissented: use of mind (in executing signature to a document authorizing records production) to help the prosecution is different from production of physical evidence. |
| Pennsylvania v **Muniz**, 1990  6th birthday question | TESTIMONY case: Booking info is not testimonial (nor is slurred speech), but the question “what was the date of your sixth birthday?” was testimonial b/c he had to choose between answering truthfully (“I don’t know”—which would clearly produce inference that he was not lucid) and lying (guessing what the date was).  Concurring opinion said that asking D to perform mental exercises (akin to physical test for drunkenness) was ok. |
| **5th AMENDMENT – PROPHYLACTIC:**  **MIRANDA**  ***Miranda* was 1966**  Is not a direct Constitutional doctrine, just a doctrine that is intended to protect the 5th A S/I right (“prophylactic” is the Court’s word of choice—which must be why Scalia hates Miranda).  “General, on-the-scene questioning” does not trigger Miranda.  Generally, “was the warning given?” is an objective inquiry, while “was the waiver knowing and intelligent?” is a bit more of a subjective inquiry.  As 5th A doctrine, Miranda is *NOT offense-specific*  Exceptions: Routine booking information; Volunteered information; Public Safety; Undercover cop. | Applies to Custodial Interrogation only. Custody is restriction akin to formal arrest in mind of reasonable person (Terry-frisk stops, and traffic stops are not “custody”). (NOTE: this is an objective, not subjective test—don’t care if the person in question didn’t feel they could leave.) Police officer’s belief about whether person is in custody is irrelevant. Interrogation is words or actions or anything else which a reasonable police officer would believe would elicit an incriminating response. It doesn’t matter if the actual officer really believed that it would elicit such a response (subjective), although that may be evidence about what a “reasonable” officer “would” believe. [Clearly a direct question qualifies; remarks made to another officer might if the officers knew subject had a “peculiar susceptibility” regarding those remarks.]  Custodial interrogation is presumed to be coercive. If police have to give the warnings, shows that they know and are prepared to respect the subject’s rights. (Miranda lets subject cut off questioning.)  Miranda rights must be invoked. They can be waived if waiver is voluntary, knowing and intelligent. (Waiver can look like behaving inconsistently with the previous assertion of rights.)  Police may lie about everything but may not lie about D’s rights. |
| **Bram** v US, 1897 | 5th A protection applies to pre-trial investigation with Federal police. |
| Voluntariness Cases  Supreme Court mistrustful of the states’ fact-finding.  In interrogations, the question of voluntariness was whether actual coercion (physical abuse) was used or psychological coercion of such an extent that “the will of the suspect was overborne.” | Even though 5th A didn’t apply to states yet, Supreme Court held that confessions had to be “voluntary”—that is, not coerced.  Examples: **Brown** v Mississippi, 1936 (men beaten with leather straps with buckles until confessed); Ashcraft v Tennessee, 1944 (36 hour non-stop interrogation with cops “in relays”); **Watts** v Indiana, 1949 (days of continual interrogation without adequate sleep or food). |
| **Johnson v Zerbst**, 1938  Pre-Miranda, but set out standards for what a waiver is that Court has applied to a number of rights. | Waiver must be” voluntary” (not coerced) and a “knowing and intelligent relinquishment or abandonment of a known right or privilege.” Each case depends on “the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.” |
| **Malloy** v Hogan, 1964 | 5THA incorporated to the states |
| **Escobedo** v Illinois, 1964  This case has dropped out now; cite Miranda on 5th A s/i and Massiah on 6th R/C | “Trial balloon”/transitional pre-**Miranda** case. Court’s language sounds more like “fundamental fairness” than anything else. Confession was excluded when police incorrectly told D that his lawyer “didn’t want to see him” (before the start of formal proceedings). |
| **Miranda** v Arizona, 1966  Although this is a case about R/C it does not mention the 6th A. Court essentially made up a 5th A-esque R/C which is not in the Constitution. | Set standard for cases involving Custodial Interrogation.  Holding: Exclude evidence gathered w/o procedure to ensure protection of right to avoid self-incrimination. The Miranda warning is the procedural safeguards unless other equally effective safeguards are in place when a person is subject to custodial interrogation. |
| **Berkemer** v McCarty, 1984  Traffic stops are not custody:   * they are presumptively temporary and brief * public nature of a traffic stop and the typical presence of only one or two police officers | CUSTODY case.  Highlights from CALI lessons (on line)  Officer stopped a vehicle he observed weaving between lanes on the highway. At various points in his investigation of a possible DUI offense, the officer, without providing Miranda warnings, asked the driver questions and received incriminating answers.  “One of the principal advantages of the doctrine that suspects must be given warnings before being interrogated while in custody is the clarity of the rule," the Court refused to draw a distinction based on the severity of the crime for which a suspect is being questioned or detained. |
| Minnesota v **Murphy**, 1984 | CUSTODY case: Appointment with probation counselor was not “in custody”—scheduled at mutually convenient time, familiar surroundings, and absence of reasonable perception that interrogation will go on until confession given. Even if D was worried that probation would be rescinded if he walked out, that was not “in custody.” |
| **Stansbury** v California, 1994 | CUSTODY case: intent of police officers is irrelevant in determining if engagement with police is “custody.” Police came to D’s home and told him he was a possible witness to a murder. Got him to accompany them to station and then he made incriminating statements before being Mirandized. Fact that they didn’t think he was their main suspect until after he incriminated himself—so weren’t “taking him into custody”—was irrelevant to the Court. Remanded to the lower court for new determination of whether he was in custody. |
| **JDB** v North Carolina, 2011  13 year old boy pulled out of class into Principal’s office and interviewed by police officer in presence of principal and asst principal (who kept telling him to confess, but somehow never bothered to call the boy’s custodial grandmother) was custody for purposes of Miranda, even if a reasonable adult would have felt free to leave. | CUSTODY case: can the custody determination in Miranda include consideration of the subject’s age? [YES per the Court/Sotomayor]  “so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis will be consistent with the objective nature of the test. That is not to say that a child’s age will be a determinative, or even significant, factor in every case.”  Now know that a “reasonable subject” inquiry is modified in two instances: a reasonable blind subject and a reasonable juvenile. Still not a subjective approach.  Dissent worried and wound up around the slippery slope issue. |
| Howes v **Fields**, 2012  A reasonable prisoner in this situation would not feel restriction in this set of circs. | CUSTODY case: Prisoner serving time on one crime was interviewed by deputies about another crime. Not Mirandized. Violation? No, because not “in custody” for purposes of Miranda.  Majority (Alito opinion): subject was not in custody: not facing the shock of arrest; unlikely to be lured into talking by the promise of release; knows deputies cannot lengthen his jail term; lack of freedom is already part of his daily life; being in interview room—away from other inmates---does not take him away from support of friends and family. |
| RI v. **Innis**, 1980  Innis murdered a taxi driver and tossed the shotgun in the woods. As being transported, one officer said to another that it would be terrible if one of the disabled little girls in the nearby school were to find the gun and shot herself with it. Innis thereupon directed officers to the gun.  His “statement” (directions to the gun) was admissible. | INTERROGATION case: the "functional equivalent" of express questioning as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."  What the actual, specific officer thought is evidence about what a “reasonable police officer” would have thought, but it is not dispositive. “Where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect."  “Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect." |
| Illinois v **Perkins**, 1990  Miranda does not apply to undercover interrogations (no coercion) **unlike 6th A** (Massiah) | INTERROGATION case: Miranda rights not violated if questioned by an undercover police agent (while in custody in jail). Because Miranda is designed to protect against feeling of coercion, it does not apply to bragging, since you do not feel coerced by the police when you don’t know that’s who you are talking to. |
| Michigan v **Mosley**, 1975 | INVOCATION case: Once right to silence invoked, “the critical safeguard is a person's “right to cut off questioning.” Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his “right to cut off questioning” was “scrupulously honored.”  (Duration of break off, different officer, different location, different subject/crime in new intvw, re-Mirandized) |
| **Edwards** v Arizona, 1981 | INVOCATION / WAIVER case: D arrested, Mirandized and invoked R/C. Taken to county jail. Next morning, two other detectives came to the jail; he was told he “had to” talk to them. Incriminated self. Court found did not waive. Police cannot question until counsel has been provided, unless D initiates. |
| Arizona v **Roberson**, 1988 | INVOCATION case: D arrested for burglary and Mirandized. Invoked R/C. 3 days later interviewed about a different burglary—reMirandized and talked. Statements deemed inadmissible under Edwards. (Difference between this case and Edwards is that here there were two separate crimes about which D was interviewed—one at 1st and another at 2nd. In Edwards, intvwd twice re same crime). Doesn’t matter if interviewers about 2nd crime were unaware of invocation at 1st interview. |
| **Minnick** v Mississippi, 1990 | INVOCATION / WAIVER case: If D invokes R/C, meets with Counsel and then is (w/o counsel) re-Mirandized and interrogated, it violates Miranda. That is, a single meeting with an attorney is not enough to restart the Miranda cycle from scratch. |
| Oregon v **Bradshaw**, 1983 | INVOCATION / WAIVER case: Although D had invoked (and it was being respected), when he was being transported to another facility, he asked “what is going to happen to me now?” Court held this “evinced a willingness and a desire for a generalized discussion about the investigation” sufficient to waive the right previously invoked. In conversation with officer, made incriminating remarks and they were admitted at trial. |
| **Davis** v US, 1994 | INVOCATION case: invocation / request for counsel must be unambiguous, though doesn’t need to be speech of “an Oxford don.”  Not enough to say the word attorney or “maybe I should” or things like that. Examples of ambiguous invocations from other cases: “can I have my probation officer here?”; “I want an attorney before this goes very much further” |
| Maryland v **Shatzer**, 2010 | INVOCATION case: Invocation of R/C to questioning about a crime was no longer “still in effect” when questioning recommenced 2.5 years later. Break in the “custody” element in that time was sufficient to remove coercive effect against which Miranda protects. Scalia said a 14-day break in custody was enough that the invocation of R/C would have to be done again—an older invocation wouldn’t carry forward. |
| Moran v **Burbine**, 1986 | WAIVER case: D waived Miranda rights without being aware that his public defender was trying to reach him (and had been told that he would not be interrogated that night). Court was very displeased that police had lied to the attorney.  Because the D didn’t know that his lawyer was being kept at arm’s length, he wasn’t influenced/coerced by that fact. Unlike Escobedo v Illinois, where D was falsely told his lawyer didn’t want to see him.  Dissent believed that due process was violated and that the lie of omission was essentially the same as a direct lie about a D’s rights under Miranda. |
| **Miller** v Fenton, 1986 | WAIVER case: D’s waiver based on false case facts (told victim was dead) and false claims of sympathy/friendship by police officer was a valid waiver. |
| Colorado v **Spring**, 1987 | WAIVER case: D’s waiver was valid even though he wasn’t told all the crimes he was being investigated for. |
| Berghuis v **Thompkins**, 2010 | INVOCATION / WAIVER case: D demonstrated ability to understand the warning but refused to sign warning acknowledgment. Sat silent through most of the 2 hour interrogation, then incriminated. Because didn’t verbalize the Right to Silence, it was not invoked. Police otherwise have to guess what silence means. (Parallel US v **Davis**, must be unambiguous when invoking.) Silence is “waived” when person talks. |
| **Harris** v NY, 1971 | CONSEQUENCES case: statements made in violation of Miranda may be used as impeachment evidence. (Miranda is not license to perjure.) |
| **Doyle** v Ohio, 1976 | CONSEQUENCES case: post-arrest/post-Miranda silence may not be used as impeachment evidence (“if you had a real alibi, why didn’t you just tell it to the police when they arrested you?”). It was “fundamentally unfair” in the Court’s view that invoking Miranda would be held against a D. (More of a due process issue than a Miranda issue per se.) |
| **Jenkins** v Anderson, 1980 | CONSEQUENCES case: a two week period of pre-arrest silence (killed, then came forward two weeks later and said it was self-defense) was an allowable topic of cross-examination, not entitled to the same constitutional protection as a post-arrest silence. |
| California v **Prysock**, 1981 | CONSEQUENCES case: failure to give the warnings in exactly the same phrase as Miranda case will not invalidate them. Has to be adequate to communicate the “gist” of the warnings, not word for word. |
| Duckworth v **Egan**, 1989 | CONSEQUENCES case: when officer pointed out (truthfully in his jurisdiction) that “we have no way of giving you a lawyer, but one will be appointed for you if you wish if and when you go to court” [for arraignment] that did not violate Miranda (even if D then thought couldn’t have a lawyer right away—which was true). |
| NY v **Quarles**, 1984 | CONSEQUENCES case: public safety exception to Miranda. Police can interrogate w/o Mirandizing and the physical evidence at least (in this case the gun) was admissible at trial in the prosecution’s case-in-chief. |
| Oregon v **Elstad,** 1985 | CONSEQUENCES case: failure to administer Miranda creates presumption of compulsion and evidence excluded from P’s case-in-chief, even if they fall within the scope of the 5th A. (Although D gave a second, written confession after being Mirandized, and that one was admissible, though the first verbal one wasn’t).  But Fruit of the Poisonous Tree Doctrine does not apply to evidence derived from voluntarily made statements, even if Miranda is violated. |
| US v **Dickerson**, 2000  Miranda is a Constitutional decision.  But, we see in other cases that Miranda is treated differently from other Constitutional provisions… no Fruit of the Poisonous Tree doctrine and no civil suits based on Miranda violations. | Holding: “In Miranda v. Arizona, 384 U.S. 436 (1966), we held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence. In the wake of that decision, Congress enacted 18 U.S.C. § 3501, which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that Miranda, **being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule Miranda ourselves.** We therefore hold that Miranda and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.” |
| Chavez v Martinez, 2003 | CONSEQUENCES case: violation of Miranda rights is not a basis for a civil claim |
| Missouri v **Siebert**, 2004  (Woman who didn’t want to be thought guilty of neglecting her disabled son, burned a disabled teenager to death)  Although Miranda reinforced, 8 of the 9 justices refused to find that the Fruit of the Poisonous Tree doctrine applied.  Second statement is not to be suppressed, as long as it really is a second statement—not just a continuation of the first. | CONSEQUENCES case: a two-stage police interrogation which 1st elicits incriminating evidence, then 2nd Mirandizes, then 3rd continues the interrogation and gets “admissible” confession is not consistent with Miranda. B/c “second” interrogation was inextricably linked to the “first” (separated by 20 minutes, same officer, continually referring back to the first), D couldn’t reasonably understand that the second questioning was a different process—wouldn’t think they had a genuine right to remain silent. The completeness and detail of the questions and answers in the first round of interrogation. Factors in assessing if the warnings functioned effectively:   * the overlapping content of the two statements * the timing and setting of the first and the second * the continuity of police personnel * the degree to which the interrogator's questions treated the second round as continuous with the first.   Kennedy concurrence focuses on police’s deliberate attempt to violate Miranda; Court more interested in perception of a reasonable D. Kennedy wanted “curative measures” such as   * a substantial break in time and circumstances between the pre-warning statement and the Miranda warning * an additional warning that explains the likely inadmissibility of the pre-warning custodial statement. |
| US v **Patane**, 2004  Physical evidence is not suppressed. | CONSEQUENCES case: (Quoting CALI on-line lessons) Physical evidence discovered by the police as a result of a non-coerced statement of the defendant obtained in violation of Miranda is admissible against the defendant. |
| **6th AMENDMENT**  **RIGHT TO COUNSEL**  Only attaches after the start of “formal proceedings” (more than just arrest).  Comes to bear during “Critical Stages” of the process.  Always applied to Federal government. Incorporated to the states in 1963 (Gideon v Wainwright)  6th A is *offense-specific*  Two acts are the **“same offense”** if the elements of one of them are incorporated fully by the elements of the other. | Only attaches after the start of “formal proceedings” (arraignment, indictment, complaint/information filed with the court—more than just arrest).  Being formally shown to eyewitnesses for purposes of identification is a “Critical Stage.”  In an eyewitness line-up, 6th A R/C applies 1) after start of formal proceedings; 2) when D is physically present. [Not applicable in a photo throw down.]  Every question and answer interaction between a D and a police agent is not a “Critical Stage.” For interactions, 6th A R/C applies 1) after start of formal proceedings; 2) when D is physically present; AND 3) interrogation (deliberate elicitation of information). UNLESS D waives right to counsel. Waiver threshold is higher than waiver of Miranda R/C.  Note that interrogation definition is “deliberate elicitation”—subjective as opposed to Miranda’s objective test. |
| Brewer v. **Williams**, 1977  (Later Williams v Nix) | Murderer of young girl; abducts and kills in Des Moines, surrenders self in Davenport. Had lawyers in both cities, and lawyer was denied opportunity to travel with him in police car as being returned to Des Moines (156 miles). Police administered “Xtian burial speech” and he lead to body while en route. Williams, despite abducting and murdering a child, was known to be very religious and officer called him “Reverend.”  NOTE: Waiver of 6th A R/C **appears to be** harder than waiver of Miranda R/C. Must be “relinquished” expressly—if D just starts talking without overt waiver and 6th A attaches, the confession is excluded. Although the Court does not come out and say this.  Other explanation of Court’s decision is that Williams’ behavior was not inconsistent with his assertion of 6th A R/C b/c he kept asserting and relying on it.  Court never gets to the issue of whether waiver was voluntary b/c found there was no waiver. But Court says that lawyer does NOT need to be present for waiver to be valid.  (Contrast with RI v Innis about Miranda R/C) In both cases Court cites **Johnson v Zerbst**, but appears to have a sense that “voluntary, knowing and intelligent” could be different for 6th A and Miranda R/C. |
| **Massiah** v US, 1964  Although a 6th A case, was in the same year as two important 5th A cases. Reasoning about R/C hinged on analysis of due process as treated in state cases (not fed). | Interviewed by accomplice-turned-agent, heard by police over radio.  Out of custody, but had been indicted. Interrogation without lawyer about the crime for which had been indicted was violation of the 6th A R/C. |
| US v **Henry**, 1980 | In custody after the start of formal proceedings. Undercover agent deliberately elicited statements about the crime—violation of 6th A.  Compare with **Perkins** where jailhouse snitch didn’t violate Miranda, because Miranda is to protect from feeling of coercion by official police body. |
| **Kuhlman** v Wilson, 1986 | Jailhouse snitch didn’t ask any questions. Just listened. Therefore not at “Critical Stage” because there was no interrogation. Therefore 6th A did not apply and statements could be admitted.  Note that the subjective intent of the agent (hoping D would make useful statements) is not enough for the “intent to elicit” to be made manifest. Not even putting the D in a cell overlooking the bank that was robbed was enough to manifest intent to elicit. There must be some interaction to deliberately elicit incriminating information. |
| Michigan v **Jackson**, 1986  **OVERRULED** by Montejo | Once D asserts 6th A R/C police may not initiate discussion to see if he wishes to waive the right. Court imposed a prophylactic “bright line” protection against any further interrogation. |
| **Montejo** v Louisiana, 2009  Attorney doesn’t have to be present for a D to waive his 6th A R/C. But waiver must still be a clear waiver. | **Jackson** OVERRULED. 6th A does not require “prophylactic” bright-line prohibition on any further police questioning.  In the facts of this case, D claimed he had also asserted Miranda R/C, which is entitled to a bright-line ban on further police questioning. (Remanded on that basis) |
| Kansas v **Venttris,** 2009 | Statements taken in violation of 6th A R/C may be used for impeachment purposes. (Rolling back of Fruit of the Poisonous Tree doctrine protections; use of Miranda rules as a baseline for other “direct” Constitutional violations.) |

**INTERSECTIONS CHART**

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| --- | --- | --- |
| **Event** | **Amendment/Right** | **Case/Rule** |
| Eyewitness ID parade | 6th A R/C | Lawyer must be present if conducted after the start of formal proceedings, or else is violation. |
| Eyewitness ID parade | 5th A S/I | Being seen by others isn’t “testimonial,” so can’t refuse to participate on grounds of self-incrimination protection. |
| Interview by undercover police agent | 6th A R/C | Lawyer must be present if conducted after the start of formal proceedings, or else is violation. (Massiah).  May interrogate about another crime for which formal proceedings have not yet begun. |
| Interview by undercover police agent | 5th A S/I | 5th A does not protect against damage D does to self by bragging |
| Interview by undercover police agent | Miranda | Since D doesn’t know it’s a police agent, there is no coercion and Miranda is not violated. (Perkins) |
| Interview by police officers | 6th A R/C | Lawyer must be present if conducted after the start of formal proceedings, or else is violation. (Massiah)  D can waive, but must be a “relinquishment”—deliberate and express (Williams). |
| Interview by police officers | 5th A S/I | Right must be specifically invoked. XXX |
| Interview by police officers | Miranda | Warning must be properly administered and waived before interrogation can be conducted, otherwise violated. “Interrogation” is narrower than for 6th A R/C—only when in custody (Traffic stops are not custody). D can waive by changing his behavior (talking), without expressly waiving. |
| ALL ACTIONS | DUE PROCESS | Conduct may not “shock the conscience of the Court” or be outside the ethos of our system of law. |
| Search and Seizure | 4th A | 4th A covers almost all the ground; DP almost never comes up |

**LAUREN’S SUMMARY**

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| --- | --- |
| Before formal proceedings, Not in custody | DP |
| Before formal proceedings, In custody | DP + 5A/Miranda |
| After formal proceedings, Not in custody | DP + 6A |
| After formal proceedings, In custody | DP + 5A/Miranda + 6A |