CRIMINAL ADJUDICATION OUTLINE

§1: THE CHARGING DECISION

§1.1: THE CHARGE

I. OVERVIEW

A. **Generally:** criminal trials are begun by the filing of an *indictment* if presented by a grand jury or an *information* or *complaint* if prepared by a prosecutor. Either document alleges a certain crime (murder, arson, robbery) was committed on a certain date by the person named as the defendant.

1. The charging instrument also defines the limits and issues for trial, setting the evidentiary framework and sentencing options, which, in turn, determine the consequences of acquittal or conviction for the accused and correctional system.
    a. Other language may also be in the charging instrument, such as, language that recites and satisfies the *men rea* requirements for a particular level of offense.
2. The charging decision involves two distinct decisions:
    a. The decision of whether to charge the person with the crime, which involves police officers in the field making an arrest and then the prosecutions decision to proceed with the a prosecution of the crime that the person was cited for.
    b. The second decision is what to charge the person with (which is the decision that we are concerned with).
3. *Judicial Review:* the charging decision is almost entirely insulated from judicial review, with the only real limit on the prosecutor being whether was actual probable cause to arrest the person and moral, ethical and economic decisions the prosecutor must take into account.
    a. Although judicial review is limited, the charging decision is still reviewed by the political system (prosecutors are elected) and the media.
    b. *Policy:* separation of powers largely dictates the limited review of the prosecutor's decisions because prosecution and law enforcement is an executive function; whereas, the judiciary is supposed to be impartial and not involved with allocation of government funds and the like, which are involved in the charging decision.
4. *Decision not to Charge:* the decision by the prosecutor not charge someone is absolutely insulated from review by anyone, which provides the prosecutor with a lot of discretion.
    a. Cases have held, fairly uniformly, that citizens lack standing to sue to compel prosecution under criminal statutes.
5. Hence, the charging decision is guided by the sensibility of the prosecutor and ethical and legal standards imposed on the prosecutor.
    a. The ABA standards are a guide, however, they are not binding on the prosecutor's office [*see* **ABA Std. 3-1.1**].

II. DECISION AND DISCRETION TO CHARGE

A. **G/R:** Decision to Charge: so long as the prosecutor has probable cause to believe the accused committed an offense defined by statute, the decision of whether or not to prosecute, and what charge to bring or file, generally rests entirely within the discretion of the prosecutor.

1. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was *not* deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *[*Bordenkircher v. Hayes*].

A(1). **ABA Std. 3-3.4:** Decision to Charge: **(a)** the decision to charge is primarily the responsibility of the prosecutor.

(b) the prosecutor should take reasonable care to ensure that investigators working at their direction or under their supervision are adequately trained in the standards governing the issuance of arrest and search warrants;

(c) the prosecutor should establish standards and procedures for evaluating complaints to determine whether the criminal proceedings should be instituted.

B. **ABA Std. 3-3.9:** Discretion in the Charging Decision: **(a)** a prosecutor should not institute, or cause to be instituted, criminal charges when the prosecutor knows that the charges are not supported by *probable cause* or in the absence of *sufficient admissible evidence* to support a conviction.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist, which would support a conviction. Factors the prosecutor (among others) may consider in exercising her decision are:

a. reasonable doubt that the accused is in fact guilty;
b. the extent of the harm caused by the offense;
c. the disproportion of the authorized punishment in relation to the particular offense or offender;
d. possible improper motives of the complainant;
e. reluctance of the victim to testify;
f. cooperation of the accused in the apprehension or conviction of others; and
g. the availability and likelihood of prosecution in another jurisdiction.

(c) A prosecutor should not be compelled by his supervisor to prosecute a case in which he has a reasonable doubt about the guilt of the accused.

(d) In making the decision to prosecute, the prosecutor should give *NO* weight to the personal or political advantages or disadvantages which might be involved or a desire to enhance her record of convictions.

(e) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(f) The prosecutor should not bring or seek charges *greater in number or degree* than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.

D. **ABA Std. 3-3.1**: Investigative Function of Prosecutor: [legal limits on prosecutor's discretion]: **(b)** a prosecutor should not invidiously discriminate against or in favor of any person on the basis of race, religion, sex, sexual preference, ethnicity, or other improper considerations in exercising discretion to investigate or prosecute.

(c) a prosecutor should not knowingly use illegal means to obtain evidence or to employ, instruct, or encourage others to use such means.

E. **G/R:** Prosecutorial Discretion: in the criminal justice system, the government retains *broad discretion* as to whom to prosecute.

1. The prosecutor's broad discretion rests largely on the recognition that the decision to prosecute is particularly ill suited to judicial review because the following things are not readily susceptible to judicial review:
    a. the strength of the government's case;
    b. prosecution's general deterrence value;
    c. case relationship to the government's enforcement policies and priorities;
2. *Caveat:* although prosecutorial discretion is broad, it is not unfettered and subject to constitutional constraints on vindictive and selective prosecution.

*[*Wayte v. US*].

F. **G/R:** Selective Prosecution: to make a *prima facie* case of selective prosecution the defendant must show that:

1. he is a member of a recognizable, distinct class;
2. a disproportionate number of his class was selected for investigation and possible prosecution; and
3. this selection procedure was subject ot abuse or was otherwise not neutral.

*[*Wayte v. US* (Marshall dissent)].

F(1). **G/R:** Selective Prosecution: selectivity in the enforcement of criminal law is subject to constitutional constraints; in particular, the decision to prosecute may not be deliberately based upon unjustifiable standard such as race, religion, or other arbitrary classification, including exercise of protected statutory and constitutional rights.

1. *Equal Protection Analysis:* it is appropriate to judge selective prosecution claims according to ordinary equal protection standards, which require:
    a. the defendant to show that selective prosecution had a discriminatory effect; and
    b. that it was motivated by a discriminatory purpose.
2. In other words, the defendant will be required to demonstrate that he was selectively prosecuted *because of* one of his protected activities.

*[*Wayte v. US*].

G. **G/R:** Vindictive Prosecution: occurs when the defendant is prosecuted, or the charges against him are enhanced, because he has exercised his constitutional right. To punish a person because

he had done what the law plainly allows him to do is a due process violation of the most basic sort.

1. For an agent of the state to pursue a course of action whose objective is penalize a person's reliance on his legal rights is *patently unconstitutional*.

a. The Due Process Clause requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial [*North Carolina v. Pearce*].

i. In other words, there is a rebuttable presumption that a prosecutor is acting vindictively when a criminal defendant appeals his initial conviction, which is overturned, and on remand the defendant is charged with a higher degree of the charge.

b. The Due Process Clause prohibits a prosecutor from re-indicting a person convicted of a misdemeanor on a felony charge after the defendant had invoked an appellate remedy, since in this situation there is real likelihood of vindictiveness [*Blackledge v. Perry*].

2. <u>caveat:</u> in the give and take of plea bargaining there is not an element of punishment or retaliation *so long as* the accused is free to accept or reject the prosecution's offer.

a. *Presumption:* defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in plea bargaining.

b. *Pretrial:* the Due Process Clause does not prohibit a prosecutor from carrying out a threat, made during plea negotiations, to bring additional charges against an accused who refuses to plead guilty to the offense with which he was originally charged.

c. *Policy:* plea bargaining flows from the mutuality of advantage to defendants and prosecutors, each with her own reasons for wanting to avoid trial.

*[*Bordenkircher v. Hayes*].

H. **G/R:** <u>Pretrial v. Trial Periods and Prosecutorial Vindictiveness:</u> there is *NOT* a presumption of prosecutorial vindictiveness in the pretrial stage and during plea negotiations and during this period the defendant must prove, objectively, that the prosecutor's charging decision was motivated by a desire to *punish* him for doing something the law plainly allowed him to do.

1. After the jury is sworn (trial period) there is a presumption of vindictiveness if the prosecutor, or trial court, enhances the defendants charges or sentence after the exercise of a constitutional right, such as appeal.

a. Whenever a trial court imposes a more severe sentence upon the defendant after a new trial, the judge must state his reasons for doing so affirmatively.

i. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the tiem of the original sentencing proceeding.

ii. The factual data upon which the increased sentence is based must be part of the record so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

b. Hence, there is a presumption of vindictiveness that may be overcome only by objective information in the record justifying the increased sentence.

*[*US v. Goodwin*].

III. CHARGING DECISION: WYOMING STANDARDS

A. **G/R:** Charging Decision: within the process of criminal prosecution, the prosecutor's power to dismiss charges, to reduce charges, to defer charges, and to control the prosecution is exclusive and not shared by the judicial department.

1. The prosecutor has broad discretion to decide whether or not prosecution of an alleged crime will serve the public interest. She may, and should, consider a wide variety of factors that bear on the merits of the prosecution such as:
    a. the nature of the offense;
    b. the nature and severity of the sanctions that will be imposed;
    c. the personal circumstances of the accused, and
    d. the expense of prosecution and congestion in the courts.
2. A prosecutor's discretion in charging, deferring, or requesting dismissal is limited by pragmatic factors, *but not* by judicial intervention.
3. Any decision *to initiate* criminal proceedings is vested in the prosecuting attorney and the decision is discretionary. The prosecutor may decide to add charges, drop charges, or reduce charges.
4. The exercise of prosecutorial discretion is not subject to judicial review as long as any unjustifiable or suspect factors, such as, race, religion, or other arbitrary or discriminatory classification are not involved.

B. **G/R:** Vindictive Prosecution: [same in federal court]: in a vindictive prosecution claim:

1. the defendant has the burden of proof and must establish *either*:
    a. actual vindictiveness; or
    b. a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness;
    *if the defendant does not carry his burden of proof, the court need not consider the government justification issue.

THEN

2. the burden shifts to the prosecution justify its decision with legitimate, articulable, objective reasons.

B(1). **G/R:** Presumption of Vindictiveness: a vindictive motive will be presumed if the government responds to a defendant's exercise of a legal right in a manner which punishes him for exercising that right.

1. The presumption arises when the government acts *by imposing increased charges*, such as:
    a. changing a charge from a misdemeanor to a felony subjecting him the possibility of greater sentence or in some other way **upping the ante**.
        i. The benchmark of vindictive prosecution is *upping the ante* in some way.

§2: THE PRELIMINARY HEARING

A. **Generally:** preliminary hearings ("prelims") are more of a realistic check on the prosecutor's discretion than the actual charging decision. The ordinary prelim is an adversarial proceeding, which makes sure the prosecutor has enough evidence to go forward with the case.

1. The prosecutor can only go forward with the case if she has probable cause to believe the accused committed the act he was arrested for; however, the probable cause standard is fairly low, therefore, the prelim only really protects against gross overcharging.
2. It is generally agreed that the *purpose* of a prelim is to determine whether there is probable cause to believe that the suspect is guilty of the crime.

B. **Fed. R. Crim. P. 5.1: (a)** Probable Cause Finding: if from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, . . . the defendant [may be held] to answer in district court. The finding may be based upon hearsay evidence in whole or in part. The defendant may cross examine adverse witnesses and may introduce evidence. Objections that on the ground that evidence was acquired by unlawful means are not properly made a the preliminary examination.

(b) Discharge of Defendant: if from the evidence it appears that the is *no* probable cause to believe that an offense has been committed or that the defendant committed it [the defendant shall be discharged]. The discharge of the defendant does not preclude the government from instituting a subsequent prosecution for the same offense.

B(1). **Fed. R. Evid. 1101(d)(3):** provides that the rules of evidence do not apply at a preliminary hearing.

C. **G/R:** Probable Cause Standard: evidence that will justify a prosecution need not be sufficient to support a conviction. Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused.

1. An information will not be set aside or a prosecution on the information prohibited if there is some rationale ground for assuming the possibility that an offense has been committed and the accused is guilty of it.
2. In other words, the standard is: more likely than not that the accused committed the crime.
3. Although this case was from bum fuck California, it is the standard used by most states.

*[*Rideout v. People*].

D. **G/R:** Judicial Review of Prelim Probable Cause Determination: a reviewing court may not substitute its judgment as to the weight of the evidence for that of the magistrate (who presided at the prelim) and if there is some evidence to support the information, the court will not inquire into its sufficiency.

1. Every legitimate inference will that may be drawn from the evidence must be drawn in favor of the information.

*[*Rideout v. People*].

E. **G/R:** Function of Prelim: the prelim is *not* a mini-trial, but rather, is limited to the purpose of determining whether there is probable cause believe that a crime was committed and that the defendant committed it.

1. It focuses on the probable cause determination, rather than consideration of the probability of conviction at the ensuing trial.
2. As a screening device, the prelim insures that the prosecution can at least sustain the burden of proving probable cause.
3. It protects the accused by avoiding an embarrassing, costly and unnecessary trial and it benefits the interests of judicial economy and efficiency.
*[*Hunter v. Dist. Court*].

F. **G/R:** Credibility Determinations: a judge in a prelim has jurisdiction to consider the credibility of witnesses only when, as a matter of law, the testimony is implausible or incredible.

1. When there is a mere conflict in the testimony, a question of fact exists for the jury and the judge must draw the inference favorable to the prosecution (this is because the prosecution has the burden of proof at the prelim).
*[*Hunter v. Dist. Court*].

G. **G/R:** Right to Counsel at Prelim: the Supreme Court has held that a person accused of a crime requires counsel at every step in the proceeding against him and that constitutional principle is not limited to the presence of counsel at trial.

1. **Test:** a criminal defendant gets an attorney at every *critical stage* of the criminal process. A critical stage is one that may affect the defendant's right to a fair trial; that is, attorney is required for the for the defendant when the attorney's absence derogate from the accused's right to a fair trial.
2. The prelim is a critical stage in the criminal proceedings against a defendant, therefore invoking the defendant's 6th Amendment right to counsel, because:
    a. the lawyer's cross examination at a prelim may lead to a dismissal;
    b. the lawyer's cross examination can obtain testimony which may be used to impeach at trial, or preserve testimony of witness who does not appear at trial;
    c. the lawyer can discover the case the state has against his client and thereby began to prepare a proper defense; and
    d. the lawyer can be influential in making effective arguments for the accused on such as matters as the necessity for early psychiatric examination or bail.

*[*Coleman v. Alabama*].

§ 3: THE GRAND JURY

A. **Generally:** the prosecutor charges someone by filing a bill of indictment. It is then presented, in closed session, to the grand jury. The grand jury consists of between 15 to 25 people and the defendant or judge are *not* present. The *function* of the Grand Jury is to determine if there is probable cause that the defendant committed the crime and that the crime was committed.

1. the Grand Jury is a historical institution and required by the Federal Constitution's grand jury clause in the 5th Amendment; however, that is one of the only clauses in the Bill of Rights that has not been incorporated and held to apply to the states through the 14th Amendment.
2. The process at the Grand Jury is non-adversarial; that is, there is no right for the defendant to cross-examine, or even be present.

3. If the Grand Jury finds probable cause, it returns a "true bill", which means there is sufficient evidence to go forward with the case by the prosecutor.

A(1). **G/R:** Grand Jury Requirement: the 5th Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by indictments of grand juries. The 5th Amendment grand jury clause only requires that the an indictment is returned by a legally constituted and unbiased grand jury [*Costello v. US*].

B. **G/R:** Composition: the composition of the grand jury is selected in essentially the same way a petite jury is selected; that is, through an array. The grand jury, in federal court, consists of between 16 and 23 members [**F. R. Cr. P. 6(a)(1)**].

C. **G/R:** Challenges: there are two types of challenges that can be made to the grand jury:

1. *Challenging the Array:* the prosecutor or defendant may challenge the array of jurors on the grounds that the grand jury was not selected, drawn, or summoned in accordance with the law;
2. *Challenge an Individual Juror:* on the ground that the juror the juror is not legally qualified.

but note: challenges must be made *before the administration of the oath to the jurors* and shall be tried by the court.

*This makes it practically impossible for a defendant to challenge the array or an individual juror because in many instances, particularly when the defendant hasn't been arrested or knows he's under investigation, because the defendant may not even know the grand jury is convening.

*[**F.R.Cr.P. 6(b)(1)**]

D. **G/R:** Who May be Present: the prosecutor, witnesses under examination, and court reporter may be present when the grand jury is in session; however, once the grand jury is deliberating or voting no other persons may be present [**F.R.Cr.P. 6(d)**].

1. There is also no requirement that if the grand jury testimony is transcribed, that it be provided to counsel [**F.R.Cr.P. 6(e)(2)**].

E. **G/R:** Return of Indictment: an indictment may be found only upon the concurrence of 12 or more jurors [**F.R.Cr.P 6(f)**].

F. **G/R:** Prosecution by Information: an offense which may be punished by imprisonment for a term exceeding one-year shall be prosecuted by indictment (grand jury) or if indictment is *waived* by information [**F.R.Cr.P. 7(a)**].

G. **G/R:** Wavier of Indictment: a defendant who has been charged with a crime for a term exceeding a year may waive, in open court, prosecution by indictment after being advised of the nature and charge against him.

H. **G/R:** Nature and Contents: the indictment or information shall be a plain and definite written statement of the essential facts constituting the offense charged. It shall be signed by the

prosecutor. The indictment or information shall state for each count the customary or official citation of the statute, rule, or regulation which the defendant is alleged to have violated.

I. **G/R:** Evidence the Grand Jury can Consider: there are few limitations on the evidence a grand jury may consider; for example:

1. hearsay evidence is sufficient for an indictment [*Costello v. US*];
    a. *policy:* if indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be too great and outweigh the benefits of the grand jury system.
2. unconstitutionally obtained evidence is sufficient to support an indictment because the exclusionary rule does not apply at grand jury proceedings [*US v. Calandra*].

J. **G/R:** Racial Discrimination in Grand Juror Selection: the Supreme Court held that it was unconstitutional to base a conviction an indictment by a grand jury from which blacks had been systematically excluded [*Vasquez v. Hillary*].

K. **G/R:** Disclosure of Exculpatory Evidence to the Grand Jury: neither the 5th Amendment's grand jury clause, nor procedural rules formulated pursuant to a circuit court's supervisory powers, obligate a the prosecutor to disclose substantial exculpatory material in his possession to the grand jury.

1. This rule is consistent with Supreme Court precedent which has routinely held that certain constitutional protections afforded defendants in criminal proceedings have not application before the grand jury; such as:
    a. *Double Jeopardy Clause:* of the 5th Amendment does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so;
    b. *Right to Counsel:* of the 6th Amendment has been noted, in dicta, not to attach when an individual is summoned to appear before a grand jury, even though he is the subject of the investigation;
    c. *Right Against Self Incrimination*: evidence previously obtained in violation of the 5th Amendment's right against self incrimination and presented before the grand jury does not make an indictment invalid
        i. However, the grand jury may not force a witness to answer questions in violation of the 5th Amendment's right against self incrimination.
    d. *Unconstitutionally Obtained Evidence:* the 4th Amendment's exclusionary rule does not extend to proceedings before the grand jury; hence, the grand jury may consider evidence obtained unconstitutionally; and
    e. *Hearsay Rule:* is not enforced before the grand jury.

L. **G/R:** Trial Court's Supervisory Power over Grand Jury: the trial court does *not* have the power to dismiss an indictment issued by the grand jury pursuant to its supervisory powers *unless* the prosecutor's violations substantially influenced the grand jury's decision to indict.

1. This is a very high standard because the Supreme Court held it was not met when the prosecutor harassed expert witnesses, improperly offered immunity to a witness, vouched improperly for law enforcement officers, and contacting the jurors on break.
2. Hence, the prosecutor basically has unreviewable discretion when she is in front of the grand jury.

*[*Bank of Nova Scotia v. United States*].

§ 4: JOINDER

A. **Generally:** joinder really encompasses two distinct concepts: (a) trying several defendants together; and (b) joining claims against a single defendant.

1. *Policy:* the policy, behind both types of joinder, is achieving judicial economy and efficiency through the joint trial that involves similar underlying facts. In fact, there is a *preference* for joint of defendants who are indicted together because they play a vital role in the criminal justice system.
2. Joinder is controlled by three rules of Criminal Procedure (Rules 8(a), 8(b), and 14) (see below);
3. Joinder of defendants is most often employed in conspiracy trials.

B. **F.R.Cr. 8:** Joinder of Offenses and Defendants:

(a) *Joinder of Offenses:* two or more offenses may be charged in the same indictment or information if the offenses charged (misdemeanor or felony) are:

--of the same or similar character [the same modus operandi in a crime done more than once where it would then make sense to try the offenses together and is not prejudicial to the defendant; OR

--based on the same transaction or act; OR

--multiple acts or transactions that are part of a common scheme or plan [such as a conspiracy].

(b) *Joinder of Defendants:* two or more defendants may be charged in the same indictment or information if they are alleged to have participated in:

--the same act or transaction; OR

--or series of acts or transactions constituting an offense or offenses [these acts don't have to occur at the same time].

***note:** unlike Rule 8(a), if the defendants participated in acts of the same or similar character, it is not sufficient for joinder of the defendants.

***note:** if there are multiple defendants involved, skip over Rule 8(a) and analyze under Rule 8(b).

C. **F.R.Cr.P. 14:** Relief form Prejudicial Joinder: if joinder is prejudicial to the defendant or the government, then the court can:

1. order the prosecutor to make an election for severance;
2. it can order severance on its own motion; or
3. provide whatever other relief justice requires.

****note:** this analysis always comes after Rule 8, that is, a defendant has to be joined before he can be severed.

D. **G/R:** Harmless Error Rule: on appeal, a reviewing court is to ignore errors or defects which do affect the substantial rights of the parties [**28 USC § 2111; Rule 52(a)**]. In fact, even some constitutional errors may be deemed harmless error, not requiring automatic reversal of the conviction.

1. **Test:** in inquiring into whether an error was harmless, the reviewing court will to determine whether the error itself had substantial influence on the trial which leaves one with grave doubt about its outcome, in which case, the conviction cannot stand.
*****[*US v. Lane*].

E. **G/R:** Misjoinder: an error involving misjoinder is subject to the harmless error rule. An error involving misjoinder affects the substantial rights of the defendant and requires reversal only if the misjoinder results in *actual prejudice* because it had a substantial and injurious effect or influence in determining the jury's verdict [*US v. Lane*].

F. **G/R:** Conspiracy Counts: if defendants are property charged in a conspiracy indictment pursuant to Rule 8(b), the fact that one or more the defendant's was acquitted from that conspiracy charge, does not automatically require, as a matter of law, reversal under Rule 14 for prejudicial joinder.

1. A trial is less prejudicial to a defendant is the evidence is *compartmentalized* so as to apply to each defendant separately.
*[*Schaffer v. US*].

G. **G/R:** Verdicts Effect on Determination of Actual Prejudice: in a multi-defendant case, a mix of guilty and not guilty verdicts is some indication that the jury was able to sift through voluminous evidence and differentiate between various defendants [*US v. Casamento*].

H. **G/R:** Spill Over Prejudice: evidence of the conduct other defendants, and a lack of coordination among defense strategies, may in some cases cause substantial spillover prejudice which may actually prejudice the defendant's under Rule 14; however, the defendant must still prove actual prejudice [*US v. Casamento*].

I. **G/R:** Trial Courts Supervisory Duties: in cases where the judge determines that the case may be over *4-months* the judge should require the prosecutor to present a reasoned basis to support a conclusion that joint trial of all the defendants is more consistent with fair administration of justice than some manageable division of the case into separate trials for groups of defendants.

1. The judge should also require the prosecutor to make an especially compelling justification for a joint trial of more than *ten defendants.*
[*US v. Casamento*].

Note: prejudice may be very difficult to prove, especially if the jury returns a mix verdict of guilty/not guilty because in *US v. Casamento* no prejudice was found in a trial with 21-defendants, which spanned 1-year and 5-months.

J. **G/R:** Mutually Antagonistic Defenses: in interpreting Rule 14, courts have expressed the view that mutually antagonistic defenses may be so prejudicial in some circumstances as to mandate severance; however, mutually antagonistic defenses are NOT prejudicial *per se*.

1. Moreover, Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of relief to the sound discretion of the trial court.
*[*Zafario v. United States*].

K. **G/R:** Severance under Rule 14: a trial court should *only* grant severance under Rule 14 if there is a serious risk that a joint trial would compromise the specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.

1. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admitted if the defendant were tried alone is admitted against a codefendant.
    a. Ex: evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that defendant was guilty.
2. When many defendants are tried together in a complex case and they have markedly different degrees of culpability the risk of prejudice is heightened.
3. Evidence that is probative of a defendant's guilt but that is technically admissible only against a codefendant also might present a risk of prejudice.
    a. Ex: when one defendant takes the stand confesses and implicates his codefendant and the implicated codefendant exercises his right not testify [*Burton v. United States*].

*[*Zafario v. United States*].

§ 5: DEFENSIVE PLEADING

§ 5.1: OVERVIEW

A. **Generally:** the defendant in a criminal case is not required to provide any evidence or answer any charges against; rather, the defendants only requirement is that he enter a plea. This makes sense in light of the presumption of innocence, the fact that the prosecution has the *entire* burden of proof, and the 5th Amendment right against self incrimination.

1. *Notice Requirements:* although the defendant does not have to answer, he does have some limited notice requirements which apply in specific cases. The notice statutes very from jurisdiction-to-jurisdiction but generally require that the defendant provide the prosecution notice that he is going to raise some defense.
    a. The most common notice statutes are for the alibi and insanity defense.
    b. These notice statutes do not violate the 5th Amendment because to plead these defenses, the defendant has to take *affirmative action*, and all the notice requirement does is accelerate the defense to the pretrial stage.
        i. This is generally true even if the defendant has to make a decision about what defense he is going to put on at trial very early in the pretrial process.
    c. Most notice statutes have withstood constitutional challenges; hence, most of the cases revolve around the sanctions for violation of those notice statutes
    d. The notice statutes do, however, implicate the defendant's constitutional right to a compulsory process and right to prepare an adequate defense.

B. **F.R.Cr.P. 16:** Discovery and Inspection: Rule 16 generally permits the accused to move for production of his criminal records, statements to the police, belongings seized from the accused and any objects or expert reports the prosecution may use at trial. Limited reciprocal discovery is then created for the prosecution, once the defense has made such a request.

C. **G/R:** Duty to Disclose Exculpatory Material: the constitution imposes a duty on the prosecutor to disclose exculpatory information.

§5.2: NOTICE OF DEFENSES AND WITNESSES

I. REQUIRED DISCLOSURE

A. **G/R:** Notice Rules: Federal Rules 12.1 and 12.2 require the accused to plead specifically to an alibi or insanity claim—dates, places, and names of witnesses must be exchanged and with an insanity claim, the defendant must submit to a mental examination by a state psychiatrist.

1. The requirement that the defendant give notice of his intent to raise the defense of insanity or alibi also require the defendant provide a list of witnesses, with relevant information, supporting those defenses.
2. *Constitutionality:* generally, the notice statutes have been held constitutional as long as the statutes provide for reciprocal disclosure and a reasonable amount of time, if they are not unduly intrusive.

B. **Rule 12.1:** Notice of Alibi:

(a) upon request of the prosecutor, the defendant shall serve *within 10-days*, or at a time the court directs, upon the prosecutor *written notice* of the defendant's intention to offer a defense of alibi. The notice shall state:

--the specific place or places the defendant claims tto have been at the time of the alleged offense and the names and addresses of the witnesses upon the defendant intends to rely to establish such alibi.

(b) Within *ten days* (after the defendant's notice of alibi) but not less than 10-days before trial, the prosecution must serve upon the defendant *written notice*:

--stating the names and addresses of witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of an alleged offense and any other witnesses relied upon to rebut the testimony of any of the defendant's alibi witnesses.

(c) Upon the failure of either party to comply the court may exclude the testimony of the undisclosed witnesses offered by the party, but it may not limit the right of the defendant to testify.

C. **Rule 12.2:** Notice of Insanity Defense:

(a) the defendant must provide the prosecutor with *written notice* of his intent to use the insanity defense within the time provided for the filing of pretrial motions. If he fails to provide notice, the insanity defense may NOT be raised.

(b) if the defendant intends to use expert testimony to establish his mental condition, he must provide the prosecution with written notice.

(c) in the appropriate case, upon motion of the prosecution, order the defendant to submit to a medical examination.

(d) if there is a failure to comply with subsections (b) or (c) the court may exclude the testimony of *any* expert offered by the defendant on the issue of the defendant's guilt.

II. SANCTIONS FOR NON-DISCLOSURE

A. **G/R:** Compulsory Process: at a minimum, criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.

1. Few rights are more fundamental than that of an accused to present witnesses in his own defense.
2. The right to offer testimony is grounded in the 6th Amendment and the right of the defendant to present evidence stands on no lesser footing than the other 6th Amendment rights that are applicable to the states.
3. *Caveat:* the accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. The Compulsory Process Clause provides the defendant with a weapon, but it cannot be used irresponsibly.

*[*Taylor v. Illinois*].

B. **G/R:** Balancing Test for Non-Compliance with a Notice Statute: when the defendant fails to comply with a state's notice statute, the court must balance the interest of the defendant and his constitutional right to the compulsory process with the public interest excluding the testimony and requiring notice. Specifically, the court must balance:

1. the fundamental character of the defendant's right to offer the testimony of witnesses in his favor; *against*, countervailing public interests because the mere invocation of right cannot automatically and invariably require the testimony to be heard.
    a. The countervailing public interests in the integrity of the judicial process permit the court to exclude testimony by a defendant when the defendant's non-disclosure is willful and blatant.
2. Hence, preclusion of testimony is a constitutionally permissible remedy for non-compliance with a notice statute.

*[*Taylor v. Illinois*].

C. **G/R:** Constitutional Limits on Notice Statutes: not all notice statutes and requirements are per se constitutional, restrictions on a criminal defendant's right to confront adverse witnesses and to present evidence may not be arbitrary or disproportionate to the purposes they are designed to serve [*Michigan v. Lucas*].

D. **G/R:** Preclusion as a Sanction: the Supreme Court had indicated that probative evidence may, in certain circumstances, be precluded when a criminal defendant fails to comply with a valid discovery rule.

1. This rule of preclusion can be applied in cases when a statute requires notice to protect a witnesses, such as a rape victim under a rape shield law, and therefore a defendant's testimony may be precluded as to other witnesses rather than merely his own witnesses. [This holding broadens *Taylor*].

*[*Michigan v. Lucas*].

§ 5.3: SPEEDY TRIAL

A. **Generally:** the 6th Amendment guarantees a right to a speedy trial; in addition, in most jurisdictions, including federal courts, legislatures have enacted statutory speedy trial acts, such as the Federal Speedy Trial Act.

1. Under such provisions, a 60 to a 120-day delay may lead to a dismissal; however, there are numerous exceptions, both constitutional and statutory.

A(1). **G/R:** The 6th Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to a speedy trial.

B. **G/R:** Constitutional Right to a Speedy Trial: the defendant's right to a speedy trial is invoked when the prosecution files formal charges; however, the right to a speedy trial, according to the Supreme Court, is generically different from other rights because deprivation of the right may work to the benefit of the accused.

1. ***Barker Test****:* the court, in determining whether a defendant was deprived his constitutional right to a speedy trial, applies the 4-prong *Barker Test* in determining whether the failure to proceed to trial "speedily" violates the 6th Amendment. The four controlling factors are:

a. the length of the delay;

i. this is double inquiry because to allege a constitutional violation the defendant must show that the interval between the accusation and trial was *presumptively prejudicial*.

(A) the presumption that pretrial delay has prejudiced the defendant intensifies over time;

(B) depending on the nature of the charges, the lower courts have generally found that post-accusation delay is presumptively prejudicial at least as it approaches a year.

b. the reason for the delay;

c. the defendant's assertion of his right; and

d. prejudice to the defendant (this is the most important factor).

The court will then weigh all the factors to determine whether there was a constitutional violation [*Barker v. Wingo*].

2. *Remedy for Constitutional Violation:* if the defendant is denied his constitutional right to speedy the trial, his case must be dismissed with prejudice (which means he walks). *[*Dogett v. US*]

B(1). **G/R:** Types of Prejudice Delay Causes: unreasonable delay between forma accusation and trial threatens to produce more than one sort of harm, including:

1. oppressive pretrial incarceration;

2. anxiety and concern of the accused;

3. the possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence.

a. This is the most serious form of prejudice because of the inability of the defendant adequately to prepare his case skews the fairness of the entire system.

i. consideration of prejudice is not limited to the specifically demonstrable and affirmative proof of particularized prejudice in every speedy trial claim;

ii. impairment of the defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony can rarely be shown.

*[*Dogett v. US*]

B(2). **G/R:** Presumption of Compromise: excessively delay presumptively compromised the reliability of a trial in ways that neither party can prove or identify *[*Dogett v. US*]

B(3). **G/R:** Standard of Governmental Behavior: there are three standards of governmental behavior that factor into the speedy trial analysis in determining prejudice to the defendant:

1. *Diligent Prosecution:* if the government pursues a defendant with reasonable diligence from indictment to arrest, the defendant's speedy trial claim and prejudice is greatly reduced;
2. *Official Negligence:* in bringing an accused trial, if the government merely acts negligent in its pursuit of the defendant, while not compelling relief in every case, the negligence is neither automatically tolerable simply because the accused cannot demonstrate exactly how he was prejudiced;
3. *Official Bad Faith:* if the government intentionally holds back on prosecution of the defendant to gain some impressible advantage at trial, this official bad faith weighs heavily against the government and a bad faith delay of great length is grounds for dismissal.

*[*Dogett v. US*]

C. **Wyo. R. Cr. P. 48(b):** Speedy Trial:

(1) It is the responsibility of the court, counsel and the defendant insure that the defendant is timely tried.

(2) A criminal trial shall be brought within **180-days** following arraignment *UNLESS* continued as provided in the rule.

(3) The following periods shall be excluded in computing time for trial:

(A) all proceedings related to the mental illness or deficiency of the defendant;
(B) proceedings on another charge;
(C) the time between the dismissal and the refilling of the same charge; and
(D) delay occasioned by defendant's change of counsel or application therefor.

(7) *Remedy:* a dismissal for lack of a speedy trial under this rule shall not bar the state from again prosecuting the defendant for the same offense *UNLESS*:

--the defendant made a written demand for a speedy trial; *or*
--can demonstrate prejudice from the delay.

D. **28 USC § 3161:** Speedy Trial Act [Time Limits and Exclusions]:

(a) *Arrest to Indictment:* any indictment or information charging a defendant with an offense must be filed within **30-days** from the date the individual was arrested or summoned;

(c)(1) *Indictment to Trial:* in any case where the defendant makes a not-guilty plea, the trial of the defendant shall begin within **70-days** from the filing of the indictment or information

(h) *Exclusions:* the following exclusions apply in computing the time in both subsections (a) and (c)(1):

(1) any period of delay resulting from other proceedings concerning the defendant, including, but not limited to:

(A) competency proceedings and exams;

(F) delay from pretrial motion;

(G) delay resulting from removal or transfer to another district;

(H) delay resulting from transportation of defendant from another district or to and from places of hospitalization;

(I) delay resulting from consideration by the court of a proposed plea agreement; and

(J) delay, of up to 30-days, for anything concerning the defendant that is under advisement by the court.

(3)

(A) Any period of delay resulting from the absence or unavailability of the defendant or essential witness.

(B) for purposes of (A) a defendant or essential witness is to be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution and his whereabouts cannot be determined by due diligence.

(4) Any delay resulting from the defendant being mentally incompetent or physically unable to stand trial.

(7) A *reasonable period of delay* when a defendant is joined with a codefendant for trial as to whom the time for trial has not yet run and no motion for severance has been granted.

(8)(A) a period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the prosecution.

E. **28 USC § 3162:** Speedy Trial Act [Sanctions]:

(a)(1) If *30-day arrest-to-indictment time limit* is not complied with the complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors:

--the seriousness of the offense;

--the facts and circumstances of the case which led to the dismissal; and

--the impact of a re-prosecution on the administration of the Speedy Trial Act and justice.

(a)(2) If *70-day indictment-to-trial time limit* is not complied with, the information or indictment shall be dismissed on motion of the defendant.

--*Burden of Proof:* The defendant shall have the burden of proof of supporting such motion but the government shall have the burden of proof in proving an exclusion;

-- In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors:

--the seriousness of the offense;

--the facts and circumstances of the case which led to the dismissal; and

--the impact of a re-prosecution on the administration of the Speedy Trial Act and justice.
--[prejudice]

--*Waiver:* if the defendant did not move for dismissal prior to trial or enter a plea of guilty or nolo he is deemed to waive his right to dismissal under this section.

F. **G/R:** Prejudice to the Defendant: in addition to the factors listed in the Speedy Trial Act (STA), the presence or absence of prejudice to the defendant must also be considered by the court in determining whether to grant a dismissal with or without prejudice.

1. In addition, the defendant's conduct should also be considered. If the defendant's culpable conduct and failure to meet the trial schedule in the first instance are circumstances of the case which can also be considered by the court, and *weigh heavily* in favor of permitting re-prosecution.
*[*United States v. Taylor*].

G. **G/R:** Length of Delay Test: the length of delay, a measure of the speedy trial violation, in some ways closely parallels the issue of the prejudice to the defendant—the longer the delay, the greater the *presumptive or actual prejudice* to the defendant, in terms of his ability to prepare for trial or the restrictions on his liberty.

1. *Policy:* inordinate delay between public charge and trial may seriously interfere with the defendant's liberty, whether he is free on bail or not, and may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy and create anxiety in him, his family, friends, and women he fucks.
*[*United States v. Taylor*].

§ 6: GUILTY PLEAS

I. OVERVIEW

A. **Generally:** plea bargaining is one of the most important aspects of the criminal process. Its importance arises from the fact that more than 95% of cases are decided without a trial thereby making it the biggest part of the criminal justice system.

1. There are two processes in plea bargaining:
    a. the deal making process, which is hidden from public scrutiny. Often times, the deal making occurs in hallways, on the phone, or in a jail cell and is generally not subject to a lot of public scrutiny.
        i. Federal court, one of the most important aspects of the deal making part is when drug dealers plea bargain for a shorter sentence by providing the government with more information on other drug dealers. This does not come back to haunt them under Rule 11.
    b. the second thing is the acceptance of the plea, the defendant must make his plea knowingly and voluntarily in open court on the record.
    **In both these stages the defendant has the right to effective assistance of counsel.

2. The plea of guilty is by far the most important defense plea, it becomes the basis for negotiating the merits and the sentence in global, concrete terms, without the hazard of jury decision making and judicial sentencing.

a. After a guilty plea, the prosecutor's sentence recommendation remains subject to review of the judge; however, because of the sentencing guidelines in place, his role is diminished.

3. *Types of Pleas:* there are two main types of pleas:

a. *Recommendation Pleas:* where the prosecutor recommends a sentence to the judge and the judge is not bound by the prosecutor's recommendation; and

b. *Non-Recommendation Pleas:* where the prosecutor tells the defendant that his sentence will be X-years, and if the judge declines to accept the plea, then the prosecutor must withdraw it.

B. **G/R:** The Bargaining Process: the defendant has a constitutional right to be present at his formal adjudication of guilt, which is a critical stage in the criminal process. However, while negotiations are going on, there is no right for the defendant to be present.

C. **G/R:** Prosecutorial Discretion in Plea Bargaining: guilty pleas, plea negotiations, and plea bargains are an important part of the criminal justice system because when properly administered they can benefit all parties. During the bargaining process, because of the certain constitutional protections, the prosecutor once again has wide, and largely unreviewable, discretion [*Bordenkircher v. Hayes*].

II. STATUTORY AND CONSTITUTIONAL REQUIREMENTS

A. **F.R.Cr.P 11:** Pleas:

(a) Alternatives:

(1) *In General.* A defendant may plead not guilty, guilty, or nolo contendere. If the defendant refuses to plead . . . the court shall enter a plea of not guilty.

(c) *Advice to Defendant.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the **nature of the charge** (see below) to which the plea is offered,

--the mandatory minimum penalty;

--the maximum penalty provided by law;

--that the court has to consider sentencing guidelines, but may depart from those guidelines in certain circumstances; and

--that the defendant may have to make restitution to a victim of the crime.

(2) if the defendant is not represented by an attorney, that the defendant has a right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) the defendant has a right to plead not guilty, to a trial, to cross examine witnesses, and the right against self incrimination;

(4) that if the plea of guilty is accepted by the court there will not be a further trial right of any kind because by the plea the defendant waives his right to a trial;

[In Wyoming the defendant must also be informed of any waiver of the right to appeal in his plea].

(d) *Insuring that the Plea is Voluntary:* the court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement.

(e)(3) *Acceptance of a Plea:* if the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(f) *Determining Accuracy of the Plea:* notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such a plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

--note: the idea behind having the judge do a factually inquiry into the plea is intended to make sure there is some basis for the defendant's guilt, it gives the court an idea that the defendant knows what he is pleading to, and it creates a better record incase the defendant attempts to withdraw his plea later.

B. **G/R:** Constitutional Protections: the defendant is afforded certain constitutional protections in plea bargaining. The Supreme Court has recognized:

1. the importance of counsel during plea negotiations;
   a. however, even if the defense attorney gives his client constitutionally deficient advise, the defendant must show actual prejudice, that is but for the advise he would not have plead guilty, before he can assert an ineffective assistance of counsel claim or attempt to have his plea withdrawn [*Hill v. Lockhard*]
   b. however, one circuit court has held that when a defense attorney does not give a criminal defendant any advise at all regarding his plea, that is sufficient to state a claim for ineffective assistance of counsel [*Orea v. Keein*].
2. the need for a public record indicating that a plea was knowingly and voluntarily made;
3. the requirement that a prosecutor's plea bargaining promise must be kept; and
4. the defendant has a right to exculpatory information (*Brady Material*) in the plea bargaining process and the failure to turn over such information by the prosecutor violates the defendant's due process rights; however, if the defendant enters a plea and *then* discovers exculpatory material that was not handed over, the defendant still is required to prove that the information was so material and important that it would have affected his decision to plea, before his current plea can be withdrawn.

*[Bordenkircher v. Hayes].

B(1). **G/R:** Constitutional Requirements for Guilty Pleas: [most codified in Rule 11] a plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction, nothing remains but to give judgment and determine punishment.

1. *Voluntariness of Waiver:* for the defendant to plead guilty, and waive all his trial rights, his determination must be on a reliable determination on the voluntariness of the issue which satisfies the constitutional rights of the defendant.
   a. The prosecution must make sure this waiver is on the record because presuming waiver from a silent record is impermissible.

b. The record must show that the defendant was offered counsel but intelligently but *intelligently and understandably* rejected the offer.

c. The court will not presume that the defendant waived his constitutional right against self-incrimination, right to a trial by jury, and his right of confrontation on a silent record.

2. Guilty pleas must be **knowingly and voluntarily**.

a. *Voluntariness:* means lack of coercion;

b. *Knowingly:* means that the defendant is fully informed of his rights and the ones that he is giving up.

3. This is referred to as "Boykinization".

*[*Boykin v. Alabama*].

C. **G/R:** Knowingly Element: a plea cannot support a judgment of guilt unless it was voluntary (the Supreme Court uses the term "voluntary" but it seems to really be referring to "knowingly") in the constitutional sense.

1. *Involuntary Pleas:* a plea may be involuntary because either:

a. the accused does not understand the nature of the constitutional protections that he is waiving; or

b. because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt.

*[*Henderson v. Morgan*].

C(1). **G/R:** Notice Requirement of Knowingly Element: notice is a requirement or sub-element of knowingly making a plea. A plea cannot be knowingly made, in the sense that it constituted an intelligent admission that he committed the offense, unless the defendant received *real notice* of the **true nature of the charge** against him—the first and most universally recognized requirement of due process.

1. *True Nature of the Charge:* the defendant must have knowledge of the true nature of the charge against him, which has been interpreted to mean that he must know the critical elements of the charge against him.

a. The "critical elements" are those elements that distinguish the charge from the next lower chargeable offense.

i. Ex: Felony robbery consists of (a) intentionally taking; (b) goods with more than a $500 value; whereas, misdemeanor robber consists of (a) intentionally taking, (b) goods with a value less than $500.

2. *Direct Consequences of the Plea:* the defendant must also be given notice of the direct consequences of the plea, which includes:

a. the rights the defendant is waiving;

b. the mandatory minimums; and

c. the maximum amount of the sentence.

See also* **Rule 11(c)(1) [codifying this standard]

3. *Indirect Consequences:* the defendant is not required to be informed of the indirect consequences of pleading guilty; such as the effect the plea may have on other aspects of the defendants life.

a. Ex: due process does not require that an illegal immigrant be told that if he pleads guilty to a felony his ass is on the first boat out of the USA because this is

only an indirect consequence of pleading guilty; other examples include having the defendant's name put on a sex offender list if he pleads guilty, and any other indirect consequences which are covered by the two requirements.

*[*Henderson v. Morgan*].

D. **G/R:** Voluntariness Element: waivers of constitutional rights must be voluntary, knowing, and intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. The standard of voluntariness of a guilty pleas is:

1. a plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by a court, prosecutor, and his own counsel, must stand *UNLESS:*

a. induced by threats (or promises to discontinue improper harassment);

b. misrepresentation (including unfulfilled or unfulfillable promises); or

c. by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes).

*[*Brady v. United States*].

D(1). **G/R:** Third Part Benefit in a Plea: [if this arises it should be analyzed under the "voluntary element" of Rule 11 because it deals with coercion] the constitution does not prohibit a prosecutor from offering, during plea negotiations, adverse or lenient treatment for some person other than the accused.

1. A guilty plea is valid if entered:

a. under a plea agreement that includes leniency for a third person; or

b. in response to a prosecutor's justifiable threat to prosecute a third party if the plea is not entered

i. where the plea is entered after the prosecutor threatens prosecution of a third party, courts have afforded the defendant an opportunity to show that probable cause for the prosecution was lacking when the threat was made.

2. A plea negotiation that includes a benefit to a third can arise and place pressure on the defendant in two respects: (a) the defendant's desire to the have the benefit conferred; and (b) the third person who is anxious to receive the benefit. Such pressure can arise in at least three contexts:

a. the defendant can offer to plead if the benefit is conferred;

i. this places the least pressure on the defendant.

b. the prosecutor can information the defendant that the benefit will be conferred if the defendant pleads; and

c. the prosecutor can inform that the third party that the beneft will be conferred if the defendant pleads.

i. this places the most pressure on the defendant.

3. ***bottom line:*** the inclusion of a third party benefit in a plea bargain is simply one factor the district court weighs in making the determination of whether the plea was voluntarily entered.

*[*US v. Marquez*].

4. **but note:** some courts (5th and 10th Circuits) have expressed reservations about packaged plea deals noting that the extent to which prosecutors in plea bargaining may utilize threats against third parties presents a substantial constitutional question and that

guilty pleas made in consideration of lenient treatment as against third persons pose a greater danger of coercion that merely bilateral plea bargaining [*US v. Nuckols*].

E. **G/R:** Alfred Pleas: the 5th Amendment is not violated when the defendant enters a plea of guilty, which he asserts would not have been entered except for his desire to avoid a possible death penalty and to limit the maximum penalty to life imprisonment or a term of years.

1. That standard remains to be whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
2. An express admission of guilty is not a constitutional prerequisite to the imposition of a criminal penalty. An individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling to unable to admit his participation in the acts constituting the crime.
3. However, when the defendant is entering an "Alfred Plea" the trial court should weigh the question of waiver more carefully than in other Boykinization hearings and inquire into the factual basis behind the plea, as required by Rule 11(f), to make sure the defendant made his plea based on evidence of guilt.

*[*North Carolina v. Alfred*].

F. **G/R:** Impermissible Penalties: the effect of a statutory provision that has the effect of discouraging the assertion of a constitutional right and thereby inducing a defendant to plead guilty constitutes an impermissible penalty on defendants who exercise their constitutional rights and therefore is unconstitutional.

1. Ex: statutory provision which provides if you go trial for murder, can get possible death penalty; whereas, if plead guilty, maximum punishment is life in jail.

*[*Brady v. US*].

G. **G/R:** Harmless Error Rule: Courts have held that failure to give the defendant precisely the correct element of the crimes or all the direct consequences is not a per se violation of due process and is subject to the harmless error rule [*see also* Wyo. R. Cr. P. 11(h) which makes the harmless error rule applicable].

H. **G/R:** Withdraw of a Guilty Plea: on a Rule 32(d) motion to withdraw a guilty plea, a defendant has the burden of persuading the trial court that valid grounds for withdrawal exist, and the court's decision that the burden has not been met is reversed only if clearly erroneous [*US v. Marquez*].

§ 7: THE JURY

I. OVERVIEW

A. **G/R:** Basic Rules: the 6th Amendment to the United States Constitution guarantees a right to a trial by jury.

1. This right has been incorporated and applies to the states through the 14th Amendment [*Duncan v. Louisiana*].

2. *Composition:* a five-person jury is too small to comport with the constitutional guarantee of a jury trial; however, a six-person jury is constitutionally permissible [*Ballew v. Georgia*; *Williams v. Florida*].
3. *Unanimity:* a criminal conviction does not have to be unanimous; however, the Supreme Court has held that it is not constitutionally permissible for 5-jurors (out of 6) to support a conviction, *Burch v. Louisiana*; however, the court has upheld convictions by 9 out of 12 jurors, *Johnson v. Louisiana*.

II. PUBLICITY

A. **G/R:** Outside Influence: the theory of the criminal justice system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by an outside influence whether of private talk or public print [*Shepard v. Maxwell*].

B. **G/R:** Presumption of Prejudice: in extreme instances of pretrial publicity, or publicity and influence during trial, when a procedure employed by a state involves such a probability that prejudice will result, the procedure will be deemed inherently lacking in due process, without the requirement (as in the usual due process claim) that the defendant show actual prejudice.

1. The defendant, in a criminal trial, is entitled to judicial serenity and calm and when that is lacking because the trial has failed to exercise his control over the media and other outside influences, prejudice will be presumed without a showing of actual prejudice to the defendant.
    a. A proceeding that is entirely lacking in solemnity and sobriety to which the defendant is presumptively prejudicial.
2. In other words, in cases with a "carnival atmosphere" prejudice will be presumed where the influence of the news media, *either in the community at large or in the courtroom itself*, pervaded the proceedings.
    a. EX:
        i. In *Estes*, prejudice was presumed because of the intrusions of the press, which were allowed to sit within the bar of the court and to overrun it with TV equipment;
        ii. In *Shepard*, prejudice was presumed because the trial was influenced by extremely inflammatory publicity and also by a courthouse overrun by reports (pictures were taken of the jury, the jury was allowed to give interviews and read newspapers, reports were sitting only a few feet from the jury box, etc . . .).

[*Shepard v. Maxwell*; *Estes v. Texas*].

C. **G/R:** Juror Knowledge of the Defendant because of Media: the constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors.

1. Qualified jurors need not, however, be totally ignorant of the facts and issues involved.
2. To hold that the existence of a preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.
3. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

a. However, the juror's assurances that he is impartial cannot dispositive of the accused's rights, and it remains open to the defendant to demonstrate the actual existence of such an opinion in the mind of the juror as will rise to the presumption of partiality.

b. The length to which the court must go in selecting jurors that are impartial is another factor relevant in evaluating those juror's issuances of impartiality.

*[*Murphy v. Florida*].

D. **G/R:** Actual Prejudice: the defendant, in cases under the Due Process Clause, asserting a violation of due process of law because of trial publicity must show actual prejudice or that the setting of trial was inherently unfair.

1. In exceptional cases, there may be an inference of actual prejudice, however, those cases are the exception not the norm.

*[*Murphy v. Florida*].

III. CHANGE OF VENUE

A. **Wyo. R. Cr. P. 21:** Transfer from the County for Trial:

(a) *Prejudice within County:* upon timely motion of the defendant, the court shall transfer the proceeding as to that defendant to another county, but *only if* the court is satisfied that there exists within the county where the prosecution is pending *so great of prejudice* against the defendant that the defendant cannot obtain a fair and impartial trial in that county.

--*note:* defense counsel, when making a motion for change of venue should use excerpts from the local news, state readership, or other common mode of communication because the motion is more likely to succeed; in addition, to bolster the motion he should have polls taken to determine the amount of persons biased because of the media reports.

IV. VOIR DIRE

A. **Generally:** there are two ways of eliminating juror bias, by change of venue, which is usually denied, and more commonly by voir dire. From jurisdiction-to-jurisdiction the rules permissible in voir dire change significantly; in addition, the discretion the trial judge exercises changes a lot also. For example, in federal court, the judge will conduct almost the entire voir dire without letting the attorney's participate, whereas, other jurisdictions will allow the attorney's to almost exclusively conduct voir dire.

1. There are three main purposes of voir dire:

a. to eliminate jurors who can be excused for cause;

b. to obtain information from the jury so that peremptory challenges may be exercised intelligently; and

c. introduce the themes of the case.

2. *Due Process Challenges:* to the conduct of the voir dire are almost never successful because of the amount of discretion that is afforded to the trial court in presiding over voir dire. The court has, however, placed some limits and requirements on voir dire:

a. in cases that involve racial issues, the jurors may be asked racial questions on voir dire [*Hamm v. South Carolina*; *Haciendo v. Ross*] [**check with Meglet]**

B. **G/R:** Challenges Cause: cause to dismiss a juror only exists if it can be shown that the juror is unable to decide the case fairly. The reason may be publicity, association with events or individuals in the case, racial prejudice, or disagreement with the governing law, as with the death penalty. In most cases, because of the jurors unwillingness to admit these things, challenges for cause are rather rare.

B(1). **WS § 7-11-105:** General Grounds for Challenging Jurors:

(a) the following is good cause for challenge to any person called as a juror in a criminal case:

(ii) that he has formed or expressed an opinion as to the guilt or innocence of the accused, or is biased or prejudiced for or against the accused.

C. **G/R:** Peremptory Challenges: peremptory challenges are not constitutionally protected fundamental rights; rather, they are state created means to the constitutional end of ensuring an impartial jury and a fair trial [*Georgia v. McCollum*].

D. **WS § 7-11-106:** Opinion Formed from News Reports or Rumors:

(a) It is *not* cause for challenge that a person called to act as a juror in a criminal case has formed or expressed an opinion as to the guilt or innocence of the accused from news media reports or rumor if:

(i) the prospective juror states that he can lay aside his impression or opinion and render a verdict based on the evidence presented in court; *and*

(ii) the court is satisfied, from the examination of the prospective juror or other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at trial.

D. **G/R:** Content Based Questions: the Due Process Clause does not require the court to ask content based questions of the venire, inquiring into the content of the news reports prospective jurors have read or seen, when pretrial publicity is an issue in the trial.

1. Since peremptory challenges are not required by the constitution, the benefit of content based questions cannot be a basis for making content questions about pretrial publicity a constitutional requirement.

a. Such questions might also have some effect in causing jurors to re-evaluate their own answers as to whether they had formed any opinion about the case.

2. Hence, as a constitutional right, content questions are not constitutionally required. [*Mu'Min v. Virginia*].

3. However, as a practical matter, most courts allow content based questions because they want to find out what prejudices the jurors have brought to bear and that may affect the outcome of the trial.

E. **G/R:** Voir Dire in Capital Cases: in death penalty cases, the court should inquire into the jurors prospective views on the death penalty. A juror is automatically excusable if, she is an ardent believer in the death penalty and vote for it whenever she got the change; or if she is diabolically opposed to the death penalty and would never vote for that form of punishment.

However, if the juror is merely undecided, iffy, or tends to favor one side, they are not excludable [*Witherspoon v. Illinois*; *Waignwright v. Witt*].

V. PREJUDICE ISSUES IN VOIR DIRE

A. **G/R:** Racial Prejudice in Venire Selection: purposeful racial discrimination in selection of venire violates a defendant's right to equal protection because it denies him the protection a trial by jury is intended to secure; that is, a fair section of the community [*Batson v. Kentucky*].

1. The court has consistently held for more than a century that racial discrimination by the State in jury selection offends the Equal Protection Clause.

a. Assumptions of partiality based on race *do not* provide a legitimate basis for disqualifying a person as an impartial juror.
*[*Georgia v. McCollum*].

A(1). **G/R:** Prima Facie Case of Purposeful Discrimination in Selecting the Venire: the showing necessary to establish a prima facie case of racial discrimination in the selection of the venire is:

1. the defendant must initially show that he is a member of a racial group capable of being singled out for different treatment.

a. In combination with that evidence, a defendant may then make a prima facie case by proving that in the particular jurisdiction members of his race have not been summoned for jury service over an extended period of time.

2. Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the result bespeaks discrimination; however, the Supreme Court has recognize that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*.
* [*Batson v. Kentucky*].

B. **G/R:** Equal Protection Clause and Peremptory Challenges: the States' privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause. The Equal Protection Clause *forbids* the prosecutor to challenge potential jurors solely on the account of race or on the assumption that black jurors as a group will be unable impartially to consider the state's case against a black defendant [*Batson v. Kentucky*].

B(1). **G/R:** Prima Facie Case of Purposeful Discrimination in Selection of Petite Jury: the defendant may establish a prima facie case of purposeful discrimination in selection of the petite jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.

1. To establish such a prima facie case, the defendant must:

1. show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race;

2. the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of mind to discriminate; and

3. the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venire-men from the petite jury on the account of their race.

2. *Then*: once the defendant has made this prima facie showing, the burden shifts to the state to come forward with a race neutral explanation for challenging the jurors of the cognizable class.

a. The prosecutor's explanation need not rise to the level of justifying exercise of a challenge for cause; in fact, the prosecutor only has the burden of production, therefore, any race neutral explanation will do (i.e., dismissed because they had big asses).

b. A race neutral explanation is an explanation based on *anything* other than race of the juror.

3. *Then*: once the prosecutor has made its race neutral explanation, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

a. an invidious discriminatory purpose may often be inferred from the totality of the circumstances and relevant facts, including the fact, if true, that the classification bears more heavily on one race than the other.

b. *pretext:* if a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's state reason was a pretext for discrimination.

c. *disparate impact:* the D will argue disparate impact at this point (i.e., eliminating all jurors of a certain race; for example, the prosecutor saying that he is eliminating all people with afros because he does not like them, that will have effect of eliminating all blacks from the jury).

i. However, although the prosecutor's criterion might well result in the disproportionate removal of prospective jurors of a certain race, the disproportionate impact does not turn the prosecutor's action inot a per se violation of the equal protection clause.

d. This trial court's finding on this element is a finding of fact, accorded great deference on appeal. In the end, the trial court's final inquiry is essentially whether the prosecutor discriminated intentionally.

[*Batson v. Kentucky*; *Hernadez v. NY*].

C. **G/R:** <u>6th Amendment's Fair Cross Section Clause:</u> a fair cross section of the venire requirement is imposed by the 6th Amendment which provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.

1. The traditional understanding of this clause is that it requires a representative venire, so that the jury will be drawn from a fair cross section of the community.

2. The fair cross section of the venire requirement is a means of assuring, not a *representative jury* (which the constitution does not require) but an *impartial* one (which the constitution does require).

a. That is, the clause requires that in the process of selecting the petite jury the prosecution and defense will compete on an equal basis.

3. The Supreme Court has held that a white defendant, in which all black's were excluded from his petite jury, was not denied the 6th Amendment's guarantee of a fair cross section from the community.

a. The court noted that the 6th Amendment only required the petite jury to be *impartial* and drawn from a venire that represents a fair cross section.

*[*Holland v. Illinois*].

C(1). **G/R:** Fair Cross Section 10% Rule: in selecting the venire, courts have adopted the 10% rule. The rule provides that if a particular group in the community is under-represented in the venire by 10% then there is a violation of the 6th Amendment.

1. Ex: Hispanics are a large group of the community; however, they have consistently only represented 3% of the venire—that would violate the 6th Amendment.

D. **G/R:** Race Based Objections: a criminal defense defendant can object to race based exclusions of jurors through peremptory challenges even if the defendant and the excluded jurors are not of the same race [*Powers v. Ohio*].

E. **G/R:** Criminal Defendants: the Equal Protection Clause prohibits a *criminal defendant* from engaging in purposeful racial discrimination in the exercise of peremptory challenges [*Georgia v. McCollum*].

F. **G/R:** Two Prong Test for Determining Whether an Constitutes "State Action" for Purposes of the Equal Protection Clause: in order to determine whether a person's (such as a criminal defendant) action constitutes state action for the purposes of the equal protection clause, four elements must be satisfied:

1. the claimed constitutional depravation has resulted form the exercise of a right or privilege having its source in state authority; and
2. the private party charged with the deprivation can be described as a state actor;
    a. in resolving this element, the court considers three factors:
        i. the extent to which the actor relies on governmental assistance and benefits;
        ii. whether the actor is performing a traditional governmental function; and
        iii. whether the injury caused is aggravated in a unique way by the incidents of governmental authority.

*If both these elements are met the action can be classified as "state action".

**[*Georgia v. McCollum*].

G. **G/R:** Gender Discrimination: the Equal Protection Clause prohibits the use of peremptory challenges to eliminate all persons of a certain gender from the venire also [*JEB v. Alabama*].

VI. BIAS

A. **Generally:** most jurors are subjected to a *voir dire* for reasons not related to race or gender; namely, to determine if they have any bias that might impede their ability to be partial in rendering a verdict in the case to be tried.

1. *Challenges for Cause:* if a juror is determined to have a bias he may be challenged for cause. Challenges for cause are relatively rare and generally includes challenges for prior involvement with the parties, the events, or witnesses. Or, more broadly, a bias which will impede or prevent fair-minded consideration of the case.

a. Each side has an unlimited number of challenges for cause.

B. **WS § 1-11-101:** Qualifications of Juror:

(a) a person is competent to act as a juror if he is:

(i) an adult citizen of the US who has been a resident of the state and county 90-days before being selected and returned;

(ii) in possession of his natural faculties, of ordinary intelligence, and without mental or physical infirmity preventing satisfactory jury service.

(iii) possessed of sufficient knowledge of the English language.

(b) No citizen shall be excluded from service as a juror on account of race, religion, sex, national origin or economic status.

C. **WS § 1-11-102:** Convicted Felon Disqualified: A person who has been convicted of any felony is disqualified to act as a juror unless his conviction is reversed or annulled.

D. **WS § 7-11-105:** General Grounds for Challenging Jurors:

(a) The following is good cause for challenge to any person called as a juror in a criminal case:

(i) that he was a member of the grand jury which found the indictment;

(ii) the he has formed or expressed an opinion as to the guilt or innocence of the accused, or is biased or prejudiced for or against the accused;

(iii) in a capital case, he states that his views on capital punishment would prevent or substantially impair performance of his duties as a juror in accordance with his oat or affirmation and the instructions of the court;

(iv) that he is a relation within the fifth degree to the personal alleged to injured, or attempted to be injured, by the offense charged or to the person on whose compliant the prosecution was instituted, or to the defendant;

(v) that he was served on a petit jury which was sworn in the same cause of the against eh same defendant, and which the jury either rendered a verdict which was set aside, or was discharged after hearing the evidence;

(vi) that he has served as a juror in a civil case brought against the defendant for the same act; and

(vii) that he has been subpoenaed as a witness in the case.

E. **WS § 7-111-4:** Trial of Challenges for Cause: Both the defense and the prosecution may challenge jurors for cause prior to the jury being sworn. Challenges for cause shall be tried to the court.

D. **G/R:** Demonstrating Actual Bias: a juror in the venire is only challengeable for *actual bias* because preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.

1. Bias will not be implied and proof of actual bias is ascertained by asking questions of the venire or individual jurors.
2. In proving actual bias, the Court said that what jurors say, when regarding bias, should generally be believed; hence, if a juror is questioned on bias, and admits some but says he can set it aside, then the court should believe the juror.
    a. This is because impartiality is not a technical conception. Impartiality is a state of mind.

*[*Dennis v. United States*].

E. **G/R:** Juror Contact: in a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during trial about the matter pending before the jury is deemed *presumptively prejudicial*.

1. The presumption is not conclusive, however, the burden rests heavily upon the government to establish, after *notice and hearing* of the defendant, that such contact with the juror was harmless to the defendant.

*[*Remmer v. US*].

F. **G/R:** Remmer Hearings: the Supreme Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove *actual bias*.

1. *Implied Bias:* a holding of implied bias to disqualify jurors because of their relationship with the parties or government is not permissible because preservation of the opportunity to prove actual bias is a guarantee of the defendant's right to an impartial jury.

*[*Smith v. Phillips*].

G. **G/R:** Prosecutorial Misconduct: the due process analysis in cases of prosecutorial misconduct is the fairness of the trial, *not* the culpability of the prosecutor because the aim of due process is not punishment of society for misdeeds of the prosecutor but avoidance of an unfair trial to the accused.

1. In other words, prosecutorial misconduct at a trial, which may bias a juror, is not a per se reason for reversal, it does, however, entitle the defendant to a *Remmer* hearing.

*[*Smith v. Phillips*].

§ 7.1: PUBLIC TRIAL

A. **Generally:** the 6th's Amendment's guarantee of a right to a public trial has been incorporated through the 14th Amendment of apply to the states. The 6th Amendment provides that the defendant shall have a right to a speedy and *public trial*.

1. A public trial essentially means that the trial is open to any member of the public; hence, if there is room in the courtroom, then anyone can show up and watch court.
2. The Court first held that the right to a public trial was only the defendants under the 6th Amendment, hence, he could waive that right (usually with agreement of the prosecutor and judge) and have the courtroom closed to the public. However, the press challenged this and eventually won under the 1st Amendment.
    a. Hence, the right to a public trial is the defendant's right and the public's right.

B. **G/R:** Press and Public's Right to a Public Trial: the press and public have a qualified First Amendment right to attend a criminal trial [*Waller v. Georgia*].

C. **G/R:** Right to Public Pretrial Activities: the Supreme Court has held that the right to a public trial extends to some pretrial activities, such as, voir dire proceedings, suppression hearings [*Waller v. Georia*].

D. **G/R:** Press Enterprise Balancing Test: the right to an open trial may give way in certain circumstances to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information. Such circumstances *will be rare* and the balance of interests must be struck with special care. However, the court should apply this balancing test to determine whether the trial should be open:

1. *Balancing Test:* the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.
    a. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.
    b. This balancing test looks a lot like strict scrutiny standard of review, which means it will be very hard to overcome the presumption of openness.
2. *Policy:* a public trial ensures that the judge and prosecutor carry out their duties responsibly, encourages witnesses to come forward, and discourages perjury.

*[*Waller v. Georgia*].

E. **G/R:** Harmless Error Analysis: the court in *Waller* seemed to suggest that the right to an open trial was not subject to harmless error analysis; however, at least one lower court that has considered the issue seemed to indicate that harmless error does apply.

1. The 2d Circuit opined that when considering whether the closure to the public was broader than necessary, the extent of the closure takes into consideration:
    a. the duration of the closure;
    b. importance of the testimony rendered while the courtroom was closed;
    c. the relationship of those excluded to the complaining defendant; and
    d. the public's right of access to the proceedings.

*[*English v. Artuz*].

J. **G/R:** Judge's Inherent Power to Control the Courtroom: the judge has the inherent authority under FRE 611 to control the courtroom; hence, the judge has the power to require individuals to leave if they are being disruptive, or he can close the doors and not let anyone in during a particular part of trial (such a reading jury instructions) to avoid interruption.

K. **G/R:** Defendant's Request for Closure: if the defendant requests that the trial be closed to the public, and the prosecution agrees, then court may be closed, *unless* the press or someone else seek admittance, then the judge must apply the *Press Enterprise* balancing test.

§8: ROLE OF THE PROSECUTOR

I. DUTY TO ASSIST THE DEFENSE

A. **Generally:** unlike civil discovery, criminal discovery is very limited. The parties will usually go trial knowing their own case very well, and have only a vague idea what the other side might try to assert. The criminal adjudicatory system is designed this way intentionally to protect the accused rights and because the system does not want to give criminal defendants the opportunity to concoct perjured testimony, which could easily be done if they knew the prosecution's theory of the case. In addition, this serves to protect witnesses from being harassed and possibly contacted before trial since each side does not, generally, know who the other side is going to call.

B. **Wyo. R. Cr. P. 16:** Discovery and Inspection: [statutory requirements for discovery]:

(a) *Disclosure of Evidence by the State.*

(1) *Information Subject to Disclosure:*

(A) Statements of Defendant.

(i) upon written demand of a defendant the state shall permit the defendant to inspect and copy or photograph:

--any relevant written or recorded statements made by the defendant;

--the substance of any oral statement made by the defendant which the prosecutor intends to use at trial;

--recorded testimony of the defendant before the grand jury which relates to the offense charged.

(B) Defendant's Prior Record (upon written demand);

(C) Documents and Tangible Objects.

--Upon written demand, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, which are in possession or control of the state.

(D) Reports of Examinations and Tests.

--Upon written demand, the state shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific test or experiments, or copies thereof, which are within the possession, custody, or control of the state.

(b) *Disclosure by the Defendant:*

(1) *Information Subject to Disclosure:*

(A) Documents and Tangible Objects.

--***If*** the defendant demands disclosure by the state, upon compliance by the state, and on demand of the state, the defendant shall permit the state to inspect and photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which the defendant intends to introduce as evidence in chief at trial and which are within the defendant's possession or control.

(B) Reports of Examinations and Tests.

-- ***If*** the defendant demands disclosure by the state, upon compliance by the state, and on demand of the state, the defendant shall permit the state to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case which are in possession of the defendant.

******This is reciprocal discovery, that is, the defendant never has to turn over any of this information and evidence if he does not request the same information

C. **G/R:** Defendant's Right to Exculpatory Evidence: [*Brady Material*]: under the Due Process Clause, criminal prosecutions must comport with prevailing notions of fundamental fairness. The Supreme Court has interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the defendant has a right to access to exculpatory information in the prosecutor's possession. Thus, the Due Process Clause requires that the prosecutor turn over exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of the criminal just system [*Brady v. Maryland*].

D. **G/R:** State's Duty to Turn over Exculpatory Material: the following things have been held to be "exculpatory material" which the defendant is entitled to have disclosed.

1. Deliberate deception by the state or prosecutor of the court or jurors by the presentation of known false evidence is incompatible with Due Process requirements.
2. The same result is reached when the state, although not soliciting false evidence, allows it to go uncorrected when it appears.
3. When the reliability of a witness may well be determinative of guilty or innocence, non-disclosure of evidence affecting credibility of that witness, falls under the same general rule—it must be turned over to the defense.
4. Significant impeachment material which bears on a witnesses credibility is exculpatory material which must be turned over to the defendant.

*[*Giglio v. US*].

D(1). Scope of *Brady* Requirements: the suppression by the prosecution of evidence favorable to an accused upon request by the defendant violates due process where the evidence is material either to *guilt or punishment*.

1. *Brady* only requires disclosure of evidence that is both favorable to the accused and *material* to either guilt or punishment.
2. **Test for Materiality:** the evidence is material if the suppressed evidence would have affected the outcome of the trial.
3. The good faith or bad faith of the government in failing to turn over material exculpatory information is irrelevant because the state has a duty to provide the information in all circumstances.

*[*United States v. Bagley*].

E. **G/R:** Reasonably Likelihood Test: a new trial is required when the exculpatory material is not turned over and the false testimony could, in any reasonable likelihood, have affected the judgment of the jury.

1. A defendant is entitled to a hearing concerning the non-disclosed exculpatory information if it would significantly affect the jury's judgment.
2. *Brady* violations depend on the *what information was withheld* NOT why the information was withheld.
*[*Giglio v. US*].

F. **G/R:** Equal Access to Exculpatory Information: the prosecution only has a duty to turn over exculpatory material that is *uniquely* in its possession; that is, if the defendant can get the exculpatory information just as easily as the prosecution, or has equal access to the information, then there is no *Brady* violation if it is not turned over.

1. Moreover, there is no affirmative duty on the prosecution to obtain exculpatory information.

G. **G/R:** When and What the Prosecutor is Required to Disclose: a prosecutor has a duty to disclose exculpatory material to the defendant, even when the defendant does not make a request for the information, when he makes a general request for the information, and when he makes a specific request for the information (in other words, whenever he has it).

1. The prosecutor is required to turn over all information that is material to either guilt or punishment.
2. **Test for Materiality:** evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.
    a. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*[*Bagley v. US*].

G(1). **G/R:** Exculpatory Information Not in Possession of the Prosecution: if the defendant requests information from the prosecution which is confidential pursuant to state statute requiring the requested records be sealed (such as DFS reports involving minors) the defendant is still entitled to have the judge view the material *in camera*, and to the disclosure of evidence if it is exculpatory in nature [*Pennsylvania v. Ritchie*].

H. **G/R:** Appealable Issues after *Bagley*: after *Bagley v. US* there are essentially two kinds of appealable issues involving non-disclosure under *Brady:*

1. the knowing use of perjured testimony, which calls into question the prosecutor's conduct and the prosecutor has the burden of proving that the state did not use perjured testimony;
    a. **g/r:** it is a well established rule that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.
2. non-disclosure issues, that is, assertions by the defendant that the prosecutor had exculpatory information which it did not turn over. This requires the defendant to prove that it was an error not to disclosure the information and that the information was material.

I. **ABA Std. 3-3.11:** Disclosure of Evidence by the Prosecutor:

(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

(b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

(c) A prosecutor should not intentionally avoid pursuit of evidence because he believes it will damage the prosecution's case or aid the accused.

J. **G/R:** Prosecutor's Duty to Preserve Potentially Exculpatory Material: the 14th Amendment does not require that the state preserve potentially exculpatory evidence on behalf of defendants (such as breathalyzer samples); that is, the government does not have to take affirmative steps to preserve evidence on behalf of criminal defendants.

1. **Test:** if the potentially exculpatory evidence is destroyed by the government in *good faith* and in accord with the government's normal practices, then the destruction of the evidence does not constitute an impermissible destruction of evidence that would deprive the defendant of any constitutional right.

a. Hence, if the evidence is destroyed by the government in *bad faith* it would be constitutional violation if the evidence was material.

b. In addition, the Supreme Court seemed to hint that if it is likely that the evidence would have in all likelihood been inculpatory, rather than exculpatory, it is less material.

*[*California v. Trombetta*].

K. **G/R:** Destruction of Exculpatory Evidence by Police: when the State fails to preserve evidentiary material, which could have been subjected to tests and which may have exonerated the defendant, a defendant's due process rights are not violated *UNLESS* the criminal defendant can show *bad faith* on the part of the police.

1. Another factor that may be taken into consideration is whether the state attempted to use the destroyed information in its case-in-chief, when it doesn't the materiality of the destroyed evidence decreases.

§ 9: THE ROLE OF THE DEFENSE COUNSEL

A. **G/R:** Right to Counsel: a criminal defendant has a constitutional right to an attorney. An indigent defendant has the right to appointment of counsel in any case, misdemeanor or felony, which could lead to a jail sentence [*Powell v. Alabama*, *Gideon v. Wainwright*, *Miranda v. Arizona*].

I. COMPETENCE OF COUNSEL

A. **G/R:** Assistance of Counsel: the 6th and 14th Amendments to the Constitution guarantee that a person brought into trial in any state or federal court must be afforded the right to assistance of counsel before he can be validly convicted and punished by imprisonment

1. The right to counsel, however, does not guarantee a good relationship with counsel, nor representation that accedes to every wish of the criminal defendant.

a. The defendant always has the choice to decide whether he is going to testify and whether he should go to trial. In other instances, strategic decisions can be made by counsel, even if they are against the wishes of the client.

2. The defendant does not have a constitutional right to choose who he wants to represent him, if the court appoints a lawyer, that is the criminal defendant's lawyer.
*****[*Faretta v. California*].

B. **G/R:** Waiver: an accused, in the exercise of free and intelligent choice, and with the approval of the court, may waive trial by jury and likewise he may competently waive and intelligently waive his constitutional right to assistance of counsel.

1. *Knowing and Intelligent Requirement:* in order to proceed *pro se* the accused must knowingly and intelligently waive his constitutional right to assistance of counsel.
2. *Standard:* although the defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation so that the record will establish that he knows what he is doing and his choice was made with open eyes.

i. The court also may appoint stand-by counsel to provide the defendant with "advice" as he proceeds pro se in the trial.

3. Although the criminal defendant has a constitutional right to proceed pro se, he does not have a right to hybrid representation wherein he conducts some of the trial while an attorney does other parts of the trial—its all or nothing.
*[*Faretta v. California*].

C. **ABA Std. 4-5.2:** Control and Direction of the Case:

(a) Certain decision relating ot the conduct of the case ultimately for the accused and others are ultimately for defense counsel. The decision which are to made by the accused after full consultation with counsel include:

(i) what pleas to enter;
(ii) whether to accept a plea agreement;
(iii) whether to waive a jury trial;
(iv) whether to testify on his own behalf; and
(v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation wit h the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

D. **G/R:** Right to Counsel and Fair Trial: the 6th Amendment right to counsel is needed in order to protect the fundamental right to a fair trail. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the 6th Amendment, including the counsel clause: "In a criminal prosecutions, the accused shall enjoy the right…to have assistance of counsel for his defense."

1. Thus, a fair trial is one in which evidence subject to the adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

a. The right to counsel plays a crucial role in the adversarial system embodied in the 6th Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled.

*[*Strickland v. Washington*].

D(1). **G/R:** Presumption of Unfair Trial: a trial will be presumed unfair under the assistance of counsel clause it two circumstances:

1. a trial will be presumed to be unfair if the defendant is completely denied the assistance of counsel; and
2. if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.
    i. This is a very limited exception taken from *Powell v. Alabama*.

*[*US v. Chronic*].

E. **G/R:** Assistance of Counsel: a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained.

1. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.
2. The 6th Amend recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.
3. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure the trial is fair.
4. **Presumption:** actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.

*[*Strickland v. Washington*].

F. **G/R:** Effective Assistance of Counsel: the right to counsel is the right to effective assistance of counsel.

1. The government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.
2. Counsel, however, can also deprive the right of effective assistance, simply by failing to render *adequate legal assistance*.
3. The benchmark for judging any claim of ineffectiveness must be 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.
    a. The same principle applies to a capital sentencing proceeding.

*[*Strickland v. Washington*].

G. **G/R:** Test for Ineffective Assistance of Counsel: a convicted defendant's claim that counsel's assistance was ineffective and so deficient to require a reversal requires the defendant to demonstrate two things:

1. The defendant must show that counsel's performance was **deficient**;

a. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the 6th Amendment.

2. The defendant must show that the deficient performance **prejudiced the defense**.

a. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose results where unreliable.

i. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.

ii. *Test for Prejudice:* the defendant must show that there is a reasonable probability (a probability sufficient to undermine confidence in the outcome) that, <u>but for</u> counsel's unprofessional errors, the result of the proceeding would have been different.

b. In addition, the defendant must:

i. on a case-by-case basis;

ii. prove that an act or omission; (rather than just a general allegation)

iii. prejudiced his defense.

*[*Chronic v. US*].

*Unless the defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the results unreliable.

**__Note:__ the court usually begins its analysis with the second prong so it usually does not have to get into whether counsel's performance was deficient.

***[*Strickland v. Washington*].

G(1). **G/R:** <u>Factors in Evaluating the Effectiveness of Counsel:</u> there are five factors that are relevant to evaluation of a lawyer's effectiveness in a particular case; however, neither separately nor in combination do they provide the basis for concluding that counsel was not competent. The factors are:

1. the time afforded for investigation and preparation;
2. the experience of counsel;
3. the gravity of the charge;
4. the complexity of possible defenses; and
5. the accessibility of witnesses to counsel.

*[*US v. Chronic*].

H. **G/R:** <u>Standard for Attorney Performance:</u> the proper standard for attorney performance is that of **reasonably effective assistance** and the advice was not in the range of competence demanded of attorneys in criminal cases.

1. The defendant must show that counsel's representation fell **below an objective standard of reasonableness.**

2. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

a. Prevailing norms of practice as reflected in the ABA standards are guides for determining what is reasonable—but they are only guides.

3. Representation of a criminal defendant entails certain basic duties; counsel's function is to assist the defendant and hence counsel owes the client:

a. a duty of loyalty;

b. a duty to avoid conflicts of interest;

i. **Presumption:** prejudice is presumed when counsel is burdened by an actual conflict of interest.

c. a duty to consult with the defendant on important decisions and to keep defendant informed of important developments in the course of prosecution;

d. a duty to bring to bear such skill and knowledge as will render a reliable adversarial testing process.

*[*Strickland v. Washington*].

I. **G/R:** Judicial Review of Counsel's Performance: judicial scrutiny of counsel's performance must be *highly deferential*. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time.

1. **Presumption:** there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

a. The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered might be considered sound trial strategy.

i. Thus, a convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.

ii. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professional competent assistance.

*[*Strickland v. Washington*].

J. **G/R:** Perjury: whatever the scope of the constitutional right to testify, such right does not extend to testifying falsely.

1. The privilege to testify cannot be construed to include the right to commit perjury;

2. after voluntarily taking the stand, the defendant is under an obligation to speak truthfully.

*[*Nix v. Whiteside*].

K. **G/R:** Attorney's Duty to Prohibit Client Perjury: the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence.

1. This special duty of an attorney to prevent and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice.

2. *Attorney's Duty:* the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct; if the client refuses:

a. then the attorney may withdraw as counsel; or

b. inform the court if the client perjures himself in court.

3. Whether an attorney's response to what he sees as a client's plan to commit perjury violates a defendant's 6th Amendment rights may depend on may factors:

1. how certain the attorney is that the proposed testimony is false;
2. the stage of the proceedings at which the attorney discovers the plan; or
3. the ways in which the attorney may be able to dissuade his client.

*[Blackmun, concurring].

*[*Nix v. Whiteside*].

L. **G/R:** Ethical Obligations of Defense Counsel: the defense counsel's ethical obligations begins when he first meets his client. Some of those ethical obligations include:

1. *Interviewing the Client:* as soon as practicable, defense counsel should seek to determine all relevant facts known to the accused, without seeking to influence the direction of the client's responses [**ABA Std. 4-3.2(a)**];
2. *Confidentiality:* the defense counsel should seek to ensure the privacy essential for confidential communication with his client [**ABA Std. 4-3.1(b)**];
3. *Advise:* the attorney should provide the accused with a candid estimate of the probable outcome after informing himself on the law and the facts without overstating the risks, hazards, or prospects of the case to exert undue influence on the accused's decision to enter a plea [**ABA Std. 4-5.1**].

M. **G/R:** Joint Representation: requiring or permitting a single attorney to represent codefendants is NOT a *per se* violation of the constitutional guarantee of effective assistance of counsel.

1. This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases certain advantages might accrue from joint representation.

*[*Holloway v. Arkansas*]

N. **G/R:** Conflicts of Interest: whenever a trial court improperly permits or requires joint representation prejudice will be presumed when one defendant objects to the joint the representation because one co-defendant has a conflicting interest with another codefendant.

1. Whenever a trial court improperly requires joint representation over timely objection, reversal is automatic.
2. Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.

*[*Holloway v. Arkansas*].

§ 10: THE PROSECUTION CASE

I. CONFRONTATION AND DUE PROCESS ISSUES

A. **G/R:** Right to Confrontation: the confrontation clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him.

1. The right to confrontation, however, is not absolute. The confrontation clause does *not* prevent the judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness.

2. Trial judges retain wide latitude insofar as the confrontation clause is concerned to impose reasonable limitations on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.
3. **note:** the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in any way, and to whatever extent the defense may wish.
4. **bottom line:** the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other confrontation clause errors, is subject to harmless error analysis.
*[*Delaware v. Van Arsdall*].

B. **G/R:** Denial of Right to Confrontation: the defendant may denied his constitutional right to cross examination if the trial court either denied him the right to confront a witness or the defendant was actually prejudiced by the limits imposed by the trial court. However, when demonstrating prejudice in determining whether the confrontation clause has been violated the focus is on *the individual witness* and not on the outcome of the entire trial.

1. *Harmless Error Analysis:* however, the defendant may be denied his right to confrontation on a particular witness, which does not affect the outcome of the case; hence, harmless error analysis applies in determining whether the defendant is entitled to a new trial because of a denial of the right to confrontation of a particular witness.
*[*Delaware v. Van Arsdall*].

B(1). **G/R:** Test for When Confrontation Clause is Violated: a criminal defendant states a violation of the confrontation clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness and thereby expose to the jury the facts from which jurors could appropriately draw inferences regarding the reliability of the witness [*Delaware v. Van Arsdall*].

C. **G/R:** Confrontation Clause Violations: when a witness's testimony at trial is *crucial* to the central issue in the case and that a *real possibility* exits that without full cross-examination, or cross-examination into a line of impeachment evidence, the defense will be impaired or the absence of cross-examination may affect the outcome of the case, then a denial of the defendant's right to cross examination is violation mandating reversal.

1. Hence, in some cases, such as when the witness's testimony are key elements in the state's case a defendant, it probably is not harmless error to deny the defendant the right to cross-examination on bias or use impeachment evidence.
2. The specific constitutional violation in *Davis* was that the defendant was denied the right to expose to the jury the facts from which juror could appropriately draw inferences relating to the reliability of the witness (a crucial witness).
*[*Davis v. Alaska*].

C(1). **G/R:** Cross Examination into Bias: subject to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation the cross examiner has traditionally been allowed to impeach, i.e., discredit the witness.

1. The exposure of the witness's motivation for testifying is a proper and important function of the constitutionally protected right to cross examination.
*[*Davis v. Alaska*].

D. **G/R:** Confrontation Clause and Pretrial Discovery: the right of confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination.

1. The ability to question adverse witnesses does *not* include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.
2. Normally, the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses.
3. In short, the Confrontation Clause only guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent.
4. In short, the confrontation clause does not extend to pretrial discovery in order to make the defendant's cross examination more effective at trial.
    a. However, if the defendant needs material information for his cross examination, it may raise due process issues (as it did in *Ritchie*) if the information is exculpatory and not handed over to the defendant under the *Brady* line of cases.
    b. The issue in *Richitie* was, however, that the prosecution did not have the information either. The court said in this situation, where the information sought was sealed under a state confidentiality statute, the proper remedy is to allow the judge to view the material *in camera* to determine whether the information can properly be disclosed to the defendant.

*[*Pennsylvania v. Ritchie*].

E. **G/R:** Harmless Error Analysis under Confrontation Clause: the constitutionally improper denial of a defendant's opportunity to impeach a witness bias, like other confrontation clause errors, is subject to harmless error analysis.

1. **Test:** the correct inquiry is whether, assuming that the damaging potential of the cross examination was fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.
    a. *Factors:* whether such an error was harmless beyond a reasonable doubt in a particular case depends on a number of factors, including:
        i. the importance of the witnesses testimony in the prosecution's case;
        ii. whether the testimony was cumulative;
        iii. the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; and
        iv. the overall strength of the prosecution's case.
2. In *Olden* the court held that the trial court's refusal to allow the defendant to impeach a crucial witnesses testimony by introducing evidence supporting a motive to lie deprived the defendant of his constitutional right to confront the witness and that such error was not harmless.
    a. This was so, notwithstanding the fact that FRE 412, the federal rape shield law, protected the victim from introduction of her sexual history at trial.

*[*Olden v. Kentucky*].

F. **G/R:** Right to Face-to-Face Confrontation: a criminal defendant has the right to face-to-face confrontation of the witnesses against him under the 6th Amendment, although this right is not absolute (see below).

1. The court held that the right to face-to-face confrontation was an essential part of the confrontation clause even though it may be upsetting to some children or rape victims because it also has the effect of undoing the false accuser and making him tell the truth.
2. In *Coy* the court held that a screen erected between the defendant and witness, which allowed the jury to view both, violated the defendant's right to face-to-face confrontation. *[*Coy v. Iowa*].

G. **G/R:** Limitations on the Defendant's Right to Face-to-Face Confrontation: a state's interest in the psychological well-being of a witness (such as child abuse victims or rape victims) may be sufficiently important to outweigh, at least in some cases, a defendant' right to face his accusers in court.

1. *Case Specific Finding of Necessity:* although face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there is a case specific finding of necessity.
    a. A case specific finding of necessity requires: the trail court to hear evidence and determine whether the use of the one way closed circuit television procedure is necessary to protect the welfare of the particular witness who seeks to testify.
    b. *Trauma Requirement:* denial of face-to-face confrontation is not needed to further the state interest in protecting the witness from trauma unless it s the presence of the defendant that caused the trauma.
        i. The trial court *must find* that that the emotional distress suffered by the witness is more than de mimimis, i.e., more than mere nervousness or excitement or some reluctance to testify.
        ii. If the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testy in less intimidating surroundings, albeit with the defendant present.
2. Hence, the Constitutional requirement of face-to-face confrontation does not categorically prohibit a child witness in a child abuse case from testifying against a defendant a trial, outside the defendant's presence, by one-way closed circuit television. *[*Maryland v. Craig*].

H. **G/R:** Due Process Violations based on Appearance of Guilt: a line of cases has held that when the defendant has been branded with the appearance of guilt, the defendant's due process rights to a fair trial are violated because the jury draws inappropriate inferences from the defendant's appearance. For example:

1. *Jump Suits/Prison Garb:* the rule from jump suits is not that the defendant can never be tried in a jump suit, but rather, if the defendant requests street clothes and is denied the request, that is grounds for automatic reversal [*Estelle v. Williams*];

2. *Wearing Shackles:* with shackles, the court will balance the need for safety against the prejudicial effect of the shackles, taking into consideration of such things as how noticeable the shackles are.
3. *Presence of Guards:* the presence of guards behind counsel table was held not to violate the defendant's due process rights [*Holbrook v. Flynn*].
4. **TEST:** whenever a courtroom arrangement is challenged as inherently prejudicial, the question must be whether an unacceptable risk is presented of impermissible factors coming into play, *not* whether the jurors articulated a conscious reason of some prejudicial effect.

II. HEARSAY TESTIMONY AND THE CONFRONTATION CLAUSE

A. **G/R:** Analytical Framework for Confrontation Clause: there are four distinct scenarios that can arise under the Confrontation Clause and for the admissibly of hearsay:

1. *Firmly Rooted Hearsay Exceptions:* hearsay falling within a traditional or firmly rooted exception to the rule will be admissible under the Confrontation Clause.
2. *Unavailable Not Required:* [Rule 803 exceptions] where the exception does not require unavailability because of the theoretical superiority of the out of court statement, the Constitution does not require the declarant to be unavailable.
3. *Unavailability Required:* [Rule 804 exemptions] where unavailability is constitutionally required, the Confrontation Clause will in *some circumstances* require a more rigorous demonstration of unavailability by the by the prosecution than the hearsay rules require.
4. *Not Firmly Rooted Hearsay Exceptions:* [Rule 807]: where the hearsay is offered by the prosecution under a residual hearsay exception, *particularized guarantees of trustworthiness* must be shown, which is not identical to meeting the "equivalent circumstantial guarantees of trustworthiness" for the Federal Rule and the state counterparts.
    a. In addition, the prosecution must establish the trustworthiness of the statement itself, rather than depending on its likely truth in light of corroborating circumstances.
    b. Newly created statutory hearsay exceptions should also be subject to the test set forth in *Wright* until widespread acceptance and longevity render such exception firmly rooted.

§ 11: THE DEFENSE CASE

A. **Generally:** the defendant is the only witness who has the right not to take the stand (unlike other witnesses who must be called to the stand before they may invoke their 5th Amendment rights). The defendant is also entitled to a presumption of innocence. Nonetheless, a decision not to testify is a difficult one for the defendant and one that is only his decision to make, after advise from counsel.

1. Forcing the defendant to take the stand is per se reversible error.

B. **G/R:** Comment of the Defendant's Failure to Testify: a defendant in any criminal case, may at his election, testify in his own defense. The defendant's right to invoke the privilege not to testify shall not create any presumption against him.

1. In addition, this presumption forbids *all comment* (by the prosecutor) in the presence of the jury upon his failure to testify in his own behalf.

*[*Reagan v. US*].

C. **G/R:** Defendant's Credibility: if the defendant elects to testify in his own behalf, his credibility may be impeached, his testimony may be commented on, and the jury can be instructed that it is to be accorded the same weight as the other witnesses testimony.

1. Once the defendant takes the witness stand, he is entitled to all the rights and protections as other defendants, but he is also subject to all its criticisms and burdens.
2. The defendant's credibility may be impeached and by the same methods that are pursued in the case of any other witness.
3. The jury may be properly instructed, and consider, his manner of testifying, the inherent probabilities of his story, whether his testimony was contradicted, his interest in the outcome of the trial, and any impeaching evidence.

*[*Reagan v. US*].

D. **G/R:** Comment Rule: the prosecution cannot comment of the defendant's failure to testify on his own behalf without violating the 5th Amendment because such comment is, in effect, a penalty imposed by the courts for exercising a constitutional privilege.

1. Comment on the decision not to testify cuts down on the privileged by making its assertion costly, which may have the effect of making the defendant testify when he does not want to.

*[*Griffin v. California*].

E. **G/R:** Commenting on the Defendant's Failure to Call other Witness: the courts are split on whether the prosecution can comment on the defendant's failure to call certain other witnesses. Some courts hold this is a *Griffin* violation, while the others find that the defense can rebut that assertion with the fact that the defendant does not have prove anything and the prosecution, likewise, could have called the witness.

F. **G/R:** Defendant's Failure to Present Any Evidence: some courts have held that when the defendant does not put on a case, and the prosecutor makes the comment that the evidence is "uncontroverted, undisputed, and not refuted" that this is a *Griffin* violation because the prosecution is shifting the burden to the defendant; however, many courts find that it is harmless error.

G. **G/R:** Jury Instructions: if the defendant requests a jury instruction saying that the jury should not construe the defendant's silence against him, the court is required to give it or it is reversible error.

1. However, if the defendant decides he does not want the instruction, for strategic reasons, and the court gives the instruction anyhow, there is not an error.

H. **G/R:** Fair Response Doctrine: the Supreme Court has said the fair response doctrine is permissible; therefore, the defendant's theory of the case cannot be that the government never allowed the defendant to tell her story and then not testify at trial. If the defendant does, the prosecutor may comment to the jury that the defendant could have presented his story at trial.

§12: DECISION AND VERDICT

I. CONDUCT OF COUNSEL DURING SUMMATION

A. **Generally:** after the close of the testimony, the defense counsel should make a motion for directed verdict, which is usually denied, then counsel will make arguments to the jury.

B(1). **G/R:** Five Impermissible Summation Comments: the following are the five generally recognized comments that constitute misconduct of counsel in summation:

1. *Going Beyond the Record:* counsel cannot make argument on facts not supported in, or by, the record (i.e., evidence that was not presented at trial).
    a. Counsel can, however, argue inferences to be drawn from those facts and other circumstantial evidence.
        i. Ex: in proving criminal intent, the prosecutor usually has to argue that he committed the crime with intent, and that argument is made through circumstantial evidence because a criminal defendant rarely says, why "yes, I did commit this crime with malice aforethought."
    b. Counsel can avoid problems by simply telling the jury that they should draw an inference from the facts that have been presented in evidence.
        i. The court may give counsel some leeway in commenting on the facts that are of "common knowledge" such as whether it was light or dark out.
    c. It is also impermissible for counsel to use evidence that admitted for a limited purpose, such as hearsay evidence, and then arguing the evidence as it was substantive evidence.
2. *Personal Opinions or Beliefs of Counsel:* it is impermissible for either a prosecutor defense attorney to comment on their belief of the truth or falsity of the defendant's guilt or innocence. The same is true with the credibility of any other witness. This is the rule because it suggests that the attorney knows something that the jury does not know.
    a. Moreover, the lawyer's opinions are irrelevant since it is exclusively the domain of the jury to decide the facts.
3. *Misrepresentations of Law:* the lawyers cannot misrepresent the law, what the law is, or what it stands for. If a lawyer does, however, it is usually considered harmless error because the judge instructs the jury not to listen to the lawyer's views of the law and that the judge will instruct the jury on the law.
    1. If the misrepresentation of the law rises to a constitutional error (such as saying the defendant has prove himself innocent) it may be reversible. Other examples are comments on the burden of proof, the defendant's failure to testify, or his failure to present evidence.
4. *Irrelevant Arguments about the Criminal Procedure:* the prosecutor cannot make comments in summation, indicating that the judge or judicial system believes the

defendant is guilty because the case has proceeded through several levels of the criminal justice system.

a. For example, the prosecutor cannot say the defendant must be guilty because a grand jury indicted, the judge found probable cause for his arrest at the prelim, then we survived a directed verdict motion, and now, finally, you—the jury—is hearing the case and remember, if you acquit the defendant, the government doesn't have a right to appeal.

5. *Appeals to Emotion, Bias, or Prejudice:* these are the most frequent occurrences and the most litigated on appeal. Lawyers make appeals to bias and emotion all the time and there is a large gray area for what is permissible and what is not permissible. The courts usually become involved when the statements become particularly abusive. Some lines the court have drawn are:

a. the lawyer cannot ask the jury to put themselves in the defendant's shoes; and

b. appeals to community or governmental values cannot be use either.

a. For example, the prosecutor cannot say, lets send a message to the drug dealers that this community will take it and put this defendant away.

B(1). **ABA Std. 3-5.8 [prosecutor] 4-7.7 [defense attorney]:** Argument to the Jury:

(a) In closing argument to the jury, the prosecutor/defense attorney may argue all reasonable inferences for the evidence in the record. The prosecutor/defense attorney should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

(b) The prosecutor/defense attorney should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor/defense attorney should not make arguments calculated to appeal the prejudices of the jury.

(d) The prosecutor/defense attorney should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

C. **G/R:** Comments on Defendant Tailoring his Testimony: it is not unconstitutional for a prosecutor, in her summation, to call to the jury's attention the fact that the defendant had the opportunity to hear all other witnesses testify, and tailor his testimony accordingly.

1. This is in accord with the longstanding rule that when the defendant takes the stand, his credibility may be impeached and his testimony assailed like that of any other witness.

a. When the defendant assumes the role of witness, the rules that generally apply to other witnesses, rules that serve the truth seeking function of the trial are generally applicable to him as well.

2. In other words, when the defendant takes the stand, she should be treated the same as any other witnesses.

3. Allowing comment upon the fact that the defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate, and given the inability to sequester the defendant, sometimes essential, to the central function of trial which is to discover the truth.

a. In addition, it does not matter if the prosecutor's comments were specific or general.

*[*Portuondo v. Agard*].

D. **G/R:** Prosecutorial Misconduct in Closing: the prosecutor is a servant of the government and the law, the twofold aim of which is that the guilty shall not escape and the innocent shall not suffer. She may prosecute with earnestness and vigor, indeed she should do so, but while she may argue (and strike blows) she is not allowed to misrepresent or badger the witness (strike foul blows).

1. A governmental prosecutor is the representative of the sovereign, not an ordinary party to litigation, and the sovereign's obligation is to govern impartially; therefore, in a criminal prosecution the duty of the prosecutor is not that she shall win, but rather, that justice shall be done.
2. In sum, the prosecutor should refrain from improper methods calculated to produce a wrongful conviction.

*[*Berger v. United States*].

E. **G/R:** Mistrial Requested by the Court: the Supreme Court has held that a mistrial declared by the court on its own initiative must be justified by *manifest necessity*; whereas, a mistrial granted tat the defendant's request need not be so justified [*United States v. Dintz*].

F. **G/R:** Duty of Prosecutor and Defense Counsel in Summation: it is clear that counsel on both sides of the table share a duty to confine arguments to the jury within proper bounds.

1. Just as the conduct of the prosecutor is circumscribed, the interests of society in the preservation of the courtroom control by the judges are no more to be frustrated through unchecked improprieties by the defense counsel.
2. In other words, defense counsel, like the prosecutor, must refrain from interjecting personal beliefs into the presentation of his case.
3. In addition, the defense counsel, like the prosecutor, is *not* permitted to make unfounded and inflammatory attacks on the opposing advocate.
4. When misconduct begins to occur in closing arguments, it is the trial judge who should deal *promptly* with any breach by other counsel.

*[*US v. Young*].

G. **G/R:** Invited Response Rule: inappropriate prosecutorial comments, standing alone, would justify a reviewing court in reversing the conviction, if the comments rose to a level of sufficient that implicated the defendants rights. However, when the defense counsel improperly argues, provoking the prosecutor to respond in kind, the Supreme Court then analyzes the issue by determining whether the prosecutor's "invited response", taken in context, unfairly prejudiced the defendant.

1. Invited responses can be effectively discouraged by prompt action from the bench, in the form of corrective instructions to the jury, and when necessary an admonition of the errant advocate.
    a. Hence, it is the *prosecutor's duty* to object and ask the district judge to deal with defense counsel's misconduct, which would resolve the issue.
    b. However, the when the prosecutor does not then:
        i. **TEST:** the dispositive issue is whether the prosecutor's remarks rose to the level of "plain error" when she responded to defense counsel.

2. The courts have essentially fallen into three camps with respect to the prosecutor's duty when she is "invited to respond":

a. *Berger Approach:* the prosecutor is held to a higher standard, as attorney for the sovereign, hence, she can respond, but not respond improperly—strike blows, just not foul ones.

b. *ABA Approach:* although enforcement is difficult against the defense counsel, the defense counsel and prosecutor are held to the same standard of care.

a. This seemed to be the approach the Supreme Court took in *Young*; however, the district court is always given a lot a discretion in making its determinations.

c. *Prosecutorial Leeway:* some courts grant the prosecutor more leeway, when responding in kind, since nothing can be enforced against the defendant's counsel.

*****[*United States v. Young*].

H. **G/R:** TEST for Reversal based on Prosecutorial Misconduct in Summation: even when the prosecutor's comments are universally condemned, undesirable, and beyond colorful, the ultimate test the court must apply is:

1. Whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.

a. Prosecutorial misconduct, which infects the trial with unfairness, are statements that:

i. misstate the evidence;

ii. implicate other specific rights of the accused, such as the right to counsel or the right to remain silent.

*[*Darden v. Wainwright*].

I. **G/R:** Prosecutorial Misconduct: [*Wyoming*]: when reviewing a claim of prosecutorial misconduct, the Wyoming Supreme Court will apply the following standards:

1. claims of prosecutorial misconduct are settled by reference to the entire record and *hinge* on whether a defendant's case has been so prejudiced as to constitute a denial of a fair trial.

2. similarly, the propriety of any comment within a closing argument is measured in the context of the entire argument.

3. a trial court's ruling as to the scope of permissible argument will not be disturbed absent a clear or patent abuse of discretion.

a. even then, reversal is not warranted unless a reasonable probability exits that, absent the error, the defendant may have enjoyed a more favorable verdict.

*[*Gayler v. State*].

J. **G/R:** Appeals to Prejudice or Bias: during closing arguments, counsel may assist the jury by reflecting upon the evidence and drawing reasonable inferences which logically flow from that evidence.

1. The prosecutor is not only entitled, she is encouraged to advocate strongly, even vehemently, however, while she may strike hard blows, she cannot strike foul ones.

2. Arguments which are designed to appeal to the jury's prejudice or passion are improper.

i. The fear in allowing such appeal is that he accused will be convicted for reasons wholly irrelevant to guilt or innocence.

ii. Jurors may be persuaded by such appeals to believe that, by convicting the defendant, they will assist in the solution of some pressing social problem, which is improper.

*[*Gayler v. State*]

K. **Note:** all these rule, in effect, point to the conclusion that the prosecutor should object during the defendant's closing, if he is making improper argument, or that the defendant should object to the prosecutor, if she is making improper argument. However, rules of courtroom decorum suggest that counsel should not interrupt opposing counsel during their closing. Competing with this, is the fact that the contemporaneous objection rule provides that if counsel does not object when the error occurs, they waive that right to appeal. Hence a lot a strategic considerations are involved in determining whether to object.

II. JURY INSTRUCTIONS

A. **Generally:** Jurors deliberate in private and out of the presence of the judge, attorneys parties, witnesses, and court officials. There is no record or transcript. The jury is alone. They have with them the pleadings and exhibits (usually do not have trial transcripts) and notes in the minority of jurisdictions where they are allowed to take such notes. There are several basic rules about jury deliberations that do not arise very much because they have become universally accepted and are implemented in every courtroom:

1. the deliberation room must be outside the courtroom and in "secret" or private. The Supreme Court has held that deliberations must be held in secret and that this is a critical aspect of the defendant's right to a fair trial.

a. *Policy:* absence of coercion, public perception, more conducive to free speaking by the jurors and it encourages vigorous dispute among the jurors.

2. The jury is allowed to use the following in deliberations (although the rules vary from jurisdiction-to-jurisdiction):

a. exhibits (as long as there is no risk of harm to the jurors);

b. the jury instructions (in Wyoming the jury gets a copy of the instructions)

c. testimony of the witnesses (some jurisdictions allow the transcript to go in, others only allow, upon request by the jury, that the testimony be read back to them).

3. There are no rules to the actual deliberation process *except* when the jury has been deliberating for a long time, or they indicate that they are deadlocked, the judge can give the jury "advise" on how to discuss the case. What the judge can tell the jury is severely limited, and usually very general.

B. **G/R:** Allen Charges: over a century ago, the Supreme Court approved of what is now referred to as an "Allen Charge" (or blasting or dynamite charge). This charge tells the jury to listen to each other, and if one or more of the jurors individually is in the minority, that he should maybe consider why she is in the minority.

1. A lot of jurisdictions, notwithstanding the decision in *Allen*, have condoned the charge and some, such as the 2d and 3d circuits, have limited its use altogether.

C. **G/R:** Numerical Division Polling: inquiry into the jury's numerical division (on guilt or innocence) by the trial court is *per se* reversible error because it is coercive and almost always brings an improper influence on the jury [*Lowenfield v. Phelps*].

D. **G/R:** Determining Coerciveness of a Jury Instruction: when determining the coerciveness of a jury instruction given to a particular jury, the court will consider an number of factors:

1. whether the judge directed the instruction(s) to a particular juror;
2. whether the judge knows the vote count;
3. whether the judge tells the jury that they have a responsibility to reach a verdict (which they do not);
    a. The Supreme Court has that it is not coercive to instruct the jury that if they could not conscientiously and freely agree upon a verdict they would be discharged.
4. whether the court overemphasizes the role of compromise;
5. whether the judge made particular comments that appeared to influence the jury, ridiculed the jury, or made the jury look foolish;
6. whether the court threatens the jury (through sequestration, making them deliberate over the weekend or holidays, etc…);
7. how long the jury has been deliberating before the jury begins giving instructions;
8. how complicated case is and the number of legal issues it involves;
9. how strong are the indicia that the jury is really deadlocked (e.g., did the court call the jury out *sua sponte* or did the jurors send a note saying they were deadlocked); and
10. how many times did the judge give the particular instruction(s).

*[*Lowenfield v. Phelps*].

E. **G/R:** Review of an Improper Instruction: a review court, when considering the propriety of a particular jury instruction, in a criminal case will *not* consider the instruction in isolation; but rather, will be analyzed in the context of the overall charge (all the instructions) [*US v. Krzyske*].

F. **G/R:** Jury Nullification: the jury has the power to render a verdict for any reason it wants; hence, the jury can ignore the judges' instructions and render a verdict consistent with their own sense of justice, even if the facts and law point toward guilt.

1. The theory of jury nullification is supported by:
    a. the secretiveness of jury deliberations;
    b. the fact that the jury, in criminal cases, renders a general verdict (guilty or not guilty) most of the time;
    c. FRE of 608(b) says that the jury's verdict cannot be impeached; and
    d. the fact that the government cannot appeal the decision by the jury to acquit.

*[*US v. Krzyske*].

G. **G/R:** Instructions on Jury Nullification: the defendant has no right to receive an instruction on jury nullification. Although juries may indeed have the power to ignore the law, their *duty* is to apply the law as interpreted by the court and they should be instructed to that effect.

1. Moreover, the court has a duty to uphold the law and apply it impartially; hence, the court would be violating its duty if it gave an instruction on nullification.

2. In *Krzyske*, the Court found it was not error to instruct the jury, upon inquiry about the nullification doctrine, that: there is no such thing as valid jury nullification [the jury's] duty is to follow the law and the instructions that court gave to the jury. The jury would violate its oath if willfully brought in a verdict contrary to the law given this case."
3. **but note:** two states require, as a matter of state constitutional law, that the jury be instructed on its power to nullify a verdict.
4. **Also note:** the jury cannot do reverse nullification; that is, convict the defendant when they believe that the state has not proven its case. However, a court will review such a verdict determination on the basis of sufficiency of the evidence, which requires the reviewing court to draw every possible inference in favor of the state. The practical effect is that the verdict will be upheld. The defendant usually only prevails of a sufficiency of the evidence argument the prosecutor makes an egregious error, like failing to prove the element of a crime.
*[*US v. Krzyske*].

III. JURY VERDICTS

A. **Generally:** after deliberation, the jury will send a note to the court saying that it has reached a verdict. Then the foreman, or the court, will read the verdict. The next thing that happens, upon counsel request, if that the jury can be polled, which entails inquiring into each juror whether the verdict was read, was in fact, that juror's verdict.

1. If all jurors answer yes, then a sentencing date is set if the defendant is found guilty, if found innocent, they through of the cuffs and the defendants walks, just like OJ.
2. The defendant has the right to move for a judgment of acquittal, notwithstanding the verdict, but those are rarely granted.
    a. After a JNOV motion, the defendant may then only file a motion for a new trial, the grounds of which may be limited to errors of law, including the argument that the verdict was against the weight of the evidence.
    b. A new trial may also be sought when new evidence is discovered and the time for that is usually limited to one or two years.
3. Defense counsel then prepares a sentencing motion and starts getting ready to appeal.
4. **Final Judgment:** is not entered until the jury has been discharged and a sentence has been imposed.
    a. The time when final judgment is entered may affect the running of the time for appeal.

B. **G/R:** Inconsistent Verdicts: [***Dunn Rule***]: when a defendant, in a multiple count indictment, is convicted of one or more counts and acquitted on the underlying, such as the underlying offense, the verdict is inconsistent. However, a criminal defendant convicted by a jury on one count cannot attack that conviction because it was inconsistent with the jury's verdict of acquittal on another count.

1. Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment.
2. The most that can be said about such inconsistent verdicts is that the jury did not speak their real conclusions (i.e., compromise verdict); however, that does not indicate that they were convinced of the defendant's guilt.

a. Rather, the Supreme Court interprets the acquittal as no more than an assumption of power which it did not have the right to exercise, but to which they were disposed through *leniency.*

*[*US v. Powell*].

C. **G/R:** General Verdicts: a general verdict is valid so long as it is legally supportable on one of the submitted grounds—even though that gives no assurances that the valid ground, rather than an invalid one, was actually the basis for the jury's decision.

1. **g/r:** when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, the verdict stands if the evidence is sufficient with respect to any one of the acts charged.

2. *Stromberg Exception:* where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground.

3. *Yates Exception:* where the defect in the statute was a defect in the statute of limitations, then that cannot be a valid ground for conviction; that is, if any of the purposes for which the defendant was convicted was illegal, then the general verdict has to be set aside because a defendant cannot be convicted on a statutory defect in the statute.

*[*Griffin v. US*].

D. Impeaching the Jury Verdict: a juror is incompetent to testify to impeach the jury's verdict, i.e., a juror may not testify in *post-verdict proceedings* for the purpose of *attacking* or *supporting* the jury verdict [at common law this was called the **Mansfield Rule** and has been adopted in **Rule 606(b).**]

1. *Racial Prejudice and Drug Use:* the federal courts (and the Supreme Court) have held that the rule bars testimony about racist remarks during deliberations and juror's consumption of drug or alcohol use during deliberations [*Tanner v. U.S.*].

2. Extraneous Influence Exception: Rule 606(b) provides that jurors **may** testify to on the question of whether extraneous prejudicial information was improperly brought to bear upon any juror.

a. *External/Internal Distinction:* the distinction is based on the nature of the allegation; matters which are internal (such as a juror's inability to hear or comprehend the trial or the physical or mental incompetence of witness) cannot be used to impeach a jury verdict; matters which are extraneous or exert an extraneous influence on the jurors are admissible to impeach the verdict.

b. *Extraneous Influence:* federal courts have held the following to be an extraneous influence:

i. testimony of the jurors describing how they heard and read **prejudicial information not admitted into evidence**;

ii. juror testimony on influence by outsiders, such as a bailiff's comments on the defendant; or

iii. juror testimony revealing bribes offered to the jury; or

iv. a juror which has submitted application at the district attorney's office in a criminal case.

3. **Analysis:** the question about juror misconduct is when did the alleged misconduct occur. *Tanner* only prohibits impeaching a jury verdicts verdict with respect to deliberation. In other cases, such as *Smith v. Phillips*, the court will allow a post-trial hearing because it dealt with information that had to do with misconduct or influences that arose before trial.
*[*Tanner v. US*].

§ 13: SENTENCING

A. **Generally:** in most jurisdictions, prior to sentencing in felony and some misdemeanor cases, a report is prepared for the judge's consideration. By rule or statute, the report is usually disclosed to the accused; however, certain portion may be withheld, raising due process issues. The scope of sentencing reports also becomes an issue because the report may contain hearsay, opinions, accusation and characterizations. Nonetheless, such information is usually allowed.

1. Sentencing in criminal cases usually occurs—at least in serious cases—a few weeks or months after the verdict or pea of guilty. The pre-sentence investigation usually will be prepared by a court employee, corrections, or probation officer.
    a. The report is severed on both sides, however, it is primarily prepared for the court.
2. *Sentencing Report:* the investigation will inquire into the facts of the crime, the role of the defendant, his or her attitude concerning the crime, the background (education, family, employment and, most importantly, his criminal record) and future prospects of the defendant, and sentencing options.
3. *Sentencing Proceeding:* the rules of evidence, including hearsay and prejudice, do not apply to sentencing, either as reports or witnesses.
    1. Hence, the only real substantive limit is the constitution—due process and cruel and unusual punishment clauses.

B. **G/R:** Categories of Sentencing: there are two main types/categories of sentencing:

1. *Indeterminate Sentencing Systems:* is the more individualized system wherein the defendant is sentenced to a certain "range of time" and the judge imposes a sentence within that range, including a range within that range (e.g., minimum 2 years, maximum 20 years, judge can give 10-12 years).
    a. *Parol Boards:* indeterminate sentencing involves a quasi-judicial body—the parol board, which is responsible for releasing prisoners. .
    b. *Historically*, sentencing has come full circle.
        i. At the turn of the twentieth-century, sentencing was wholly determinate (a conviction of robbery carried a 5-years and there was no change for mitigating or aggravating circumstances). Then, the judicial system moved to more indeterminate sentencing, looking at details of the offense and offender, before sentencing.
        iii. *Problems:* there are problems with the individualized system; such as, judges tend to go easy on defendants of their same races, socio-economic class, etc…that is why federal courts when the federal sentencing guidelines because they would rather have less disparity.

2. *Determinate Sentencing Systems:* is less individualized, an offender, depending on a number of factors, gets a certain sentence. Some offenses carry a mandatory minimum sentence. In federal court: they have tried to merge the two systems, however, it is fairly determinate and a defendant's sentence is based mainly on two things:

a. the offense committed; and

b. the defendant's criminal history, which is a very important factor.

i. These changes have came from a number of factors:

(a) sentencing used to look at rehabilitation;

(b) then retribution become a greater concern, then

(c) after a lot of disparities, we started shifting back to rehabilitation, then

(d) overcrowded prisons have became a major factor;

(e) then the court started to take into consideration things such as addiction, and the system began to learn that retribution doesn't mean shit if you're smoking crack.

ii. courts are beginning to look at education and family too in determining sentences.

C. **G/R:** Outside Limit on Judges' Sentencing Power: a sentencing judge is *not* confined to the narrow issue of guilt or innocence; his task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined.

1. *Fullest Information Possible:* highly relevant, if not essential, to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.

2. Modern concepts of individualized, or indeterminate sentencing, have made it more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence that are applicable tat trial.

3. *Due Process Clause:* in determining whether a defendant shall receive the minimum or maximum sentence available under a given statute, which is usually a large range, the Federal Constitution does not restrict the view of the sentencing judge to information he received in open court.

a. In addition, this remains true whether the sentence is for death or some lesser amount.

*[*Williams v. New York*].

4. **note:** as a practical matter, most states statutorily have provided some protection for the defendant, such as giving the defendant notice of the report and its contents.

D. **G/R:** Due Process Violations: there can be a due process violation if the information relied on by the judge in sentencing can be proven to be materially false.

1. In addition, since *Williams* other limitations have been placed on what the court can examine in the sentencing phase:

a. After an appeal, as in *Peerless*, the judge cannot consider the fact the defendant appealed in imposing a harsher sentence; however, the defendant can still get a harsher sentence after a new trial, the judge just has to state his reasons for imposing that sentence.

b. The court cannot consider the fact that the defendant exercised his right to trial, even though it appears that the defendant was overwhelmingly guilty.

i. The judge can, however, consider the fact that the defendant plead guilty because that is an admission of guilt and implied statement that the defendant is seeking retribution.

E. **G/R:** Credibility of Defendant at Trial, in Sentencing: the sentencing judge may legitimately consider the evidence heard during trial, as well as the demeanor of the accused.

1. The judge's opportunity to observe the defendant, particularly if he took the stand in his defense, can often provide useful insights into an appropriate disposition.

2. A defendant's truthfulness and mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation. Hence, they are relevant for sentencing purposes.

a. Therefore, when the trial court finds that the defendant lied on the stand, and that lie was flagrant, it may constitutionally be taken into account in sentencing because the defendant's readiness to lie under oath is probative of his prospects for rehabilitation.

*[*United States v. Grayson*].

F. **G/R:** Consideration of the Defendant's Membership in Associations: the sentencing authority is free to consider a wide range of relevant material; thus, a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come.

1. The Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the 1st Amendment.

2. **Test:** association in a group (such as the Aryan Nation) cannot be considered in sentencing because it implicates a defendant's First Amendment Right ***unless:***

a. the association, and the defendant's involvement in it, is relevant to the defendant as a whole—such as where there is evidence of racial intolerance or subversive advocacy where those are *relevant* to the issues involved.

b. the group itself involves itself in crime because then the group's activities, of which the defendant is a part, reflects on the defendant as a person; and

c. when racial prejudice, or membership in a racially prejudice group, when racial hatred is an element of the crime.

*[*Dawson v. Delaware*].

G. **G/R:** Sentencing Enhancements: when the defendant is subject to a crime that in a sentencing enhancement for aggravating circumstances, such as racial motivation, *full due process protections* apply to the enhancement proceeding.

1. Hence, a sentencing judge cannot constitutionally find, after a general determination of guilt, that the defendant was guilty of the aggravating circumstance, which would increase his sentence. The defendant is entitled to a jury determination on whether the aggravating circumstance occurred.

2. exception: the court can consider the effect of a prior conviction as an aggravating circumstance because that is has been determined by the jury.

*[*Apprendi v. New Jersey*].

G. **G/R:** Victim Impact Statements: the sentencing authority has always been free to consider a wide range of relevant material in imposing a sentence. Hence, states remain free to devise new procedures (in capital cases as well as others) to devise new procedures and new remedies, including the use of victim impact statements during the sentencing phase.

1. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a gernal type long considered by sentencing authorities.

*[*Payne v. Tennessee*].

F. **G/R:** Independent Regulatory Agencies: an independent regulatory agency is constitutional under a separation of powers analysis *unless:*

1. Congress have vested the Commission with powers that are more appropriately performed by the other branches of government; or

2. the provisions vested in the commission undermine the institutional integrity of the judiciary.

*Congress gave the judiciary a role in making sentencing rules, which would be imposed by law. The Court **held** because Congress established procedures and guidelines it could delegate some rulemaking authority to the judiciary without violating separation of powers.

*[*Mistretta v. US*].

G. **G/R:** Federal Sentencing Guidelines: when a D is sentenced in federal court this is how it works:

1. a probation officer puts together a report, with a number of factors it takes into consideration.

2. On X-axis is of the offense charged and on the Y-axis is offender characteristics. The probation officer then finds the two numbers and finds the box with the appropriate sentence which is at the intersection of the Y and X axis's. The sentence will then be some limited range.

a. Offense characteristics: the chart asks:

i. what is the offense charged, then you go through the book and find out what number is assigned, and 10 is the offense characteristic number (say for distribution of methamphetamine).

ii. Then there is specific characteristics: two additional points for the amount of drugs sold;

iii. then there is a number assigned based on other things, such as, victim and defendant's role in the crime and other things; and

iv. whether the D accepted responsibility (which counts for a –2), this is an incentive to plead guilty.

b. Offender Characteristics:

i. looks at number and type of previous offenses and this is essentially the only thing the court looks at this stage.

3. One of the main reasons for this is to take away the discretion from the judges, however, it imposes sentences that are almost uniformly longer and it does away with the notion of rehabilitation.

a. The judge can take into account some things that do not show up in the sentencing guidelines; however, when the judge does that, he has a heavy burden to explain his reasons. And, all reasons do not automatically pass muster. Family, education, and things of that nature are taken out of consideration.

b. The court can take into account things that are not involved which are more egregious—like terrorists acts.

c. The only other way to get out of the "box" is to cooperate and help the police in investigating other drugs; this is a "5K.1" motion.

4. Some states have moved toward a system like the federal system, with a little more discretion.

§ 14: APPEALS

A. **Generally:** after final judgment has been entered in a criminal case, the defendant may file an appeal. On appeal, the defendant carries the burden to demonstrate a legal mistake. An appellate court will not re-litigate facts or hear new evidence and it will give a lot of deference to the trial.

1. The appellate court will only make its final determinations on the basis of the *record*, testimony and exhibits.

2. **Analysis:** the appellate court will engage in a two-step analysis in determining whether reversible error is present:

a. first it will determine if a legal error is in fact present; if, and only if, the court finds an error is present will the court proceed to the second level on analysis.

b. second it will determine whether the error was harmless error (which does not require reversal) or plain error.

B. **W.R.C.P. 52:** Error:

(a) *Harmless Error:* any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error:* plain errors or defects affecting substantial rights may be noticed although they not brought to the attention of the court.

******This is essentially the same as FRE 52.

C. **G/R:** Plain Error: all but a few jurisdictions recognize the authority of an appellate court to reverse on the basis of plain error even though that error was not properly raised and preserved at the trial level.

1. **Test:** there is a four step test for determining whether the error is plain error:

a. Error;

i. this only means errors that were not timely raised, and not rights or errors that were waived;

b. that is plain;

i. this means clear or unequivocally obvious, i.e., clear under current law.

c. that affects substantial rights; and

i. affecting substantial rights means that the error must have been so prejudicial as to affect the outcome of the trial. The defendant has the burden of proof under plain error review in proving her substantial rights were affected.

d. seriously affects the fairness and integrity of public reputation or judicial proceedings.

*[*US v. Olano*].

D. **G/R:** Harmless Error Review of Non-Constitutional Errors: for non-constitutional errors, the court considers whether the error was merely a technical violation or took form the defendant the substantive protection of a right.

1. A violation of the substance of such a right requires a new trial, so the strength of the evidence supporting the conviction is irrelevant.

a. Ex: errors in jury selection or change of venue.

2. In determining whether error is harmless, the Supreme Court's standard is: that if the error did not affect or influence the conviction, or had only a very slight effect, the verdict and judgment should stand.

E. **G/R:** Harmless Error Review of Constitutional Violations: harmless error review can be applied to constitutional violations and that review requires the court to be convinced beyond reasonable doubt that the error complained of did not contribute to the verdict obtained.

1. **Analysis:** the court will engage in a two step analysis:

a. first the court must determine if the error falls in that category of violations subject to the harmless error rule or instead falls in that category of violations requiring automatic reversal.

b. second, if the harmless error rule is applicable, the court must determine the impact of the error on the case before it on the reasonable doubt standard.

2. **Structural Defects:** errors constituting structural defects that affect the framework within which the trial proceeds require automatic reversal. Examples of such violations include:

a. denial of right to counsel;

b. denial of an impartial judge;

c. unlawful exclusion of members of the defendant's race from a grand jury;

d. the right to self representation at trial; and

e. the right to a public trial.

3. **Trial Errors:** trial errors, errors which occurred during the presentation of the case to the jury and which therefore may be quantitatively assessed in the context of other evidence I order to determine whether its admission was harmless beyond a reasonable doubt.