

**CRIMINAL LAW**

I. JDX

- a. State acquires jdx to adjudicate the crime if the conduct happened there or the result happened there.
- b. As to crimes of omission, their jdx lies where the act should have been performed.

II. MERGER

- a. Solicitation and attempt merge into the substantive offense.
- b. Conspiracy does NOT merge with the substantive offense.
- c. Double jeopardy prohibits trial or conviction of a person for a lesser included offense if he has been put in jeopardy for the greater offense.

III. ESSENTIAL ELEMENTS OF CRIME

a. **Actus reus**

- i. Any ***bodily movement***. D must have either performed a ***voluntary*** physical act or failed to act under circumstances imposing a legal duty to act.
- ii. Bodily movements that do not qualify for criminal liability:
  - 1. Conduct which is not the product of your own volition
    - a. Ex: someone pushing you into a third person who then falls in front of a bus and gets killed.
  - 2. Reflexive or convulsive act, like having an epileptic seizure.
  - 3. Act performed while unconscious or asleep (sleep walking, not falling asleep at the wheel of your car).

b. **Omission**

- i. Generally, no legal duty to rescue.
- ii. But sometimes there is a legal duty to act, which can arise in 1 of 5 circumstances:
  - 1. Statute
  - 2. Contract
  - 3. Relationship between parties
  - 4. Voluntarily assuming duty of care and then failing adequately to perform it
  - 5. Creation of peril

c. **Mens rea** (most important in criminal law)

- i. 4 common law mental states:

1. ***Specific intent***

These qualify for additional defenses not available for other kinds of crime (voluntary intoxication and mistake, no matter how reasonable or unreasonable, silly or preposterous)

2. ***Malice***

- a. Only 2 malice crimes on the bar: murder and arson

3. ***General intent***

- a. Catch-all category

4. ***Strict liability***

- a. Any defense that negates intention cannot be a defense to the no-intent crimes of strict liability

ii. Specific intent crimes (memorize)

1. *Solicitation* – intent to have the person solicited commit the crime
2. *Conspiracy* – intent to have the crime completed
3. *Attempt* - intent to complete the crime
4. *First degree murder* - premeditation
  - a. **TIP:** If in the question on the bar exam, you see the word *murder* just sitting there by itself, the examiners will ALWAYS mean common law murder, which today is murder in the second degree. Murder is a malice crime, not a specific intent crime, so you will NOT be able to use the defenses that apply to specific intent crimes.
    - i. First degree murder IS a specific intent crime and you can use one of the additional defenses that only apply to specific intent crimes to reduce the specific intent crime of first degree murder back to the malice crime of second degree murder.
    - ii. Additional defenses for specific intent crimes:
      1. ANY mistake of fact, no matter how silly
      2. Voluntary intoxication
5. \**Assault* – intent to commit a battery
6. *Larceny* – intent to permanently deprive the other of his interest in property taken
7. *Robbery* – same as larceny
8. *Burglary* – intent to commit a felony in the dwelling
9. *Embezzlement* – intent to defraud
10. *False pretenses* – intent to defraud
11. *Forgery* – intent to defraud

iii. Malice crimes

1. *Murder*
2. *Arson*
3. Malice crimes require only a reckless disregard of an obvious or high risk that the particular harmful result will occur.

iv. General intent crimes

1. All crimes not so far mentioned are general intent crimes unless they qualify for our formula for strict liability.
2. Examples:
  - a. Battery
  - b. Kidnapping
  - c. Rape
  - d. False imprisonment

v. Transferred intent

1. Always 2 crimes when D wants to shoot one person, but kills another: guilty of murder for person killed, guilty of attempted murder for the other person who D shot at but missed.
2. NEVER merge any crimes that have different victims.

vi. Strict liability

1. Formula for strict liability:
    - a. *If the crime is in the administrative, regulatory, or morality area, and you don't see any adverbs like knowingly, willingly, intentionally, the statute was meant to be a no intent crime of strict liability.*
  2. Questions 16 and 17 on page 302 multistate volume 2
    - a. Mistake of fact is only a defense when it negates intention, so it cannot be a defense to strict liability crimes.
    - b. Consent of the victim is almost never a defense in this country.
- d. Model Penal Code analysis of fault
- i. Purposely, knowingly, or recklessly
    1. When a statute requires that D act purposely, knowingly, or recklessly, a subjective standard is used.
    2. **Purposely**
      - a. A person acts purposely when his *conscious objective* is to engage in certain conduct or cause a certain result.
    3. **Knowingly**
      - a. A person acts knowingly when he is *aware* that his conduct is of a particular nature or *knows* that his conduct will necessarily or very likely cause a particular result.
      - b. Knowing conduct satisfies a statute requiring willful conduct.
    4. **Recklessly**
      - a. A person acts recklessly when he *knows* of a *substantial and unjustifiable risk* and *consciously disregards it*.
      - b. Mere realization of the risk is not enough.
  - ii. Negligence
    1. A person acts negligently when he *fails to be aware of a substantial and unjustifiable risk*, where such failure is a substantial deviation from the standard of care.
    2. In determining whether a person acted negligently, an objective standard is used.
- IV. ACCOMPLICE LIABILITY
- a. *Accomplices are liable for the crime itself and all other foreseeable crimes.*

**TIP:** Do NOT give anyone accomplice liability for being merely present when the crime was committed or for not calling the police even if they seem to be consenting to the crime. Person has to be **ACTIVELY INVOLVED IN THE CRIME.**
  - c. At common law, parties to a crime included the:
    - i. Principal in the first degree
      1. Person who actually engaged in the act or omission that constitutes the offense or who caused an innocent agent to do so
    - ii. Principal in the second degree
      1. Person who aided, commanded, or encouraged the principal and was present at the crime
    - iii. Accessory before the fact
      1. Person who assisted or encouraged but was not present
    - iv. Accessory after the fact
      1. Person who, with knowledge that the other committed a felony, assisted him to escape arrest or punishment
  - d. Modern statutes

- i. All parties to a crime, except for the accessory after the fact, can now be found guilty of the principal offense.
- e. **Withdrawal**
  - i. A person who effectively withdraws from a crime before it is committed cannot be held guilty as an accomplice.
  - ii. Withdrawal must occur *before* the crime becomes unstoppable.
    - 1. ***Repudiation*** is sufficient withdrawal for mere encouragement.
    - 2. ***Attempt to neutralize*** assistance is required if participation went beyond mere encouragement.
  - iii. notifying the police or taking other action to prevent the crime is also sufficient.

## V. INCHOATE OFFENSES

### a. **Solicitation**

- i. Solicitation is asking someone to commit a crime with the intent that the person solicited commit the crime.
- ii. It ends when you ask them.
- iii. If person agrees to do it, it becomes a conspiracy and the solicitation merges and the only crime left when they agree to do it is conspiracy.
- iv. **Defenses**
  - 1. It is no defense that the person solicited is not convicted or that the offense solicited could not in fact have been successful.
- v. **Merger**
  - 1. If the person solicited commits the crime, both that person and the solicitor can be held liable for that crime.
  - 2. If the person solicited commits acts sufficient to be liable for attempt, both parties can be held liable for attempt.
  - 3. If the person solicited agrees to commit the crime but does not even commit acts sufficient for attempt, both parties can be held liable for conspiracy.
  - 4. Solicitor cannot be punished for both the solicitation and these other offenses.

### b. **Conspiracy** (important)

- i. **TRIP** - in any conspiracy question, make sure that the people are pursuing an UNLAWFUL objective. For example, not unlawful for person to enter own house with another person and take silverware.
- ii. **Elements**
  - 1. ***Agreement b/w 2 or more persons***
  - 2. ***Intent to enter into an agreement***
  - 3. ***Intent to achieve the objective of the agreement***
- iii. **Liability**
  - 1. Each conspirator is liable for all the crimes of co-conspirators if those crimes were committed ***in furtherance of the conspiracy*** and were ***foreseeable***.
- iv. **Agreement requirement**
  - 1. Does not have to be express.
  - 2. We do not need any written or spoken words of agreement.
  - 3. It may be inferred from joint activity.
  - 4. A conspiracy at common law must involve a meeting of minds between at least 2 independent persons.
  - 5. ***Wharton Rule***

- a. Where 2 or more people are necessary for the commission of the substantive offense, there is no crime of conspiracy unless more parties participate in the agreement than are necessary for the crime.
- v. Effect of acquittal of some conspirators
  1. Under the traditional view, the **acquittal** of all persons with whom D is alleged to have conspired precludes conviction of the remaining D.
  2. Under the MPC **unilateral** approach, D can be convicted of conspiracy regardless of whether the other parties have all been acquitted or were in the agreement.
- vi. Overt act
  1. The majority rule in this country says that in order to ground liability for conspiracy, there must be an agreement plus an overt act.
    - a. Any little act will do.
      - i. Ex: making phone call to recruit people
      - ii. Showing up at the place you agreed to rob
  2. The minority rule and the common law rule ground liability for conspiracy with the agreement itself.
- vii. Termination of conspiracy
  1. A conspiracy usually terminates upon completion of the wrongful objective.
  2. Unless agreed to in advance, acts of concealment are not part of the conspiracy.
- viii. Impossibility
  1. NOT a defense to conspiracy.
- ix. Withdrawal
  1. Even if adequate, can never withdraw D from liability for the conspiracy itself.
  2. D can only withdraw for liability for other conspirators' crimes.
  3. To withdraw, a conspirator must perform an affirmative act that notifies all members of the conspiracy of her withdrawal. Notice must be given in time for the members to abandon their plans. If she has also provided assistance as an accomplice, she must try to neutralize the assistance.
- c. Attempt
  - i. Attempt is an act done with **intent to commit a crime**, that **falls short of completing the crime**.
  - ii. Mere preparation cannot ground liability for attempt.
    1. Most cases follow the **proximity test**, which requires that the act be dangerously close to successful completion of the crime.
    2. Today, most state criminal codes and the MPC require that the act or omission constitute a **substantial step** in a course of conduct planned to culminate in the commission of the crime.
  - iii. Factual impossibility no defense
  - iv. Legal impossibility is a defense
  - v. Abandonment is not a defense
    1. If D had the intent and committed an overt act, she is guilty of attempt despite the fact that she changed her mind and abandoned the plan before the intended crime was completed.
  - vi. Attempt merges with the completed crime.

## VI. RESPONSIBILITY AND CRIMINAL CAPACITY

### a. Insanity

#### i. *M'Naghten*

1. At time of his conduct, D lacked ability to know **wrongfulness of his actions** or understand the **nature and quality of his actions**.
- ii. **Irresistible impulse**
  1. D lacked capacity for **self-control** and **free choice**.
- iii. **Durham rule**
  1. D's conduct was a product of a **mental illness**.
- iv. **MPC**
  1. D lacked the substantial capacity to:
    - a. Appreciate the **criminality of his conduct**; or
    - b. **Conform his conduct** to the requirements of law.
- v. **Mental condition during criminal proceedings**
  1. Under the DPC, D may not be tried, convicted, or sentenced if, as a result of a mental disease or defect, he is unable
    - a. To understand the nature of the proceedings being brought against him; or
    - b. To assist his lawyer in the preparation of his defense.
  2. D may not be executed if he is incapable of understanding the nature and purpose of the punishment.

**b. Intoxication**

**i. Involuntary intoxication**

1. A form of insanity.
2. Both insanity and involuntary intoxication are defenses to ALL crimes, including the no intent crimes of strict liability.
3. Involuntary intoxication results from the taking of an intoxicating substance without knowledge of its nature, under direct duress imposed by another, or pursuant to medical advice while unaware of the substance's intoxicating effect.

**ii. Voluntary intoxication**

1. Defense only to specific intent crimes.
2. Not a defense to crimes involving malice, recklessness, negligence, or strict liability.
3. Intoxication is voluntary if it is the result of the intentional taking without duress of a substance known to be intoxicating.

**Infancy**

- i. Under 7, no criminal liability.
- ii. Under 14, rebuttable presumption of no criminal liability.

**d. Self-defense**

**i. Non-deadly force**

1. A victim may use non-deadly force in self-defense any time the victim reasonably believes that force is about to be used on them.

**ii. Deadly force**

1. Majority: allows victim to use deadly force in self-defense any time victim reasonably believes that deadly force is about to be used on them.
2. Minority: requires victim, prior to using deadly force, to retreat if it safe to do so.
  - a. 3 exceptions to duty to retreat:
    - i. In your home
    - ii. If victim of rape or robbery
    - iii. Police officers have no duty to retreat

**iii. Use of self defense by an original aggressor**

1. Only allowed if original aggressor withdraws and communicates the withdrawal to the original victim.

**e. Defense of others**

- i. D has the right to defend others if she reasonably believes that the person assisted has the legal right to use force in his own defense.
- ii. All that is necessary is the *reasonable appearance* of the right to use force.

**f. Defense of a dwelling**

- i. Deadly force may NEVER be used solely to defend your property.
- ii. Force cannot be used to regain possession of property wrongfully taken unless the person using force is in immediate pursuit of the taker.

**g. Crime prevention**

- i. Non-deadly force may be used to the extent that it reasonably appears necessary to prevent a felony or serious breach of the peace.
- ii. Deadly force is reasonable only if it is necessary to terminate or prevent a dangerous felony involving risk to human life.

**h. Use of force to effectuate arrest**

- i. Non-deadly force may be used by police officers if it reasonably appears necessary to effectuate an arrest.
- ii. Deadly force is reasonable only if it is necessary to prevent a felon's escape and the felon threatens death or serious bodily harm.
  1. A private person has a privilege to use nondeadly force to make an arrest if a crime was in fact committed and the private person has reasonable grounds to believe that the person arrested was in fact committed the crime.
  2. A private person may use deadly force only if the person harmed was actually guilty of the offense for which the arrest was made.

**i. Duress**

- i. Defense to ALL crimes EXCEPT HOMICIDE.

**j. Mistake of fact**

- i. Only a defense if it negates intention (specific intent crimes).
- ii. NEVER a defense to strict liability crimes.

MENTAL STATE OF CRIME CHARGED	APPLICATION OF THE DEFENSE
Specific intent	Any mistake (no matter how reasonable, unreasonable or silly)
Malice and general intent	Reasonable mistakes only
Strict liability	Never

**k. Consent**

- i. Do not indulge a consent of the victim defense on the bar exam.

**l. Entrapment**

- i. Very narrow defense, almost never available because predisposition on the part of D to commit the crime negates entrapment.
- ii. **Elements:**

1. The criminal design originated with law enforcement officers; and
2. D was not predisposed to commit the crime prior to contact by the gov't.

VII. COMMON LAW CRIMES

a. **Battery**

- i. Completed assault.
- ii. Battery is an unlawful application of force to the person of another resulting in either bodily injury or an offensive touching. Needs not be intentional.
- iii. General intent crime, NEVER strict liability.

b. **Assault**

- i. 2 theories:
  1. *Assault as an attempted battery (specific intent crime)*
  2. *Assault as a threat (general intent crime)*

c. **Homicide**

i. **Murder if you show 1 of 4 intents:**

1. Intent to kill
2. Intent to do serious bodily harm
3. Depraved heart/highly reckless murder
4. Felony murder

ii. **Manslaughter**

1. **Voluntary manslaughter**

- a. ~~There~~ no matter what other label you might use, never attach voluntary manslaughter label unless in the facts of the question you can find some passion (adequate provocation)
  1. Provocation is adequate if:
    1. It was a provocation that would arouse *sudden and intense passion* in the mind of an ordinary person, causing him to lose self-control;
    2. D was in fact *provoked*;
    3. There was not sufficient time between provocation and killing for passions of a reasonable person *to cool*; and
    4. D in fact *did not cool off*.

2. **Involuntary manslaughter**

- a. Killings from criminal negligence

3. **Misdemeanor manslaughter**

- a. Killing someone while committing a misdemeanor or an unenumerated felony

d. **Defenses to felony murder**

- i. If D has a defense to underlying felony, he has a defense to felony murder.
- ii. The felony committed must be something other than the killing.
- iii. The deaths must be foreseeable.
- iv. Deaths caused while fleeing from a felony are felony murder.
  1. But once D reaches some point of temporary safety, deaths caused thereafter are NOT felony murder.
- v. Red line view
  1. D not liable for death of a co-felon as a result of resistance by victim or police.



e. **Causation**

i. ***Cause-in-fact***

1. A D's conduct is the cause-in-fact of the result if the result would not have occurred but for the D's conduct.

ii. ***Proximate cause***

1. A D's conduct is the proximate cause of the result if the result is a natural and probable consequence of the conduct.

f. **False imprisonment**

- i. Consists of the unlawful confinement of a person without his valid consent.

g. **Kidnapping**

- i. Unlawful confinement of a person that involves either
  1. Some movement of the victim; or
  2. Concealment of the victim in a secret place.

VIII. RAPE

- a. The unlawful carnal knowledge of a woman by a man not her husband, without her effective consent.
- b. Slightest penetration completes the crime of rape.
- c. Lack of effective consent exists where:
  - i. Intercourse is accomplished by actual force
  - ii. Intercourse is accomplished by threats of great and immediate bodily harm
  - iii. The victim is incapable of consenting due to unconsciousness, intoxication, or mental condition; or
  - iv. Victim is fraudulently caused to believe that the act is not intercourse.

IX. STATUTORY RAPE

- a. Consent of victim and mistake of fact are no defense.
- b. Strict liability crime

X. PROPERTY OFFENSES

a. **Larceny**

- i. Wrongful taking
- ii. And carrying away (asportation)
- iii. Of tangible personal property
- iv. Of another
- v. By trespass
- vi. With intent to permanently deprive owner of his interest in the property.
  1. Must exist at time of taking or it is not CL larceny.
  2. Taking property in the belief that it is yours or that you have some right to it is NOT CL larceny.
  3. Custody vs. possession
    - a. Ordinarily, low level employees have only custody of an employer's property and so are guilty of larceny for taking it.
    - b. A bailee has a greater scope of authority and so is not guilty of larceny for taking it, but may be guilty of embezzlement.
  4. Continuing trespass situation
    - a. If D **wrongfully** takes property without the intent to permanently deprive, and later decides to keep the property, she is guilty of larceny when she decides to keep it.

- b. However, if the original taking was *not wrongful* and she later decides to keep it, it is not larceny.

**b. Embezzlement**

- i. The fraudulent
- ii. Conversion
- iii. Of personal property
- iv. Of another
- v. By a person in lawful possession of that property.

**c. False pretenses**

- i. Obtaining TITLE
- ii. To personal property of another
- iii. By an intentional false statement of past or existing fact
  - 1. False representation could be with respect to something in the present or past, but not something in the future.
- iv. With intent to defraud the other.

**d. Larceny by trick distinguished from false pretenses**

- i. If the victim is tricked – by a misrepresentation of fact – into giving up mere possession of property, the crime is larceny by trick.
- ii. If the victim is tricked into giving up title to property, the crime is false pretenses.

**e. Robbery**

- i. To be robbery, you must take FROM PERSON or his presence
- ii. The presence requirement is very broadly drawn and could include tying up a farmer in the barn and taking stuff from his house.
- iii. Picking a pocket is larceny, NOT ROBBERY.
- iv. Threat must be of imminent harm, not of future harm.
  - 1. Can be a threat against a third party.
- v. **Elements:**
  - 1. A taking
  - 2. Of personal property of another
  - 3. From the other's person or presence
  - 4. By force or threats of immediate death or physical injury to the victim, a member of his family, or some person in victim's presence
  - 5. With the intent to permanently deprive him of it.

**f. Extortion**

- i. 2 differences between extortion and robbery:
  - 1. No need to take anything from the person or his presence for extortion and
  - 2. The threats are of future rather than imminent harm.
- ii. Common law extortion consists of the corrupt collection of an unlawful fee by an officer under color of office.

**g. Burglary**

- i. Breaking (actual or constructive)
- ii. Entering
- iii. Of the dwelling house of another
- iv. At night (CL)

v. With the intent to commit a felony inside (must exit at time of breaking and entering)

**h. Receipt of stolen property**

- i. Receiving possession and control
- ii. Of stolen personal property
- iii. Known to have been obtained in a manner constituting a criminal offense
- iv. By another person
- v. With the intent to permanently deprive the owner of his interest in it

**i. Forgery**

- i. Making or altering
- ii. A writing with apparent legal significance
- iii. So that it is false
- iv. With intent to defraud

**j. Malicious mischief**

- i. The malicious
- ii. Destruction of or damage to
- iii. The property of another

**k. Arson**

- i. Arson is the malicious burning of the dwelling house of another.
- ii. CL only applies to fire, not to water/smoke damage or explosions.
- iii. If you own it, it cannot be CL arson.

**HOT TOPICS**

- Mental states for crimes in general and specific intent crimes with their additional defenses (voluntary intoxication and any mistake of fact no matter how silly)
- Transferred intent
- Accomplice liability
- Inchoate offenses
  - Solicitation
  - \*\*\*Conspiracy
  - Attempt
- Homicide defenses
  - Intoxication
  - Infancy
  - Mistake of fact
- Homicide crimes in general and 5 defenses to felony murder
- Distinguish among CL property crimes of larceny, embezzlement, and false pretenses
- Robbery
- Burglary
- Arson

## CRIMINAL PROCEDURE

### I. EXCLUSIONARY RULE

#### a. Limitations

- i. It does not apply to conduct of *grand juries*
- ii. It is not an available remedy in *civil proceedings*
- iii. In order to qualify for exclusion, search in question must violate either the *federal constitution or a federal statute*
- iv. Exclusion not an available remedy in *parole revocation proceedings*
- v. 3 part *good faith defense* to exclusion:
  1. Won't exclude evidence where cop relies in good faith on a *judicial opinion* later changed by another opinion.
  2. Won't exclude evidence where the police rely in good faith on *a statute or an ordinance* later declared unconstitutional.
  3. Good faith reliance on a *defective search warrant*. 4 exceptions:
    - a. The affidavit underlying that warrant is so **lacking in probable cause** no reasonable police officer would have relied on it.
    - b. The warrant is **invalid on its face** (i.e. fails to state with particularity the place to be searched and the things to be seized).
    - c. Affiant **lied to or misled** the magistrate.
    - d. The magistrate has wholly **abandoned his judicial role**.
- vi. Use of excluded evidence for *impeachment* purposes
  1. All illegally seized oral or physical evidence may be admitted to impeach the credibility of the D's trial testimony.
    - Only D's trial testimony may be impeached, not the testimony of other defense witnesses.
- vii. Exclusion not available for *violations of the knock and announce rule* in the execution of search warrants.

#### b. Fruit of the poisonous tree doctrine

- i. We are going to exclude all evidence obtained or derived from exploitation of the original police illegality.
- ii. 3 ways the gov't can break the chain b/w an illegal police action and subsequent derived piece of evidence:
  1. Police can show it had a *source* for that evidence *independent* of the illegality
  2. *Inevitable discovery*
  3. Intervening *acts of free will* on the part of the D (important)
    - a. Ex: Illegally arrested on Fri night. On Sat, gets out on bail. On Mon, consults an attorney. On Tues, comes to police and confesses voluntarily. Is this a fruit of the illegal arrest on Fri? No, because the free will instances break the chain between the arrest and the confession.
- iii. Where the original police illegality is a *Miranda violation*, fruit of the poisonous tree doesn't apply.

#### c. Harmless error test

- i. If illegal evidence is admitted, a resulting conviction should be overturned on appeal unless the government can show beyond a reasonable doubt that the error was harmless.

d. **Enforcing the exclusionary rule**

- i. A D is entitled to have the admissibility of evidence or a confession decided as a matter of law by a judge out of the hearing of the jury.
- ii. The gov't bears the burden of establishing the admissibility by a preponderance of the evidence.

II. FOURTH AMENDMENT

- a. Provides that people should be free from *unreasonable searches and seizures*.
- b. Arrest warrants generally not required before arresting someone in a public place.
- c. The non-emergency arrest of an individual in his own home requires an arrest warrant.
- d. Police must have probable cause for arrest to bring a suspect to the station for questioning or fingerprinting.
  - i. Probable cause = trustworthy facts or knowledge sufficient for a reasonable person to believe that the suspect has committed or is committing a crime.

e. **Search and seizure**

i. **Model**

1. Was the search or seizure by a *government agent*?
2. If yes, did the search violate D's *reasonable expectation of privacy*?
3. If yes, did the gov't agent have a *warrant*?
  - a. If there is a warrant:
    - i. Was the warrant *proper* (based on probable cause, precise on its face and issued by a neutral and detached magistrate) or was the government agent's reliance on the warrant in good faith?
    - ii. Was the warrant *properly executed*?
      1. Without unreasonable delay
      2. After announcement (unless officers would be endangered)
      3. Person or place searched or seized within scope of warrant
  - b. If there is no warrant:
    - i. Was the search within a *warrantless search exception*?
      1. Incident to lawful arrest
      2. Automobile search
      3. Plain view
      4. Consent
      5. Stop and frisk
      6. Hot pursuit and evanescent evidence

ii. ***Governmental conduct***

1. Publicly paid police (*on or off duty*)
2. Any private individual acting *at the direction of the public police*
3. Privately paid police are NOT gov't conduct *unless they are deputized* with the power to arrest you.
  - a. Privately paid campus police at a private police are almost always deputized with power to arrest you → gov't conduct.

iii. ***Reasonable expectation of privacy***

1. No reasonable expectation of privacy if no standing to object to the legality of the search.
  - a. Automatic categories of standing:

- i. You own the premises searched
- ii. You live on the premises searched whether you have any ownership interest or not
- iii. Overnight guests
- b. “Sometimes” standing
  - i. You sometimes have standing if you were legitimately present where the search takes place
  - ii. If you own property seized
    - 1. Things held out to public
      - a. One does NOT have a reasonable expectation of privacy in objects held out to the public.
      - b. **Note:** use of sense-enhancing technology that is not in general public use (e.g., a thermal imager) to obtain info from inside a suspect’s home that could not otherwise be obtained without physical intrusion violates the suspect’s reasonable expectation of privacy.

2. Whitebread’s prediction of what will be on the bar about standing

- a. Overnight guests have standing
- b. Passengers in cars who don’t claim ownership of the car or of the property taken -- they do not have standing to object to the search of that car just because they were present when the search took place.
- c. A drug dealer briefly on premises of someone else solely for the business purpose of cutting up drugs for sale does not have standing to object to the search of those premises.

3. Seizure of public items implicates no right to privacy at all:

- a. Sound of your voice
- b. Style of your handwriting
- c. The paint on the outside of your car
- d. Account records held by a bank
- e. Monitoring the location of your car on a public street or in your driveway
- f. Anything that can be seen across the open fields
- g. Anything that can be seen from flying over in the public airspace
- h. The odors emanating from your luggage
- i. Garbage set out for collection

iv. Did police have a search warrant?

Warrants issue only on a **showing of probable cause** to believe that seizable evidence will be found on the person or premises at the time the warrant is executed.

a. Use of informers

- i. Rule: you can have a valid warrant based in part on an informer’s tip even though that informer is anonymous.
- ii. Standard: totality of circumstances
- b. Going beyond the face of the affidavit
  - i. A search warrant issued on the basis of an affidavit will be held invalid if D establishes **all 3** of the following:

- 1. **A false statement** was included in the affidavit by the affiant
- 2. The affiant **intentionally or recklessly** included the false statement; and

3. The false statement was **material** to the finding of probable cause.
2. Warrant must be **precise on its face**
  - a. It must state with particularity the place to be searched and the things to be seized.
3. Warrant must be issued by **a neutral and detached magistrate**
  - a. Court clerks are sufficiently neutral from law enforcement to allow them to issue warrants for violations of city ordinances.
- v. Search of persons found on premises
  1. A warrant founded on PC to search for contraband authorizes the police to detain the occupants of the premises during a proper search, but a search warrant does not authorize the police to search persons found on the premises who were not named in the warrant.
- vi. If warrant is no good, see if you can save the evidence anyway using the good faith defense for reliance on a defective search warrant.
- vii. If no warrant at all, can you fit this search into of 6 exceptions to the warrant requirement?
  1. *Searches incident to a lawful arrest*
    - a. Arrest must be lawful. If arrest unlawful, search is unlawful.
    - b. Search must be contemporaneous in time and place with the arrest.
    - c. Geographic scope limitation: the person and the area into which he could reach either to procure a weapon or destroy evidence can be searched (the person and his wingspan).
    - d. The police may also make a protective sweep of the area if they believe accomplices may be present.
    - e. If arrested in a car, the wingspan will include the interior of the car and everything in it but not the trunk of the car.
  2. *Automobile exception*
    - a. Requires the same probable cause they would need in order to get a warrant.
    - b. If the police have PC to believe that a vehicle contains fruits, instrumentalities or evidence of a crime, they may search the whole vehicle and any container that might reasonably contain the item for which they had PC to search.
    - c. Police may search the entire car and open any package, luggage, or container which can reasonably contain the item they are looking for regardless of whether it is owned by the passenger or the driver.
      - i. If a warrantless search of a vehicle is valid, the police may tow the vehicle to the station and search it later.
    - d. **Note:** if police have PC to believe that an automobile itself is contraband, they may seize it from a public place without a warrant.
    - e. PC can arise after car has stopped, but must arise before anything or anybody is searched.
  3. *Plain view*
    - a. Police must be **legitimately present** where he does the viewing
    - b. Discover **evidence, fruits or instrumentalities** of crime, or **contraband**
    - c. See such evidence in **plain view**

- d. **Have PC** to believe that the item is evidence, contraband, or a fruit or instrumentality of crime.

#### 4. *Consent*

- a. Consent must be **voluntary and intelligent**.
- b. Saying they have a warrant negates consent if that warrant later turns out to be defective.
- c. Police do not have to warn you of your right not to consent.
- d. Third party consent
  - i. Where 2 or more people have an equal right to use a piece of property, any 1 of them can consent to a warrantless search.
  - ii. But if the 2 people are both present and one says it's ok to search and the other one says it is not, the one that says it is not controls.

#### 5. *Stop and frisk*

- a. Standard: reasonable suspicion
  - i. If the police have a reasonable suspicion of criminal activity or involvement in a completed crime, supported by articulable facts (not merely a hunch), they may detain a person for investigative purposes.
  - ii. If the police also have reasonable suspicion that the detainee is armed and dangerous, they may frisk the detainee for weapons.
- b. Weapons are always admissible so long as the stopping was reasonable
- c. What is the legal standard for admissibility of evidence of crime, not weapons, found in a stop and frisk?
  - i. How much like a weapon or contraband could it have seemed from the outside?
  - ii. The scope of the frisk is generally limited to a patdown of outer clothing, unless the officer has specific information that a weapon is hidden in a particular area of the suspect's clothing.
    - 1. An officer may also order occupants out of a stopped vehicle and frisk them and search the passenger compartment of the vehicle if the officer has a reasonable belief that an occupant is dangerous.

#### 6. *Hot pursuit and evanescent evidence* (evidence that might go away if we took the time to get a warrant)

- a. You can scope under D's fingernails w/o a warrant because he might wash his hands.
- b. Police in hot pursuit of a fleeing felon may make a warrantless search and seizure and may even pursue the suspect into a private dwelling
- c. Police may seize without a warrant evidence likely to disappear before a warrant can be obtained
- d. Contaminated food or drugs, persons injured or threatened with injury, and burning fires justify warrantless searches and seizures.

#### 7. *The following warrantless searches have been upheld:*

- a. Administrative searches to seize spoiled or contaminated food
- b. Administrative searches of a business within a highly regulated industry
- c. Inventory searches of arrestees
- d. Searches of airline passengers prior to boarding
- e. Searches of parolees and their homes



- f. Searches of government employees' desks and file cabinets where the scope is reasonable and there is a work-related need or reasonable suspicion of work-related misconduct
- g. Drug tests of railroad employees involved in an accident
- h. Drug tests of persons seeking customs employment in positions connected to drug interdiction
- i. Drug tests of public school students who participate in extra-curricular activities.

**viii. Automobile stops**

- 1. Generally, police may not stop a car unless they have at least reasonable suspicion to believe that a law has been violated.
- 2. However, if *special law enforcement needs* are involved, the SC Ct allows police to set up roadblocks to stop cars without individualized suspicion that the driver violated some law.
- 3. To be valid, the roadblock must
  - a. Stop cars on the basis of some neutral, articulable standard; and
  - b. Be designed to serve purposes closely related to a particular problem pertaining to cars and their mobility.
- 4. Passengers have standing to raise a wrongful stop as a reason to exclude evidence found during the stop.
- 5. After lawfully stopping a vehicle, officer may order occupants of the vehicle to get out.
  - a. If officer reasonably believes the detainees to be armed, he may frisk the occupants and search the passenger compartment for weapons, even after he has ordered the occupants out.

**f. Wiretapping and eavesdropping**

- i. Rule: ADs require a warrant
- ii. **Unreliable ear exception:**
  - 1. Everyone assumes the risk that the person to whom he is speaking is wired or will consent to the gov't monitoring the conversation.

**iii. Pen registers**

- 1. Although pen registers are not controlled by the Fourth Amendment, by statute judicial approval is required before a pen register may be used.

**III. CONFESSIONS**

**a. *Voluntariness***

- i. For a self-incriminating statement to be admissible under the DPC, it must be voluntary, as determined by the **totality of the circumstances**.
- ii. Confession will be involuntary if it is the result of official compulsion.
- iii. If an involuntary confession is admitted into evidence, the conviction need not be overturned if there is other overwhelming evidence of guilt.

**IV. MIRANDA**

**a. *Custody requirement***

- i. Individual must be in custody to trigger the need to give Miranda warnings.
- ii. You are in custody if, at the time of the interrogation, you are not free to leave.
- iii. Probation interviews and routine traffic stops are not custodial.

**b. *Interrogation requirement***

- i. Not required for the admissibility of spontaneous statements
  - 1. **TIP:** look for the word “blurt” in the answer.
- ii. Legal definition: any words or conduct by the police that they should know would *likely elicit a response* from D.
- iii. Waiver must be knowing, voluntary, and intelligent.
  - 1. **TIP:** There can be no waivers of Miranda rights from silence or shoulder shrugging.
- iv. The accused may terminate police interrogation any time prior to or during the interrogation by invoking either the right to remain silent or the right to counsel.
- v. Right to remain silent
  - 1. Police must scrupulously honor this request by not badgering the accused, although the S Ct has allowed later questioning to occur on an unrelated crime.
- vi. Right to counsel
  - 1. If the accused unambiguously indicates that he wishes to speak to counsel, all questioning must cease until counsel has been provided unless the accused then waives his right to counsel (e.g. by reinitiating questioning).

**c. Effect of violation**

- i. Generally, evidence obtained in violation of the Miranda rule is inadmissible at trial under the exclusionary rule.
- ii. Use of confession for impeachment
  - 1. Statements obtained in violation of Miranda may be used to impeach the D’s trial testimony, but may not be used as evidence of guilt.

**d. Public safety exception**

- i. The S Ct has allowed interrogation without Miranda warnings where it was reasonably prompted by concern for public safety.

V. FIFTH AMENDMENT RIGHT TO COUNSEL

- a. Once the D asserts his right to terminate the interrogation and request an attorney, re-initiation of interrogation by the police without his attorney present violates his 5<sup>th</sup> Am right to counsel.
- b. Arises in only 1 circumstance when someone, on hearing the Miranda warnings, says, “I want a lawyer.”
- c. NOT offense specific. Police may not re-initiate interrogations on ANY topic without his counsel present.
  - 1. All other times that you get a lawyer invokes your 6<sup>th</sup> Am right to counsel.

VI. SIXTH AMENDMENT RIGHT TO COUNSEL

- a. Guarantees the right to the assistance of counsel in all criminal proceedings, which include all critical stages of a prosecution *after judicial proceedings have begun*.
- b. Offense specific
- c. Attorney only has to be present at the interrogation if asked questions about that attorney’s case.

VII. PRETRIAL IDENTIFICATION

- a. **2 substantive bases on which to attack:**
  - i. Denial of right to counsel
    - 1. No right to counsel at the showing of photographs.
    - 2. Right to counsel at any **post-charge** lineup or show-up.
  - ii. Denial of due process
    - 1. D can attack an identification as denying due process if the identification is unnecessarily suggestive and there is a **substantial likelihood of misidentification**.

- b. **Remedy:**
  - i. Exclude the in-court identification
  - ii. State can defeat the claim for the remedy by showing an **independent source** for the pretrial identification: ample opportunity to observe the guy at the time of the crime

## VIII. PRETRIAL PROCEDURES

### a. **Preliminary hearing to determine PC to detain**

- i. D's liberty can be restricted only on a finding of probable cause.
  - 1. If PC has already been determined no preliminary hearing to determine PC need be held.
  - 2. If PC has not already been determined and there are significant constraints on an arrestee's liberty, a preliminary hearing to determine PC must be held within a reasonable time.

### b. **Bail**

- i. Bail issues are immediately appealable.
- ii. Arbitrary denials of bail will violate due process – detainees must be given opportunity to prove eligibility.
- iii. Preventive detention is constitutional.

### c. **Grand jury**

- i. States do not have to use grand juries as a regular part of their charging process.
- ii. Exclusion does not apply to the conduct of grand jury.
- iii. The procedures of grand juries are secret – D has no right to appear or send witnesses.
- iv. A conviction resulting from an indictment issued by a grand jury from which members of a minority group have been excluded will be reversed without regard to harmlessness of error.

### d. **Speedy trial**

- i. A determination of whether a D's 6<sup>th</sup> Am right to a speedy trial has been violated is made by an evaluation of the totality of the circumstances.
- ii. Factors considered:
  - 1. Length of delay
  - 2. Reason for delay
  - 3. Whether D asserted his right
  - 4. Prejudice to D
- iii. Remedy:
  - 1. Dismissal with prejudice

## IX. TRIAL

### a. **Right to an unbiased judge**

- i. **Financial interest** in the actual case or **actual malice** against the D

### b. **Pretrial proceedings and trial**

- i. Preliminary PC hearings are presumptively open to the public and press, as are pretrial suppression hearings, although the latter may be closed to the public under limited circumstances.
- ii. The press and public have a 1<sup>st</sup> Am right to attend the trial itself, even when the defense and prosecution agree to close it.

### c. **Other due process rights**

- i. Due process is violated if:
  - 1. The trial is conducted in a manner making it unlikely that the jury gave the evidence reasonable consideration;
  - 2. The state compels D to stand trial in prison clothing;

3. The state compels the D to stand trial or appear at penalty phase proceedings visibly shackled, unless the ct finds the shackling justified by concerns about courtroom security or escape; or
4. The jury is exposed to influence favorable to the prosecution.

**d. Right to a jury trial**

- i. Any time D is tried for an offense the maximum sentence of which exceeds 6 months.
- ii. If the sum of the sentences for criminal contempt exceeds 6 months, you have a constitutional right to jury trial.
  1. A judge may place a contemnor on probation for up to 5 years without affording him the right to a jury trial, as long as revocation of probation would not result in imprisonment for more than 6 months.
- iii. If you use 6 jurors, it must be unanimous. No federally protected constitutional right to unanimous 12 person jury verdict. Non-unanimous verdicts of 10-2 and 9-3 have been approved by the S Ct.
- iv. The cross-sectional requirement
  1. Jury venire must reflect fair cross-section of the community in which you're in
  2. No right to have own jury reflect fair cross-section
- v. Peremptory challenge
  1. It is unconstitutional for the prosecution or the defense to exercise peremptory challenges to exclude from the jury prospective jurors on account of their race or gender.
    - a. D must show facts or circumstances that raise an inference that the exclusion was based on race or gender.
    - b. If on such a showing, the prosecutor must come forward with a race-neutral explanation for the strike.
      1. The judge then determines whether the prosecutor's explanation was the genuine reason for striking the juror or merely a pretext for purposeful discrimination.

**e. Ineffective assistance of counsel**

- i. Only likely to come up on essay because it requires discussion.
- ii. **Elements:**
  1. Deficient performance by counsel
  2. But for such deficiency, the result of the proceeding would have been different.

**f. Right to confront witnesses**

- i. Not an absolute right
- ii. Face to face confrontation is not required when preventing such confrontation serves an important public purpose.
- iii. If 2 persons are tried together and one has given a confession that implicates the other, the right of confrontation prohibits use of that statement, even where the confession interlocks with the D's own confession, which is admitted.
- iv. However, such a statement may be admitted if:
  1. All portions referring to the other D can be **eliminated**;
  2. The **confessing D takes the stand** and subjects himself to cross-examination with respect to truth or falsity of what the statement asserts; or
  3. The confession of the non-testifying co-D is being used to **rebut the D's claim that his confession was obtained coercively**.

**X. GUILTY PLEAS**

- a. Waivers of right to jury trial
- b. 2 rules**

- i. *S Ct will not disturb guilty pleas after sentencing*
  - ii. *S Ct has adopted the K theory of plea bargaining*
    - 1. S Ct treats plea bargains like Ks and says that the terms of whatever the bargain were should be revealed in the record at the plea taking...
- c. Judge must tell D ON THE RECORD:
  - i. *Nature of the charge*
  - ii. *Maximum authorized penalty and any mandatory minimum penalty*
  - iii. *Right to plead not guilty and demand a trial*
- d. Remedy
  - i. D may withdraw his plea and plead again
- e. Collateral attacks on guilty pleas after sentence
  - i. 4 good bases for withdrawing guilty pleas after sentence.
    - 1. *Plea was involuntary*
      - a. A guilty plea is not involuntary merely because it was entered in response to the prosecution's threat to charge D with a more serious crime if he does not plead guilty.
    - 2. *Lack of jdx*
    - 3. *Ineffective assistance of counsel*
    - 4. *Failure of the prosecutor to keep an agreed upon plea bargain (important)*
      - a. Ex: D Smith agreed to plead guilty in exchange for prosecutor's promise to consolidate all charges and make a sentence recommendation.
      - b. Breach of an agreed upon plea bargain by the prosecutor is a good basis for withdrawing guilty pleas after sentence.

## XI. DEATH PENALTY

- a. *Any death penalty statute that does not give D a chance to present mitigating facts and circumstances is unconstitutional.*
- b. *There can be no automatic category for imposition of the death penalty.*
  - i. Watch for death penalty statute that says you get death if you kill a cop → unconstitutional.
- c. *The state may not by statute limit the mitigating factors; all relevant mitigating evidence must be admissible or the statute is unconstitutional.*
- d. *Only a jury and not a judge may determine the aggravating factors justifying imposition of the death penalty.*

## XII. RIGHTS DURING PUNISHMENT

- a. Prisoners have no reasonable expectation of privacy in their cells and so have no 4<sup>th</sup> Am protection with respect to searches of their cells.
- b. Prisoners' 1<sup>st</sup> Am rights of freedom of speech, association, and religion may be burdened by regulations reasonably related to penological interests.
- c. Incoming mail can be broadly regulated, but outgoing mail generally cannot be regulated.
- d. A federal statute prohibits states from interfering with a prisoner's religious practices absent a compelling interest.

## XIII. DOUBLE JEOPARDY – bars jeopardy for same offense by same sovereign

- a. When does it attach?
  - i. In a *jury trial*, it attaches when the *jury is sworn*.
  - ii. In a *judge trial*, when the *first witness is sworn*.
  - iii. Generally does not attach when procedures are civil.

b. **Exceptions permitting re-trial:**

- i. The jury is unable to agree on a verdict.
- ii. Mistrials for manifest necessity (appendicitis)
- iii. Retrial after successful appeal is not double jeopardy
- iv. Breach of an agreed upon plea bargain by the D (important)
  1. When D breaches a plea bargain agreement, his plea and sentence can be withdrawn and the original charges re-instated.

c. **What constitutes same offense?**

- i. 2 crimes do NOT constitute same offense if each crime requires proof of an additional element the other does not.
- ii. Lesser included offenses
  1. Attachment of jeopardy for a greater offense bars retrial for lesser included offenses and vice versa.
  2. **Exception:** on trial for battery. Victim dies. They can now sue you for murder.

d. **Separate sovereigns**

- i. A person may be tried for the same conduct by both the state and federal governments or by 2 states, but not by a state and its municipalities.

e. **Appeals by prosecution**

- i. Even after jeopardy has attached, the prosecution may appeal any dismissal on D's motion that does not constitute an acquittal on the merits.

XIV. 5<sup>th</sup> PRIVILEGE AGAINST COMPELLED TESTIMONY

- a. Anyone can assert in any kind of case (civil, criminal, administrative hearing, congressional hearing)
- b. What matters is the nature of the questions.
- c. Anyone asked under oath in any kind of case a question the response to which might tend to incriminate them is entitled to assert the 5<sup>th</sup> Am privilege.
- d. The privilege must be claimed in civil proceedings to prevent the privilege from being waived for a later criminal prosecution.

e. ***Scope of protection***

- i. 5<sup>th</sup> Am does not protect us from having the gov't use our bodies to incriminate us. You can be compelled to give a hair sample, urine sample, etc. The 5<sup>th</sup> Am privilege does not protect real or physical evidence.
- ii. 5<sup>th</sup> Am protects us only from compelled testimony – no lie detector tests, no custodial police interrogations.

f. ***Violation***

- i. Violation does not occur until a person's compelled statements are used against him in a criminal case.

g. ***Prohibitions against burdens on assertion of privilege***

- i. Unconstitutional for the prosecutor to make a negative comment on the D's failure to testify or his remaining silent on hearing the Miranda warnings.

h. ***5<sup>th</sup> Am privilege can be eliminated in 3 ways:***

- i. Grant of an immunity (use and derivative use immunity)
  1. Cannot use to convict you
  2. We can prosecute you based on evidence we can show we had before the immunity grant
- ii. No possibility of incrimination

1. A person has no privilege against compelled self-incrimination if there is no possibility of incrimination (e.g., SoL has run).
- iii. Waiver
1. Criminal D, by taking the witness stand, waives the 5<sup>th</sup> Am privilege as to all legitimate subjects of cross-examination.

#### HOT TOPICS

- Exclusion and limitations on exclusion
- Fruit of the poisonous tree doctrine
  - Search and seizure
    - Miranda
  - Pre-trial identification
- Right to jury trial and guilty pleas
- Ineffective assistance of counsel
  - Double jeopardy
- 5<sup>th</sup> Am right against compelled testimony

BAREXAMDOCTOR.COM  
UNLIMITED ESSAYS  
AND PTS ONLINE!