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CRIMINAL PROCEDURE

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I. INTRODUCTION

A. CONSTITUTIONAL RESTRAINTS ON CRIMINAL PROCEDURE

The development of numerous constitutional limitations upon the manner in which a criminal suspect may be arrested, convicted, and punished has rendered much of criminal procedure an inquiry into constitutional law.

B. INCORPORATION OF BILL OF RIGHTS INTO DUE PROCESS

The first eight amendments to the United States Constitution apply by their terms only to the federal government. However, the Supreme Court has incorporated many of these rights into the due process requirement binding on the states by virtue of the Fourteenth Amendment. Those portions of the Bill of Rights "fundamental to our concept of ordered liberty" have been so incorporated. [Duncan v. Louisiana, 391 U.S. 145 (1968)]

C. CONSTITUTIONAL REQUIREMENTS BINDING ON STATES

The following rights have been held binding on the states under the due process provisions of the Fourteenth Amendment:

(i) The Fourth Amendment ***prohibition against unreasonable searches and seizures*** [Wolf v. Colorado, 338 U.S. 25 (1949)], and the ***exclusionary rule*** requiring that the result of a violation of this prohibition not be used as evidence against the defendant [Mapp v. Ohio, 367 U.S. 643 (1961)];

(ii) The Fifth Amendment ***privilege against compulsory self-incrimination*** [Malloy v. Hogan, 378 U.S. 1 (1964)];

(iii) The Fifth Amendment ***prohibition against double jeopardy*** [Benton v. Maryland, 395 U.S. 784 (1969)];

(iv) The Sixth Amendment right to a ***speedy trial*** [Klopfer v. North Carolina, 386 U.S. 213 (1967)];

(v) The Sixth Amendment right to a ***public trial*** [*In re* Oliver, 333 U.S. 257 (1948)];

(vi) The Sixth Amendment right to ***trial by jury*** [Duncan v. Louisiana, 391 U.S. 145 (1968)];

(vii) The Sixth Amendment right to ***confront witnesses*** [Pointer v. Texas, 380 U.S. 400 (1965)];

(viii) The Sixth Amendment right to ***compulsory process*** for obtaining witnesses [Washington v. Texas, 388 U.S. 14 (1967)];

(ix) The Sixth Amendment right to ***assistance of counsel*** in felony cases [Gideon v. Wainwright, 372 U.S. 335 (1963)], and in misdemeanor cases in which imprisonment is imposed [Argersinger v. Hamlin, 407 U.S. 25 (1972)]; and

(x) The Eighth Amendment ***prohibition against cruel and unusual punishment*** [Robinson v. California, 370 U.S. 660 (1962)].

Note: The Constitution provides the floor of protection for criminal defendants. States are free to grant greater protection, and many do.

D. CONSTITUTIONAL RIGHTS NOT BINDING ON STATES

Two provisions of the Bill of Rights have not been held binding on the states.

1. Right to Indictment

The right to indictment by a grand jury for capital and infamous crimes has been held not to be binding on the states. [Hurtado v. California, 110 U.S. 516 (1884)]

2. Prohibition Against Excessive Bail

It has not yet been determined whether the Eighth Amendment prohibition against excessive bail creates a right to bail (or whether it simply prohibits excessive bail where the right to bail exists) and whether it is binding on the states. However, most state constitutions create a right to bail and prohibit excessive bail.

II. FOURTH AMENDMENT

A. IN GENERAL

The Fourth Amendment provides that people should be free in their persons from ***unreasonable*** searches and seizures.

1. Search

A search can be defined as a governmental intrusion into an area where a person has a reasonable and justifiable expectation of privacy.

2. Seizure

A seizure can be defined as the exercise of control by the government over a person or thing.

3. Reasonableness

What is reasonable under the Fourth Amendment depends on the circumstances. For example, certain searches and seizures are considered to be reasonable only if the government has first obtained a warrant authorizing the action, while other searches and seizures are reasonable without a warrant. The material that follows specifically outlines the requirements for searches and seizures under the Fourth Amendment.

B. ARRESTS AND OTHER DETENTIONS

Governmental detentions of persons, including arrests, certainly constitute seizures of the person, so they must be reasonable to comply with the Fourth Amendment. Whether a seizure of the person is reasonable depends on the scope of the seizure (e.g., is it an arrest or merely an investigatory stop?) and the strength of the suspicion prompting the seizure (e.g., an arrest requires probable cause, while an investigatory detention can be based on reasonable suspicion).

1. What Constitutes a Seizure of the Person?

Generally, it is obvious when police arrest or seize a person. When it is not readily apparent, the Supreme Court has indicated that a seizure occurs only when, under the ***totality of the circumstances***, a reasonable person would feel that he was not free to decline the officer's

requests or otherwise terminate the encounter. [Florida v. Bostick, 501 U.S. 429 (1991)] In this regard, police pursuit of a suspect is not a seizure in and of itself. To constitute a seizure, the Fourth Amendment requires a ***physical application of force*** by the officer or a ***submission*** to the officer's show of force. It is not enough that the officer merely ordered the person to stop. [California v. Hodari D., 499 U.S. 621 (1991)]

Example: Without a warrant or probable cause, at around 3 a.m. in January, six police officers went to Kaupp's home. At least three officers entered his room, awoke him, and told him that they wanted him to "go and talk" about a murder. Kaupp replied, "Okay" and was handcuffed and taken out of his house, shoeless and dressed only in his underwear. Kaupp was taken to the murder scene and then to the police station, where he confessed to playing a minor role in the crime. Kaupp's attorney sought to have Kaupp's confession suppressed as the fruit of an illegal arrest, but the court ruled that Kaupp was not arrested until after his confession—he consented to going to the police station by saying, "Okay" and was handcuffed only pursuant to a policy adopted to protect officers when transporting persons in their squad cars. Kaupp was convicted and sentenced to 55 years' imprisonment. The Supreme Court overturned the conviction on appeal, finding that Kaupp's "Okay" was merely an assent to the exercise of police authority, that a reasonable person would not know that the handcuffs were merely for the protection of the officers, and that it cannot seriously be suggested that under the circumstances a reasonable person would feel free to tell the officers when questioning started that he wanted to go home and go back to bed. [Kaupp v. Texas, 538 U.S. 626 (2003)]

Compare: Officers boarded a bus shortly before its departure and asked individuals for identification and consent to search their luggage. The mere fact that people felt they were not free to leave because they feared that the bus would depart does not make this a seizure of the person.

2. Arrests

An arrest occurs when the police take a person into custody against her will for purposes of criminal prosecution or interrogation.

a. Probable Cause Requirement

An arrest must be based on probable cause. Probable cause to arrest is present when, at the time of arrest, the officer has within her knowledge reasonably trustworthy facts and circumstances sufficient to warrant a reasonably prudent person to believe that the suspect has committed or is committing a crime for which arrest is authorized by law. [Beck v. Ohio, 379 U.S. 89 (1964)]

Example: D was in the front passenger seat of a car that the police stopped for speeding late at night. The driver consented to a search of the car. The police found almost $800 in the car's glove compartment and bags of cocaine hidden in the back seat. None of the men admitted ownership of these items. Under the circumstances, the police had probable cause to believe that D, alone or with the other occupants, committed the crime of possession of cocaine. [Maryland v. Pringle, 540 U.S. 366 (2004)]

1) Mistaken Offense

An arrest is not invalid merely because the grounds stated for the arrest at the time it was made are erroneous, as long as the officers had other grounds on which there was probable cause for the arrest. [Devenpeck v. Alford, 543 U.S. 146 (2005)]

Example: Police officers pulled Defendant over on suspicion that he was impersonating an officer because his car had police-type lights. They found his answers to their questioning evasive. Upon discovering that Defendant was taping their conversation, they arrested him, erroneously thinking that the taping violated a state privacy law. *Held:* If the officers had probable cause to arrest Defendant for impersonating an officer, the arrest was valid; it does not matter that they lacked probable cause for the "offense" they stated at the time of the arrest. [Devenpeck v. Alford, *supra*]

b. Warrant Generally Not Required

In contrast to the rule for searches, police generally need not obtain a warrant before arresting a person in a ***public place***, even if they have time to get a warrant. [United States v. Watson, 423 U.S. 411 (1976)]

1) Felony

A police officer may arrest a person without a warrant when she has ***probable cause to believe*** that a felony has been committed and that the person before her committed it.

2) Misdemeanor

An officer may make a warrantless arrest for a misdemeanor ***committed in her presence***. A crime is committed in the officer's "presence" if she is aware of it through any of her senses.

Note: The police may make a warrantless misdemeanor arrest even if the crime for which the arrest is made cannot be punished by incarceration. [Atwater v. Lago Vista, 532 U.S. 318 (2001)]

3) Exception—Home Arrests Require Warrant

The police must have an arrest warrant to effect a nonemergency arrest of an individual in her own home. The officers executing the warrant may enter the suspect's home only if there is reason to believe the suspect is within it. [Payton v. New York, 445 U.S. 573 (1980)] All warrantless searches of homes are presumed unreasonable. The burden is on the government to demonstrate sufficient exigent circumstances to overcome this presumption. [Welsh v. Wisconsin, 466 U.S. 740 (1984)]

a) Homes of Third Parties

Absent exigent circumstances, the police executing an arrest warrant may not search for the subject of the warrant in the home of a third party without first obtaining a separate search warrant for the home. If the police do execute an arrest warrant at the home of a third party without obtaining a search warrant for the home, the arrest is still valid (*see* c., below), but evidence of any crime

found in the home cannot be used against the owner of the home since it is the fruit of an unconstitutional search. [Steagald v. United States, 451 U.S. 204 (1981)] However, the arrestee will ***not*** be able to have such evidence suppressed unless he can establish a legitimate expectation of privacy in the home. (*See* C.3.a.1), *infra*.)

c. Effect of Invalid Arrest

An unlawful arrest, ***by itself***, has no impact on a subsequent criminal prosecution. Thus, if the police improperly arrest a person (e.g., at his home without a warrant), they may detain him if they have probable cause to do so [*see* New York v. Harris, 495 U.S. 14 (1990)], and the invalid arrest is not a defense to the offense charged [Frisbie v. Collins, 342 U.S. 519 (1952)]. Of course, evidence that is a fruit of the unlawful arrest may not be used against the defendant at trial because of the exclusionary rule.

3. Other Detentions

a. Investigatory Detentions (Stop and Frisk)

Police have the authority to briefly detain a person for investigative purposes even if they lack probable cause to arrest. To make such a stop, police must have a ***reasonable suspicion*** supported by ***articulable facts*** of criminal activity or involvement in a completed crime. [Terry v. Ohio, 392 U.S. 1 (1968)] *Note:* If the police also have reasonable suspicion to believe that the detainee is ***armed and dangerous***, they may also conduct a frisk (a limited search) to ensure that the detainee has no weapons (*see* C.5.e., *infra*).

1) Reasonable Suspicion Defined

The Court has not specifically defined "reasonable suspicion." It requires something more than a vague suspicion (e.g., it is not enough that the detainee was in a crime-filled area [Brown v. Texas, 443 U.S. 47 (1979)]), but full probable cause is not required. Whether the standard is met is judged under the ***totality of the circumstances***. [United States v. Sokolow, 490 U.S. 1 (1989)]

Examples: 1) Reasonable suspicion justifying a stop is present when: (i) a suspect who is standing on a corner in a high crime area (ii) flees after noticing the presence of the police. Neither factor standing alone is enough to justify a stop, but together they are sufficiently suspicious. [Illinois v. Wardlow, 528 U.S. 119 (2000)]

2) Police had reasonable suspicion—and therefore there was no Fourth Amendment violation—where they detained Defendant at an airport while dogs sniffed his bags for drugs based on the following facts known by the police: (i) Defendant paid for airline tickets in cash with small bills; (ii) Defendant traveled under a name that did not match the name for the phone number he gave; (iii) Defendant traveled to a drug source city (Miami) and stayed for only 48 hours, while his flight time was 20 hours; (iv) Defendant appeared nervous; and (v) Defendant refused to check his bags. [United States v. Sokolow, *supra*] *Note:* The fact that these suspicious circumstances are part of a drug courier profile used by the

police neither helps nor hurts the totality of the circumstances inquiry.

2) Source of Suspicion

Like probable cause, reasonable suspicion need not arise from a police officer's personal knowledge. The suspicion can be based on a flyer, a police bulletin, or a report from an informant. [United States v. Hensley, 469 U.S. 221 (1985)]

a) Informant's Tips

Where the source of suspicion of criminal activity is an informant's tip, the tip must be accompanied by ***indicia of reliability***, including predictive information, sufficient to make the officer's suspicion reasonable.

Example: Police received an anonymous tip asserting that a woman was carrying cocaine and predicting that she would leave a specified apartment at a specified time, get into a specified car, and drive to a specified motel. After observing that the informant had accurately predicted the suspect's movements, it was reasonable for the police to think that the informant had inside knowledge that the suspect indeed had cocaine, thus justifying a *Terry* stop. [Alabama v. White, 496 U.S. 325 (1990)]

Compare: Police received an anonymous tip that a young black man in a plaid shirt standing at a particular bus stop was carrying a gun. When police arrived at the bus stop, they found a young black man there wearing a plaid shirt. They searched the man and found an illegal gun. Here there was not sufficient indicia of reliability in the tip to provide reasonable suspicion. The fact that the informant knows a person is standing at a bus stop does not show knowledge of any inside information; any passerby could observe the suspect's presence. Unlike the tip in *White,* the tip here did not provide predictive information and left police with no way to test the informant's knowledge and credibility. [Florida v. J.L., 529 U.S. 266 (2000)]

3) Duration and Scope

While investigatory stops generally are brief, they are not subject to a specific time limit. For a stop to be valid, the police must act in a ***diligent and reasonable manner in confirming or dispelling their suspicions.*** [United States v. Sharpe, 470 U.S. 675 (1985)—20-minute stop deemed reasonable where officers investigated their suspicions diligently and the suspect's evasive conduct prolonged the encounter]

a) Identification May Be Required

As long as the police have the reasonable suspicion required to make a *Terry* stop, they may require the detained person to identify himself (i.e., state his name), and the detainee may be arrested for failure to comply with such a requirement. [Hiibel v. Sixth Judicial District Court, 542 U.S. 177 (2004)] In dicta, the Court suggested that it would recognize an exception to this rule

under the Fifth Amendment right against self-incrimination (*see* XIV., *infra*) if by merely giving his name, the detainee may incriminate himself, but noted that such a case would be rare.

4) Development of Probable Cause
If during an investigatory detention, the officer develops probable cause, the detention becomes an arrest, and the officer can proceed on that basis. He can, for example, conduct a full search incident to that arrest.

5) What Constitutes a Stop?
If an officer merely approaches a person but does not detain her, no arrest or investigatory detention occurs. Not even reasonable suspicion is necessary in such cases. A seizure or stop occurs only if a reasonable person would believe she is not free to decline an officer's requests or otherwise terminate the encounter. (*See* B.1., *supra*.)

6) Property Seizures on Reasonable Suspicion
Police may briefly seize items upon reasonable suspicion that they are or contain contraband or evidence, but such seizures must be limited. [United States v. Place, 462 U.S. 696 (1983)—90-minute detention of luggage reasonably suspected to contain drugs unconstitutional]

b. Automobile Stops
Stopping a car is a seizure for Fourth Amendment purposes. Thus, generally, police officers may not stop a car unless they have ***at least reasonable suspicion*** to believe that a law has been violated. However, in certain cases where ***special law enforcement needs*** are involved, the Court allows police officers to set up roadblocks to stop cars without individualized suspicion that the driver has violated some law. To be valid, it appears that such roadblocks must:

(i) Stop cars on the basis of some ***neutral, articulable standard*** (e.g., every car or every third car); and

(ii) Be designed to serve purposes ***closely related to a particular problem pertaining to automobiles and their mobility***.

[*See* Delaware v. Prouse, 440 U.S. 648 (1979); *and see* Indianapolis v. Edmond, 531 U.S. 32 (2000)]

Examples: 1) Because of the gravity of the drunk driving problem and the magnitude of the states' interest in getting drunk drivers off the roads, police may set up roadblocks to check the sobriety of all drivers passing by. [Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990)]

2) Because of the difficulty of discerning whether an automobile is transporting illegal aliens, police may set up roadblocks near the border to stop every car to check the citizenship of its occupants. [United States v. Martinez-Fuerte, 428 U.S. 543 (1976); *and see* United States v. Villamonte-Marquez, 462 U.S. 579 (1983)—suspicionless boarding of boat in channel leading to open sea justified on similar grounds]

Compare: The police may not set up roadblocks to check cars for illegal drugs. The nature of such a checkpoint is to detect evidence of ordinary criminal wrongdoing unrelated to use of cars or highway safety. If suspicionless stops were allowed under these circumstances, all suspicionless seizures would be justified. [Indianapolis v. Edmond, *supra*]

1) Police Officer's Mistake of Law

A police officer's mistake of law that gives rise to reasonable suspicion does not invalidate a seizure as long as the mistake was ***reasonable***. [Heien v. North Carolina, 135 S. Ct. 530 (2014)—police officer's reasonable mistake that a vehicle must have two working brake lights, when in fact only one was required by law, did not invalidate the stop and subsequent arrests of defendants who were in a car with one working brake light]

2) Seizure of Occupants

An automobile stop constitutes a seizure not only of the automobile's driver, but also any passengers as well. *Rationale:* Such a stop curtails the travel of the passengers as well the driver, and a reasonable passenger in a stopped vehicle would not feel free to leave the scene without police permission. [Brendlin v. California, 551 U.S. 249 (2007)]

Example: Officer pulled Driver's car over for, admittedly, no valid reason. Upon approaching Driver's car and asking Driver for her license, Officer noticed that Passenger resembled a person wanted for parole violation. Officer confirmed his suspicion via radio and arrested Passenger. Upon searching Passenger, Officer discovered drug paraphernalia. *Held:* Passenger has standing to challenge the admissibility of the drug paraphernalia as the fruit of an unlawful seizure.

3) Distinguish—Informational Roadblocks

If the police set up a roadblock for purposes other than to seek incriminating information about the drivers stopped, the roadblock likely will be constitutional.

Example: The police set up a roadblock to ask drivers if they had any information about a deadly hit and run that occurred a week earlier, approximately where the roadblock was set up. D was arrested at the roadblock for driving under the influence of alcohol after he nearly ran over one of the officers stationed at the roadblock. The Court held that the roadblock and arrest were constitutional. [Illinois v. Lidster, 540 U.S. 419 (2004)]

4) Police May Order Occupants Out

Provided that a police officer has lawfully stopped a vehicle, in the interest of officer safety, the officer may order the occupants (i.e., the vehicle's driver ***and*** passengers) to get out. Moreover, if the officer reasonably believes that the detainee is armed and dangerous, she may conduct a frisk of the detainee. She may also search the passenger compartment of the vehicle to look for weapons, even after the driver and other occupants have been ordered out of the vehicle. [Pennsylvania v. Mimms, 434 U.S. 106 (1977); Maryland v. Wilson, 519 U.S. 408 (1997); Thornton v. United States, 541 U.S. 615 (2004)]

5) Pretextual Stops
If an officer has probable cause to believe that a traffic law has been violated, the officer may stop the suspect's automobile, even if the officer's ulterior motive is to investigate a crime for which the officer lacks sufficient cause to make a stop. [Whren v. United States, 517 U.S. 806 (1996)—police in a high drug crime area stopped D's automobile after observing D wait a long time at an intersection, abruptly turn without signaling, and speed off at an unreasonable speed; *and see* Arkansas v. Sullivan, 532 U.S. 769 (2001)] Furthermore, as long as the police do not extend the valid stop beyond the time necessary to issue a ticket and conduct ordinary inquiries incident to such a stop, it does not violate the Fourth Amendment to allow a narcotics detection dog to sniff the car. [Illinois v. Caballes, 543 U.S. 405 (2005); *and see* C.3.b.1)b), *infra*]

c. Detention to Obtain a Warrant
If the police have probable cause to believe that a suspect has hidden drugs in his house, they may, for a reasonable time, prohibit him from going into the house unaccompanied so that they can prevent him from destroying the drugs while they obtain a search warrant. [Illinois v. McArthur, 531 U.S. 326 (2001)—police kept suspect from reentering his trailer alone for two hours while an officer obtained a warrant]

d. Occupants of Premises Being Searched May Be Detained
Pursuant to the execution of a ***valid warrant*** to search for contraband, the police may detain occupants of the premises while a proper search is conducted. [Michigan v. Summers, 452 U.S. 692 (1981)]

e. Station House Detention
Police officers must have ***full probable cause*** for arrest to bring a suspect to the station against the suspect's will for questioning [Dunaway v. New York, 442 U.S. 200 (1969)] or for fingerprinting [Hayes v. Florida, 470 U.S. 811 (1985)].

4. Grand Jury Appearance
For all practical purposes, seizure of a person (by subpoena) for a grand jury appearance is ***not within the Fourth Amendment's protection***. Even if, in addition to testifying, the person is to be asked to give handwriting or voice exemplars, there is no need for the subpoena to be based on probable cause or even objective suspicion. In other words, a person compelled to appear cannot assert that it was unreasonable to compel the appearance. However, the Supreme Court has suggested that it is conceivable that such a subpoena could be unreasonable if it was extremely broad and sweeping or if it was being used for harassment purposes. [United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973)]

5. Deadly Force
There is a Fourth Amendment "seizure" when a police officer uses deadly force to apprehend a suspect. An officer may not use deadly force unless it is ***reasonable*** to do so under the circumstances. [Scott v. Harris, 550 U.S. 372 (2007)]

Example: It was reasonable for an officer to end a chase by bumping a suspect's car (which ultimately resulted in the suspect's becoming a paraplegic) where the suspect was driving at high speeds and weaving in and out of traffic. Under

such circumstances, the suspect's conduct posed an immediate threat to his own life and the lives of innocent bystanders. [Scott v. Harris, *supra*]

Compare: It was unreasonable to shoot a fleeing burglar who refused to stop when ordered to do so where there was no evidence that the suspect was armed or posed any threat to the police or others. [Tennessee v. Garner, 471 U.S. 1 (1985)]

C. EVIDENTIARY SEARCH AND SEIZURE

Like arrests, evidentiary searches and seizures must be reasonable to be valid under the Fourth Amendment. Reasonableness here usually means that the police must have obtained a warrant before conducting the search, but there are six circumstances where a warrant is not required (*see* 5., *infra*).

1. General Approach

A useful analytical model of the law of search and seizure requires answers to the following questions:

a. Does the defendant have a ***Fourth Amendment right***?

1) Was there ***governmental conduct***?

2) Did the defendant have a ***reasonable expectation of privacy***?

b. If so, did the police have a ***valid warrant***?

c. If the police did not have a valid warrant, did they make a ***valid warrantless search*** and seizure?

2. Governmental Conduct Required

The Fourth Amendment generally protects only against governmental conduct and not against searches by private persons. Government agents here include only the ***publicly paid police*** and those ***citizens acting at their direction*** or behest; private security guards are not government agents unless deputized as officers of the public police.

Example: A private freight carrier opened a package and resealed it; police later reopened the package. The Supreme Court found that this was not a "search" under the Fourth Amendment because the police found nothing more than the private carrier had found. Moreover, the warrantless field test of a substance found in the package to determine whether it was cocaine was not a Fourth Amendment "seizure," even though the testing went beyond the scope of the original private search. [United States v. Jacobsen, 466 U.S. 109 (1984)]

3. Physical Intrusion into Constitutionally Protected Area or Violation of Reasonable Expectation of Privacy

There are two ways in which searches and seizures can implicate an individual's Fourth Amendment rights: (i) search or seizure by a government agent of a constitutionally protected area in which the individual had a reasonable expectation of privacy; or (ii) physical intrusion by the government into a constitutionally protected area to obtain information.

Example: The government's installation of a GPS tracking device on a vehicle, and the use of the device to monitor the vehicle's movements, constituted a physical intrusion into a constitutionally protected area (i.e., it was a trespass as to the vehicle) and, as such, was a search governed by the Fourth Amendment. [United States v. Jones, 132 S. Ct. 945 (2012)]

a. Standing

It is not enough merely that ***someone*** has an expectation of privacy in the place searched or the item seized. The Supreme Court has imposed a standing requirement so that a person can complain about an evidentiary search or seizure only if it violates his ***own*** reasonable expectations of privacy. [Rakas v. Illinois, 439 U.S. 128 (1978)] Whether a person has a ***reasonable expectation of privacy*** generally is based on the ***totality of the circumstances***, considering factors such as ownership of the place searched and location of the item seized. [Rawlings v. Kentucky, 448 U.S. 98 (1980)] The Court has held that a person has a reasonable expectation of privacy any time:

(i) She ***owned or had a right to possession*** of the place searched;

(ii) The ***place searched was in fact her home***, whether or not she owned or had a right to possession of it; or

(iii) She was an ***overnight guest*** of the owner of the place searched [Minnesota v. Olson, 495 U.S. 91 (1990)].

1) Search of Third-Party Premises

Standing does not exist merely because a person will be harmed by introduction of evidence seized during an illegal search of a third person's property.

Example: A police officer peered through the closed window blind of Lessee's apartment and observed Lessee and defendants bagging cocaine. When defendants left the apartment, the officer followed them to their car and arrested them. The car and apartment were searched, and cocaine and a weapon were found. At trial, defendants moved to suppress all evidence, claiming that the officer's peeking through the window blind constituted an illegal search. It was determined that defendants had spent little time in Lessee's apartment and had come there solely to conduct a business transaction (i.e., bagging the cocaine). *Held:* The defendants did not have a sufficient expectation of privacy in the apartment. They were there only for a few hours and were not overnight guests. Moreover, they were there for business purposes rather than social purposes, and there is a lesser expectation of privacy in commercial settings. Therefore, the defendants had no Fourth Amendment protections in the apartment and cannot challenge the search. [Minnesota v. Carter, 525 U.S. 83 (1999)]

2) No Automatic Standing to Object to Seizure of Evidence in Possessory Offense

Formerly, a defendant had automatic standing to object to the legality of a search

and seizure any time the evidence obtained was introduced against her in a possessory offense. (This allowed a defendant to challenge the search without specifically admitting possession of the items.) Because a defendant at a suppression hearing may now assert a legitimate expectation of privacy in the items without his testimony being used against him at trial [*see* Simmons v. United States, V.D.3, *infra*], the automatic standing rule has been abolished as unnecessary [United States v. Salvucci, 448 U.S. 83 (1980)].

3) No Automatic Standing for Co-Conspirator
That a co-conspirator may be aggrieved by the introduction of damaging evidence does not give the co-conspirator automatic standing to challenge the seizure of the evidence; the co-conspirator must show that her own expectation of privacy was violated. [United States v. Padilla, 508 U.S. 77 (1993)]

b. Things Held Out to the Public

1) Generally—No Expectation of Privacy
A person does not have a reasonable expectation of privacy in objects held out to the public, such as ***the sound of one's voice*** [United States v. Dionisio, B.4., *supra*]; one's ***handwriting*** [United States v. Mara, B.4., *supra*]; ***paint on the outside of a car*** [Cardwell v. Lewis, 417 U.S. 583 (1974)]; ***the smell of one's luggage or car*** (e.g., drug sniffs by narcotics dogs) [United States v. Place, 462 U.S. 696 (1983); Illinois v. Caballes, B.3.b.5), *supra*]; ***account records held by the bank*** [United States v. Miller, 425 U.S. 435 (1976)]; ***or magazines offered for sale*** [Maryland v. Macon, 472 U.S. 463 (1985)].

a) Compare—Squeezing Luggage
Although the Supreme Court has held that one does not have a reasonable expectation of privacy in the smell of one's luggage, one does have a reasonable expectation of privacy in luggage against physically invasive inspections. Squeezing luggage to discern its contents constitutes a search. [Bond v. United States, 529 U.S. 334 (2000)]

Example: After completing an immigration status check of passengers on a bus, Officer began walking toward the front of the bus and squeezing soft-sided luggage in the overhead compartment. Upon feeling what felt like a brick in Defendant's bag, Officer searched the bag and found a "brick" of methamphetamine. The Court held that while travelers might expect their luggage to be lightly touched or moved from time to time, they do not expect their luggage to be subjected to an exploratory squeeze. Therefore, Officer's conduct constitutes a search under the Fourth Amendment. [Bond v. United States, *supra*]

b) Dog Sniffs at Traffic Stops
As long as police officers have ***lawfully stopped*** a car and ***do not extend the stop*** beyond the time necessary to issue a ticket and conduct ordinary inquiries incident to such a stop, a dog sniff of the car does not implicate the Fourth Amendment. [Illinois v. Caballes, *supra*—Fourth Amendment was not

violated when, during a routine traffic stop, a police officer walked a narcotics detection dog around defendant's car and the dog alerted to the presence of drugs, even though before the dog alerted, the officer did not have a reasonable and articulable suspicion that would justify a search; the sniff is not a search] However, police officers may not extend an otherwise-completed traffic stop, absent ***reasonable suspicion***, in order to complete a dog sniff. The key question is not whether the dog sniff occurs before the police issue the ticket, but rather whether the dog sniff adds time to the stop. [Rodriguez v. United States, 135 S. Ct. 1609 (2015)—it was a violation of the Fourth Amendment when a police officer issued the defendant a warning ticket, thereby completing the traffic stop, and then detained the defendant for seven to eight minutes to conduct a dog sniff]

Note: During a routine traffic stop, a dog "alert" to the presence of drugs can form the basis for probable cause to justify a search of the automobile. [Florida v. Harris, 133 S. Ct. 1050 (2013)]

c) Dog Sniffs at Entry to Home

Although the entry to a home is within the curtilage protected by the Fourth Amendment against unreasonable searches (*see* below), a police officer may approach a home in hopes of speaking to its occupants—just like a private citizen, such as a neighbor or a delivery person. However, the scope of the license is limited. Police officers may not exceed the license by having a drug dog sniff around the entry or other areas within the curtilage. Such a physical intrusion into a constitutionally protected area constitutes a "search" within the meaning of the Fourth Amendment, and therefore requires a valid warrant or warrant exception. [Florida v. Jardines, 133 S. Ct. 1409 (2013)—canine drug alert at defendant's front door could not be the basis of probable cause to obtain a search warrant; the sniff constituted an unconstitutional warrantless search]

2) "Open Fields" Doctrine

Furthermore, under the "open fields" doctrine, areas outside the "curtilage" (dwelling house and outbuildings) are subject to police entry and search—these areas are "held out to the public" and are unprotected by the Fourth Amendment. (The Court will consider the building's proximity to the dwelling, whether it is within the same enclosure—such as a fence—that surrounds the house, whether the building is used for activities of the home, and the steps taken by the resident to protect the building from the view of passersby.) [Oliver v. United States, 466 U.S. 170 (1984)] Even a building such as a barn may be considered to be outside the curtilage and therefore outside the protection of the Fourth Amendment. [United States v. Dunn, 480 U.S. 294 (1987)] In addition, the Fourth Amendment does not prohibit the warrantless search and seizure of garbage left for collection outside the curtilage of a home. [California v. Greenwood, 486 U.S. 35 (1988)]

3) Fly-Overs

The police may, within the Fourth Amendment, fly over a field or yard to observe with the naked eye things therein. [California v. Ciraolo, 476 U.S. 207 (1986)] Even

a low (400 feet) fly-over by a helicopter to view inside a partially covered greenhouse is permissible. [Florida v. Riley, 488 U.S. 445 (1989)—plurality decision based on flight being permissible under FAA regulations] The police may also take aerial photographs of a particular site. [Dow Chemical Co. v. United States, 476 U.S. 227 (1986)]

a) Compare—Technologically Enhanced Searches of Homes
The Supreme Court has held that because of the strong expectation of privacy within one's home, obtaining by sense enhancing technology any information regarding the interior of a home that could not otherwise have been obtained without physical intrusion constitutes a search, at least where the technology in question is not in general public use. [Kyllo v. United States, 533 U.S. 27 (2001)—use of thermal imager on defendant's home from outside the curtilage to detect the presence of high intensity lamps commonly used to grow marijuana constitutes a search]

4) Automobiles
A police officer may constitutionally reach into an automobile to move papers to observe the auto's vehicle identification number. [New York v. Class, 475 U.S. 106 (1986)] However, the police may not covertly and trespassorily place a GPS tracking device on a person's automobile without a warrant. [United States v. Jones, 3., *supra*]

4. Searches Conducted Pursuant to a Warrant
To be reasonable under the Fourth Amendment, most searches must be pursuant to a warrant. The warrant requirement serves as a check against unfettered police discretion by requiring police to apply to a neutral magistrate for permission to conduct a search. A search conducted without a warrant will be invalid (and evidence discovered during the search must be excluded from evidence) unless it is within one of the six categories of permissible warrantless searches (*see* 5., *infra*).

a. Requirements of a Warrant
To be valid, a warrant must:

1) Be issued by a ***neutral and detached magistrate***;

2) Be ***based on probable cause*** established from facts submitted to the magistrate by a government agent upon oath or affirmation; and

3) ***Particularly describe*** the place to be searched and the items to be seized.

b. Showing of Probable Cause
A warrant will be issued only if there is probable cause to believe that seizable evidence will be found on the premises or person to be searched. [Carroll v. United States, 267 U.S. 132 (1925)] The officers requesting the warrant must submit to the magistrate an affidavit containing sufficient facts and circumstances to enable the magistrate to make an independent evaluation of probable cause (i.e., the officers cannot merely present their conclusion that probable cause exists). [United States v. Ventresca, 380 U.S. 102 (1965)]

1) May Be Anticipatory
It is sufficient that there is reason to believe that seizable evidence will be found on the premises to be searched at a future date when the warrant will be executed; there need not be reason to believe that there is seizable material on the premises at the time the warrant is issued. [United States v. Grubbs, 547 U.S. 90 (2006)—warrant was properly issued when it "predicted" that seizable material would be found in defendant's home after police delivered to the home pornographic material that the defendant had ordered]

2) Use of Informers—Totality of Circumstances Test
If the officers' affidavit of probable cause is based on information obtained from informers, its sufficiency is determined by the ***totality of the circumstances***. [Illinois v. Gates, 462 U.S. 213 (1983)] The affidavit need not contain any particular fact about the informer, as long as it includes enough information to allow the magistrate to make a common sense evaluation of probable cause (i.e., that the information is trustworthy).

a) Reliability, Credibility, and Basis of Knowledge
Formerly, the affidavit had to include information regarding the reliability and credibility of the informer (e.g., she has given information five times in the past and it has been accurate) and her basis for the knowledge (e.g., she purchased cocaine from the house to be searched). These are still relevant factors, but are no longer prerequisites.

b) Informer's Identity
Generally, the informer's identity need ***not*** be revealed to obtain a search warrant [McCray v. Illinois, 386 U.S. 300 (1967)] (although if the informer is a material witness to the crime, her identity may have to be revealed at or before trial).

c) Going "Behind the Face" of the Affidavit
When a defendant attacks the validity of a search warrant, the Fourth Amendment permits her to contest the validity of some of the assertions in the affidavit upon which the warrant was issued. The defendant may go "behind the face" of the affidavit.

(1) Three Requirements to Invalidate Search Warrant
A search warrant issued on the basis of an affidavit that, on its face, is sufficient to establish probable cause will be invalid if the defendant establishes ***all three*** of the following:

(i) A ***false statement*** was included in the affidavit by the affiant (i.e., the police officer applying for the warrant);

(ii) The affiant ***intentionally or recklessly*** included that false statement (i.e., the officer either knew it was false or included it knowing that there was a substantial risk that it was false); and

(iii) The false statement was ***material*** to the finding of probable cause (i.e., without the false statement, the remainder of the affidavit could not support a finding of probable cause). Thus, the mere fact that an affiant intentionally included a false statement in the affidavit apparently will not automatically render the warrant invalid under Fourth Amendment standards.

[Franks v. Delaware, 438 U.S. 154 (1978)]

(2) Evidence May Be Admissible Even Though Warrant Not Supported by Probable Cause

A finding that the warrant was invalid because it was not supported by probable cause will not entitle a defendant to exclude the evidence obtained under the warrant. Evidence obtained by police in ***reasonable reliance*** on a facially valid warrant may be used by the prosecution, despite an ultimate finding that the warrant was not supported by probable cause. [United States v. Leon, 468 U.S. 897 (1984); *and see* Massachusetts v. Sheppard, 468 U.S. 981 (1984)—technical defect in warrant insufficient basis for overturning murder conviction]

c. Warrant Must Be Precise on Its Face

The warrant must describe with reasonable precision the ***place to be searched*** and the ***items to be seized***. If it does not, the warrant is unconstitutional, even if the underlying affidavit gives such detail. [Groh v. Ramirez, 540 U.S. 551 (2004)]

Examples: 1) A warrant authorizes the search of premises at 416 Oak Street for heroin. The structure at 416 Oak Street is a duplex. Is the warrant sufficiently precise? No. In a multi-unit dwelling, the warrant must specify which unit is to be searched. *But note:* If police reasonably believe there is only one apartment on the floor of a building, the warrant is not invalid if they discover, during the course of their search, that there are in fact two apartments on the floor. Indeed, any evidence police seize from the wrong apartment prior to the discovery of the error will be admissible. [Maryland v. Garrison, 480 U.S. 79 (1987)]

2) A was believed to have committed criminal fraud in regard to certain complex land transactions. A search warrant was issued authorizing the search for and seizure of numerous described documents and "other fruit, instrumentalities and evidence of the crime at this time unknown." Was the warrant sufficiently precise? Yes, given the complex nature of the crime and the difficulty of predicting precisely what form evidence of guilt would take. [Andresen v. Maryland, 427 U.S. 463 (1976)]

d. Search of Third-Party Premises Permissible

The Fourth Amendment does not bar searches of premises belonging to persons not suspected of crime, as long as there is ***probable cause*** to believe evidence of someone's guilt (or something else subject to seizure) will be found. Thus, a warrant can issue for the search of the offices of a newspaper if there is probable cause to believe evidence of someone's guilt of an offense will be found. [Zurcher v. Stanford Daily, 436 U.S. 547 (1978)]

e. Neutral and Detached Magistrate Requirement

The magistrate who issues the warrant must be neutral and detached from the often competitive business of law enforcement.

Examples: 1) The state attorney general is not neutral and detached. [Coolidge v. New Hampshire, 403 U.S. 443 (1971)]

2) A clerk of court may issue warrants for violations of city ordinances. [Shadwick v. City of Tampa, 407 U.S. 345 (1972)]

3) A magistrate who receives no salary other than compensation for each warrant issued is not neutral and detached. [Connally v. Georgia, 429 U.S. 245 (1977)]

4) A magistrate who participates in the search to determine its scope is not neutral and detached. [Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979)]

f. Execution of a Warrant

1) Must Be Executed by the Police

Only the police (and not private citizens) may execute a warrant. Moreover, when executing a warrant ***in a home***, the police may not be accompanied by a member of the media or any other third party unless the third party is there to aid in executing the warrant (e.g., to identify stolen property that might be found in the home). [Wilson v. Layne, 526 U.S. 603 (1999)—unreasonable to allow newspaper reporter and photographer to accompany police during execution of an arrest warrant in plaintiff's home] *Rationale:* To be reasonable, police action pursuant to a warrant must be related to the objectives of the warrant. The presence of reporters or other third parties not aiding in the execution of the warrant renders the search unreasonable. Note that while the First Amendment prohibition against abridging freedom of the press is an important right, it does not supersede the very important Fourth Amendment right of persons to be free of unreasonable searches.

2) Execution Without Unreasonable Delay

The warrant should be executed without unreasonable delay because probable cause may disappear.

3) Announcement Requirement

Generally, an officer executing a search warrant must knock and announce her authority and purpose and await admittance for a reasonable time or be refused admittance before using force to enter the place to be searched.

a) Sufficiency of Delay

If the officers executing a warrant have a reasonable fear that evidence, such as cocaine, will be destroyed after they announce themselves, a limited 15-20 second delay before using force to enter the house is reasonable. [United States v. Banks, 540 U.S. 31 (2004)]

b) "No Knock" Entry Possible
No announcement need be made if the officer has reasonable suspicion, based on facts, that knocking and announcing would be ***dangerous or futile*** or that it would ***inhibit the investigation***, e.g., because it would lead to the destruction of evidence. [Richards v. Wisconsin, 520 U.S. 385 (1997)] Whether a "no knock" entry is justified must be made on a case-by-case basis; a blanket exception for warrants involving drug investigations is impermissible. [Richards v. Wisconsin, *supra*] *Note:* The fact that property damage will result from a "no knock" entry does not require a different standard—reasonable suspicion is sufficient. [United States v. Ramirez, 523 U.S. 65 (1998)]

c) Remedy
The Supreme Court has held that the exclusionary rule will not be applied to cases where officers violate the knock and announce rule. (*See* V.B.8., *infra*.)

4) Scope of Search
The scope of the search is limited to what is reasonably necessary to discover the items described in the warrant.

5) Seizure of Unspecified Property
When executing a warrant, the police generally may seize any contraband or fruits or instrumentalities of crime that they discover, whether or not specified in the warrant.

6) Search of Persons Found on the Premises
A search warrant does not authorize the police to search persons found on the premises who are not named in the warrant. [Ybarra v. Illinois, 444 U.S. 85 (1979)] If the police have probable cause to arrest a person discovered on the premises to be searched, however, they may search her ***incident to the arrest***.

7) Detention of the Occupants
A warrant to search for contraband implicitly carries with it the limited authority to detain occupants of the premises while the search is being conducted. [Michigan v. Summers, B.3.d., *supra*] However, such detentions are limited to persons in the immediate vicinity of the premises when the warrant is being executed. It does not give officers authority to follow, stop, detain, and search persons who left the premises shortly before the warrant was executed. [Bailey v. United States, 133 S. Ct. 1031 (2013)]

5. Exceptions to Warrant Requirement
There are ***six exceptions*** to the warrant requirement; i.e., six circumstances where a warrantless search is reasonable and therefore is valid under the Fourth Amendment. To be valid, a warrantless search must meet all the requirements of at least one exception.

a. Search Incident to a Lawful Arrest
The police may conduct a warrantless search incident to an arrest as long as it was made on probable cause. [*See* Virginia v. Moore, 553 U.S. 164 (2008)]

1) Constitutional Arrest Requirement
If an arrest violates the Constitution, then any search incident to that arrest also will violate the Constitution.

2) Any Arrest Sufficient
The police may conduct a search incident to arrest whenever they arrest a person, and this is true even if the arrest is invalid under state law, as long as the arrest was constitutionally valid (e.g., reasonable and based on probable cause). Although the rationale for the search is to protect the arresting officer and to preserve evidence, the police need not actually fear for their safety or believe that they will find evidence of a crime as long as the suspect is placed under arrest. [United States v. Robinson, 414 U.S. 218 (1973)]

a) Issuance of Traffic Citation—Insufficient Basis
For traffic violations, if the suspect is not arrested, there can be no search incident to arrest, even if state law gives the officer the option of arresting a suspect or issuing a citation. [Knowles v. Iowa, 525 U.S. 113 (1999)—a nonconsensual automobile search conducted after the suspect was issued a citation for driving 43 m.p.h. in a 25 m.p.h. zone was illegal, and contraband found during the search was excluded from evidence] *Rationale:* When a citation is issued, there is less of a threat to the officer's safety than there is during an arrest, and the only evidence that needs to be preserved in such a case (e.g., evidence of the suspect's speeding or other illegal conduct) has already been found.

3) Geographic Scope
Incident to a constitutional arrest, the police may search the person and areas into which he might reach to obtain weapons or destroy evidence (his ***"wingspan"***). [Chimel v. California, 395 U.S. 752 (1969)] The arrestee's wingspan follows him as he moves. Thus, if the arrestee is allowed to enter his home, police may follow and search areas within the arrestee's wingspan in the home. [Washington v. Chrisman, 455 U.S. 1 (1982)] The police may also make a ***protective sweep*** of the area beyond the defendant's wingspan if they believe accomplices may be present. [Maryland v. Buie, 494 U.S. 325 (1990)]

a) Automobiles
After arresting the occupant of an automobile, the police may search the interior of the auto incident to the arrest ***if*** at the time of the search:

(i) The ***arrestee is unsecured and still may gain access*** to the interior of the vehicle; or

(ii) The police reasonably believe that ***evidence of the offense for which the person was arrested*** may be found in the vehicle.

[Arizona v. Gant, 556 U.S. 332 (2009)] *Gant* overturned a practice permitting a search incident to arrest of the entire interior of an auto whenever the person arrested had recently been in the auto. This practice was based on a broad interpretation of an earlier case, *New York v. Belton,* 453 U.S. 454 (1981).

Example: A police officer stopped a vehicle for speeding. Upon approaching the vehicle, he smelled burnt marijuana and saw an envelope on the floor marked with the street name of a certain type of marijuana. He ordered the car's four occupants out of the vehicle and arrested them for unlawful possession of marijuana. Having only one pair of handcuffs and no assistance, he could not secure the arrestees. He had them stand apart from each other and proceeded to search the vehicle. During the search, the officer discovered cocaine in a jacket in the vehicle. The search was a valid search incident to arrest either because an "unsecured" arrestee easily could have gained access to the vehicle, or because the officer could reasonably believe that the vehicle contained evidence of the drug charge on which he arrested the occupants. [New York v. Belton, *supra*]

Compare: The police arrested defendant for driving on a suspended license shortly after he stepped out of his car. Defendant was then handcuffed and placed in a squad car. The police then searched the passenger compartment of defendant's car and found cocaine in a jacket in the car. The search here was an ***invalid*** search incident to arrest. Because defendant was handcuffed and locked in a squad car, he could not likely gain access to the interior of his car in order to destroy evidence or procure a weapon. Nor did the police have any reason to believe that the car contained any evidence relevant to the charge of driving on a suspended license. [Arizona v. Gant, *supra*]

b) Cell Phones

The police generally ***may not***, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. Such a search implicates greater individual privacy interests than a brief physical search. Data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Officers ***may*** examine the phone's physical aspects to ensure that it will not be used as a weapon, but the data on the phone can endanger no one, and does not fall within the search incident to a lawful arrest exception to the warrant requirement. [Riley v. California, 134 S. Ct. 2473 (2014)]

4) Must Be Contemporaneous with Arrest

A search incident to an arrest must be contemporaneous in time and place with the arrest. [Preston v. United States, 376 U.S. 364 (1964); United States v. Chadwick, 433 U.S. 1 (1977)]

a) Automobiles

At least with regard to searches of automobiles, the term "contemporaneous" does not necessarily mean "simultaneous." Thus, for example, if the police

have reason to believe that an automobile from which a person was arrested contains ***evidence of the crime for which the arrest was made***, they may search the interior of the automobile incident to arrest after the arrestee has been removed from the automobile and placed in a squad car; and this is so even if the arrestee was already outside of the automobile at the time he was arrested, as long as he was a recent occupant of the automobile. [*See* Thornton v. United States, 541 U.S. 615 (2004)]

5) Search Incident to Incarceration or Impoundment

The police may search an arrestee's personal belongings before incarcerating him after a valid arrest. [Illinois v. Lafayette, 459 U.S. 986 (1983)] Similarly, the police may search an entire vehicle—including closed containers within the vehicle—that has been impounded. [Colorado v. Bertine, 479 U.S. 367 (1987)]

a) DNA Tests

When officers make an arrest supported ***by probable cause to hold for a serious offense*** and they bring the suspect to the police station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is a legitimate police booking procedure that is a ***reasonable*** search under the Fourth Amendment. [Maryland v. King, 133 S. Ct. 1 (2012)]

b. "Automobile" Exception

If the police have probable cause to believe that a vehicle such as an automobile contains contraband or fruits, instrumentalities, or evidence of a crime, they may search the vehicle without a warrant. [Carroll v. United States, 267 U.S. 132 (1925)] *Rationale:* Automobiles and similar vehicles are mobile and so will not likely be available for search by the time an officer returns with a warrant. Moreover, the Supreme Court has declared that people have a lesser expectation of privacy in their vehicles than in their homes.

Note: Similarly, if the police have probable cause to believe that the car itself is contraband, it may be seized from a public place without a warrant. [Florida v. White, 526 U.S. 559 (1999)]

Example: On three occasions, the police observed Defendant selling cocaine from his car, giving the police probable cause to believe that Defendant's car was used to transport cocaine. Under state law, a car used to transport cocaine is considered to be contraband subject to forfeiture. Several months later, the police arrested Defendant on unrelated drug charges while he was at work and seized his car from the parking lot without a warrant, based on their prior observations. While inventorying the contents of the car, the police found cocaine and brought the present drug charges against Defendant. The cocaine was admissible into evidence. Even though the police did not have probable cause to believe that the car contained cocaine when it was seized, they did have probable cause to believe that it was contraband and therefore seizable, and inventory searches of seized items are proper (*see* 6.b., *infra*). [Florida v. White, *supra*]

1) Scope of Search

If the police have full probable cause to search a vehicle, they can search the ***entire vehicle*** (including the trunk) and all containers within the vehicle that ***might contain the object*** for which they are searching. [United States v. Ross, 456 U.S. 798 (1982)] Thus, if the police have probable cause to believe that drugs are within the vehicle, they can search almost any container, but if they have probable cause to believe that an illegal alien is hiding inside the vehicle, they must limit their search to areas where a person could hide.

a) Passenger's Belongings

The search is not limited to the driver's belongings and may extend to packages belonging to a passenger. [Wyoming v. Houghton, 526 U.S. 295 (1999)—search of passenger's purse upheld where officer noticed driver had syringe in his pocket] *Rationale:* Like a driver, a passenger has a reduced expectation of privacy in a vehicle.

b) Limited Probable Cause—Containers Placed in Vehicle

If the police only have probable cause to search a container (recently) placed in a vehicle, they may search that container, but the search may not extend to other parts of the car. [California v. Acevedo, 500 U.S. 565 (1991)]

Example: Assume police have probable cause to believe that a briefcase that D is carrying contains illegal drugs. Unless they arrest D, they may not make a warrantless search of the briefcase because no exception to the warrant requirement applies. They follow D, and he places the briefcase in a car. They may then approach D and search the briefcase, even though they could not search it before it was placed in the car. They may not search the rest of the car, however, because D has not had an opportunity to move the drugs elsewhere in the car. Presumably, if some time passes and D has an opportunity to move the drugs, the police will have probable cause to search the entire car.

2) Motor Homes

The automobile exception extends to any vehicle that has the attributes of mobility and a lesser expectation of privacy similar to a car. For example, the Supreme Court has held that it extends to motor homes if they are not at a fixed site. [California v. Carney, 471 U.S. 386 (1985)]

3) Contemporaneousness Not Required

If the police are justified in making a warrantless search of a vehicle under this exception at the time of stopping, they may tow the vehicle to the station and search it later. [Chambers v. Maroney, 399 U.S. 42 (1970)]

Example: A vehicle search, based on probable cause, conducted three days after the vehicle was impounded is permissible. [United States v. Johns, 469 U.S. 478 (1985)]

c. Plain View

The police may make a warrantless seizure when they:

(i) Are ***legitimately on the premises***;

(ii) Discover ***evidence, fruits or instrumentalities*** of crime, or ***contraband***;

(iii) See such evidence ***in plain view***; and

(iv) ***Have probable cause*** to believe (i.e., it must be immediately apparent) that the item ***is*** evidence, contraband, or a fruit or instrumentality of crime.

[Coolidge v. New Hampshire, 4.e., *supra*; Arizona v. Hicks, 480 U.S. 321 (1987)]

Examples: 1) Police may seize ***unspecified property*** while executing a search warrant.

2) Police may seize from a lawfully stopped automobile an opaque balloon that, based on knowledge and experience, the police have probable cause to believe contains narcotics, even though the connection with the contraband would not be obvious to the average person. [Texas v. Brown, 460 U.S. 730 (1983)]

Compare: While investigating a shooting in an apartment, Officer spotted two sets of expensive stereo equipment which he had reasonable suspicion (but not probable cause) to believe were stolen. Officer moved some of the components to check their serial numbers. Such movement constituted an invalid search because of the lack of probable cause. [Arizona v. Hicks, *supra*]

d. Consent

The police may conduct a valid warrantless search if they have a ***voluntary*** consent to do so. Knowledge of the right to withhold consent, while a factor to be considered, is not a prerequisite to establishing a voluntary consent. [Schneckloth v. Bustamonte, 412 U.S. 218 (1973)]

Example: After Deputy stopped Defendant for speeding, gave him a verbal warning, and returned his license, Deputy asked Defendant if he was carrying any drugs in the car. Defendant answered "no" and consented to a search of his car, which uncovered drugs. Defendant argued that his consent was invalid because he had not been told that he was free to go after his license was returned. The Supreme Court, applying the principles of *Schneckloth*, found that no such warning was necessary. Voluntariness is to be determined from all of the circumstances, and knowledge of the right to refuse consent is just one factor to be considered in determining voluntariness. [Ohio v. Robinette, 519 U.S. 33 (1996)]

Note: An officer's false announcement that she has a warrant negates the possibility of consent. [Bumper v. North Carolina, 391 U.S. 543 (1968)]

1) Authority to Consent

Any person with an ***apparent equal right to use or occupy*** the property may consent to a search, and any evidence found may be used against the other owners

or occupants. [Frazier v. Cupp, 394 U.S. 731 (1969); United States v. Matlock, 415 U.S. 164 (1973)] The search is valid even if it turns out that the person consenting to the search did not actually have such right, as long as the police reasonably believed that the person had authority to consent. [Illinois v. Rodriguez, 497 U.S. 177 (1990)]

a) Limitation—Where Party Is Present and Objects

The police may not act on consent from an occupant if a co-occupant is present and objects to the search and the search is directed against the co-occupant. [Georgia v. Randolph, 547 U.S. 103 (2006)] If a co-occupant has objected to a search and is removed for a reason unrelated to the refusal (e.g., a lawful arrest), the police may act on consent of the occupant, even if the removed co-occupant had refused consent. [Fernandez v. California, 134 S. Ct. 1126 (2014)]

b) Parents and Children

A parent generally has authority to consent to a search of a child's room (even an adult child), as long as the parent has access to the room, but, depending on the child's age, might not have authority to consent to a search of locked containers within the child's room. [*See, e.g.,* United States v. Block, 590 F.2d 535 (4th Cir. 1978)—mother had authority to consent to search of 23-year-old son's room but not a locked footlocker in the room] Whether a child has authority to consent to a search of a parent's house or hotel room is a question of whether it is reasonable to believe that the child had such authority. [*See* United States v. Gutierrez-Hermosillo, 142 F.3d 1225 (10th Cir. 1998)—14-year-old had authority to allow police into father's hotel room while father was present] Even a relatively young child probably has authority to consent to a search of the common areas of a home or her own room. [*See, e.g.,* Lenz v. Winburn, 51 F.3d 1540 (11th Cir. 1995)—nine-year-old had authority to consent to entry into her home]

2) Scope of Search

The scope of the search is limited by the ***scope of the consent***. However, consent extends to all areas to which a reasonable person under the circumstances would believe it extends.

Example: Police stopped D for a traffic violation, told him that they suspected him of carrying drugs, and asked for permission to search the car. D consented. The officers found a bag containing cocaine. At trial, D argued that his consent did not extend to any closed container (the bag). The Supreme Court held that because D knew the police were searching for drugs and did not place any restriction on his consent, it was reasonable for the police to believe that the consent extended to all areas where drugs might be found. [Florida v. Jimeno, 500 U.S. 248 (1991)]

e. Stop and Frisk

1) Standards

As noted above (*see* B.3.a., *supra*), a police officer may ***stop*** a person without

probable cause for arrest if she has an articulable and ***reasonable suspicion*** of criminal activity. In such circumstances, if the officer also ***reasonably believes*** that the person may be ***armed and presently dangerous***, she may conduct a protective ***frisk***. [Terry v. Ohio, B.3.a. *supra*; United States v. Cortez, 449 U.S. 411 (1981)]

2) Scope of the Intrusion

a) Patdown of Outer Clothing
The scope of the frisk is generally limited to a patdown of the outer clothing for concealed instruments of assault. [Terry v. Ohio, *supra*] However, an officer may reach directly into an area of the suspect's clothing, such as his belt, without a preliminary frisk, when she has specific information that a weapon is hidden there, even if the information comes from an informant's tip lacking sufficient reliability to support a warrant. [Adams v. Williams, 407 U.S. 143 (1972)]

b) Automobiles
If a vehicle has been properly stopped, a police officer may order the driver out of the vehicle even without a suspicion of criminal activity. If the officer then reasonably believes that the driver or any passenger may be armed and dangerous, she may conduct a frisk of the suspected person. [Pennsylvania v. Mimms, 434 U.S. 106 (1978); Arizona v. Johnson, 555 U.S. 323 (2009)] Moreover, the officer may search the passenger compartment of the vehicle, even if the officer has ***not arrested*** the occupant and has ordered the occupant out of the vehicle, provided the search is ***limited to those areas in which a weapon may be placed*** or hidden and the officer possesses a reasonable belief that the occupant is dangerous. [Michigan v. Long, 463 U.S. 1032 (1983)]

c) Identification May Be Required
As long as the police have the reasonable suspicion required to make a *Terry* stop, they may require the detained person to identify himself (i.e., state his name), and the detainee may be arrested for failure to comply with such a requirement except, perhaps, where the detainee may make a self-incrimination claim. [*See* Hiibel v. Sixth Judicial District Court, B.3.a.3)a), *supra*]

d) Time Limit
There is no rigid time limit for the length of an investigative stop. The Court will consider the purpose of the stop, the reasonableness of the time in effectuating the purpose, and the reasonableness of the means of investigation to determine whether a stop was too long. [United States v. Sharpe, 470 U.S. 675 (1985)]

3) Admissibility of Evidence
If a police officer conducts a patdown within the bounds of *Terry*, the officer may reach into the suspect's clothing and seize any item that the officer reasonably believes, based on its "***plain feel***," is a ***weapon or contraband***. [Terry v. Ohio, *supra*; Minnesota v. Dickerson, 508 U.S. 366 (1993)—excluding from evidence cocaine that officer found during valid patdown because officer had to manipulate

package to discern that it likely was drugs] Properly seized items are admissible as evidence against the suspect.

f. Hot Pursuit, Evanescent Evidence, and Other Emergencies

1) Hot Pursuit Exception

Police officers in hot pursuit of a ***fleeing felon*** may make a warrantless search and seizure. The scope of the search may be as broad as may reasonably be necessary to prevent the suspect from resisting or escaping. [Warden v. Hayden, 387 U.S. 294 (1967)] When the police have probable cause and attempt to make a warrantless arrest in a "public place," they may pursue the suspect into private dwellings. [United States v. Santana, 427 U.S. 38 (1976)]

2) Evanescent Evidence Exception

Police officers may seize without a warrant evidence likely to disappear before a warrant can be obtained. [*See* Cupp v. Murphy, 412 U.S. 291 (1973)—scrapings of tissues from under a suspect's fingernails, which could be washed away] Whether such a warrantless search is reasonable is judged by the totality of the circumstances.

a) Blood Alcohol Testing

The natural dissipation of alcohol in the bloodstream does ***not*** automatically constitute a sufficient exigency to justify a warrantless blood alcohol content ("BAC") test. As in the case of any evanescent evidence, a determination of whether a warrantless BAC test is reasonable depends on the totality of the circumstances. In particular, where police officers can reasonably obtain a warrant before a blood sample is drawn without significantly undermining the efficacy of the search, the Fourth Amendment requires that they do so. In general, establishing probable cause is relatively simple in drunk driving cases, and warrants can often be obtained expeditiously by telephone, e-mail, or video conferencing. Thus, warrantless BAC testing often will be found unreasonable. [*See* Missouri v. McNeely, 133 S. Ct. 1552 (2013)]

3) Emergency Aid Exception

Emergencies that threaten health or safety if not immediately acted upon will justify a warrantless search. This includes situations where the police see someone injured or threatened with injury. [*See,* e.g., Brigham City v. Stuart, 547 U.S. 389 (2006)] Whether an emergency exists is determined objectively, from the officer's point of view. [Michigan v. Fisher, 558 U.S. 45 (2010)] (Some states refer to this as the community caretaker exception.)

Examples: 1) Police responded to a domestic disturbance call at a home. Upon arriving, they found blood on the hood of a pickup truck and windows broken out of the home. They saw defendant through an open window, screaming and with a cut on his hand. An officer asked if medical attention was needed, and defendant told the officer to get a warrant. The officer then opened the house door part way, and defendant pointed a gun at the officer. Evidence of the gun need not be suppressed as the fruit of an unlawful entry. The

officer could have objectively believed that the defendant could have attacked a spouse or child who needed aid or that defendant was in danger himself. [Michigan v. Fisher, *supra*]

2) A warrantless search may be justified to find contaminated food or drugs [*see, e.g.,* North American Cold Storage v. City of Chicago, 211 U.S. 306 (1908)] or to discover the source of a fire while it is burning (but not after it is extinguished) [Michigan v. Tyler, 436 U.S. 499 (1978)].

Compare: The need to search a murder scene, without more, does not justify a warrantless search. [Mincey v. Arizona, 437 U.S. 385 (1978)]

6. Administrative Inspections and Searches

a. Warrant Required for Searches of Private Residences and Businesses
Inspectors must have a warrant for searches of private residences and commercial buildings. [Camara v. Municipal Court, 387 U.S. 523 (1967); Michigan v. Clifford, 464 U.S. 287 (1984)—warrantless administrative search of fire-damaged residence by officials seeking to determine origin of fire violated owners' Fourth Amendment rights; owners retained reasonable expectation of privacy in the damaged structure, and the warrantless search was unconstitutional] However, the same standard of probable cause as is required for other searches is not required for a valid administrative inspection warrant. A showing of a general and ***neutral enforcement plan*** will justify issuance of the warrant, which is designed to guard against selective enforcement. [Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)]

1) Exceptions Permitting Warrantless Searches

a) Contaminated Food
A warrant is not required for the seizure of spoiled or contaminated food. [North American Cold Storage v. City of Chicago, *supra*]

b) Highly Regulated Industries
A warrant is not required for searches of businesses in highly regulated industries, because of the urgent public interest and the theory that the business has impliedly consented to warrantless searches by entering into a highly regulated industry. Such industries include liquor [Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)], guns [United States v. Biswell, 406 U.S. 311 (1972)], strip mining [Donovan v. Dewey, 452 U.S. 594 (1981)], and automobile junkyards [New York v. Burger, 479 U.S. 812 (1987)], but not car leasing [G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977)] or general manufacturing [Marshall v. Barlow's, Inc., *supra*].

b. Inventory Searches
The police may search an arrestee's personal belongings in order to inventory them before incarcerating the arrestee. [Illinois v. Lafayette, 5.a.5), *supra*] Similarly, the police may search an entire vehicle—including closed containers within the

vehicle—that has been impounded, as long as the search is part of an established department routine. [Colorado v. Bertine, 5.a.5), *supra*] Moreover, jail officials need not have reasonable suspicion that a person arrested for a minor offense possesses a concealed weapon or contraband to subject him to a strip search before admitting him to the general prison population. Deference must be given to the officials unless there is substantial evidence indicating that their response to a situation is exaggerated. The risks that an unsearched prisoner poses are great—from diseases to weapons to gang affiliations. Therefore, suspicionless strip searches are not an exaggerated response. [Florence v. Board of Chosen Freeholders, 132 S. Ct. 1510 (2012)]

c. Search of Airline Passengers

Courts have generally upheld searches of airline passengers prior to boarding. This seems to be regarded as somewhat akin to a consent or administrative search. One court, however, has held that a passenger must be permitted to avoid such a search by agreeing not to board the aircraft.

d. Public School Searches

A warrant or probable cause is not required for searches conducted by public school officials; only ***reasonable grounds*** for the search are necessary. This exception is justified due to the nature of the school environment. [New Jersey v. T.L.O., 469 U.S. 325 (1985)] The Court has also upheld a school district rule that required students participating in ***any extracurricular activity*** to submit to random urinalysis drug testing monitored by an adult of the same sex. [Board of Education v. Earls, 536 U.S. 822 (2002)]

1) Reasonableness Standard

A school search will be held to be reasonable only if:

(i) It offers a ***moderate chance of finding evidence*** of wrongdoing;

(ii) The measures adopted to carry out the search are ***reasonably related to the objectives of the search;*** and

(iii) The search is ***not excessively intrusive*** in light of the age and sex of the student and nature of the infraction.

[New Jersey v. T.L.O., *supra;* Safford Unified School District #1 v. Redding, 557 U.S. 364 (2009)]

Example: A 13-year-old student was brought before her school's principal. The principal had found in the student's day planner several knives and lighters and a cigarette. He also found five painkillers (four prescription and one over-the-counter) that were banned at school absent permission. He told the student he had a tip that she was distributing such pills. The student said the knives, etc., belonged to a friend and denied knowledge of the painkillers. She allowed the principal's assistant to search her outer clothing and backpack. No contraband was found. The principal then sent the student to the school nurse, who had her remove her outer clothing and pull

her underwear away from her body so if any drugs were hidden in them, they would fall out. No drugs were found, and the student brought an action, claiming that the search violated her constitutional rights. *Held:* Because only a few, nondangerous pills were involved and there was a lack of any specific reason to believe that the student might have been hiding pills in her underwear, the strip search was excessively intrusive. [Safford Unified School District #1 v. Redding, *supra*]

e. Parolees

The Supreme Court has upheld warrantless searches of a parolee and his home—even without reasonable suspicion—where a state statute provided that as a condition of parole, a parolee agreed that he would submit to searches by a parole officer or police officer at any time, with or without a search warrant or probable cause. The Court held that such warrantless searches are reasonable under the Fourth Amendment because a parolee has a diminished expectation of privacy under such a statute and the government has a heightened need to search parolees because they are less likely than the general population to be law-abiding. [*See* Samson v. California, 547 U.S. 843 (2006)]

f. Government Employees' Desks and Files

A warrantless search of a government employee's desk and file cabinets is permissible under the Fourth Amendment if it is reasonable in scope and if it is justified at its inception by a noninvestigatory, work-related need or a reasonable suspicion of work-related misconduct. [O'Connor v. Ortega, 480 U.S. 709 (1987)]

g. Drug Testing

Although government-required drug testing constitutes a search, the Supreme Court has upheld such testing without a warrant, probable cause, or even individualized suspicion when justified by ***"special needs"*** beyond the general interest of law enforcement.

Examples: 1) The government can require railroad employees who are involved in accidents to be tested for drugs after the accidents. [Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989)]

2) The government can require persons seeking Customs positions connected to drug interdiction to be tested for drugs. There is a special need for such testing because persons so employed will have ready access to large quantities of drugs. [National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)]

3) The government can require public school students who participate in ***any extracurricular activities*** to submit to random drug tests because of the special interest schools have in the safety of their students. [Board of Education v. Earls, *supra*]

Compare: 1) Special needs do not justify a warrantless and nonconsensual urinalysis test to determine whether a pregnant woman has been using cocaine, where the main purpose of the testing is to generate evidence that may be used by law enforcement personnel to coerce women into drug programs. [Ferguson v. Charleston, 532 U.S. 67 (2001)]

2) The government may not require candidates for state offices to certify that they have taken a drug test within 30 days prior to qualifying for nomination or election—there is no special need for such testing. [Chandler v. Miller, 520 U.S. 305 (1997)]

7. Searches in Foreign Countries and at the Border

a. Searches in Foreign Countries

The Fourth Amendment does ***not*** apply to searches and seizures by United States officials in foreign countries and involving an alien, at least where the alien does not have a substantial connection to the United States. Thus, for example, the Fourth Amendment was held not to bar the use of evidence obtained in a warrantless search of an alien's home in Mexico. [United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)]

b. Searches at the Border or Its Functional Equivalent

There is a diminished expectation of privacy at the border and its functional equivalents due to competing interests of national sovereignty. Searches there do not require a warrant, probable cause, or reasonable suspicion. A functional equivalent of the border might be a point near the border where several routes all leading to the border merge.

c. Roving Patrols

1) Stops

Roving patrols inside the United States border may stop an automobile for questioning of the occupants if the officer ***reasonably suspects*** that the automobile may contain illegal aliens, but the apparent Mexican ancestry of the occupants alone cannot create a reasonable suspicion. [United States v. Brignoni-Ponce, 422 U.S. 873 (1975)]

2) Searches

A roving patrol inside the border may not conduct a warrantless search unless the requirements of one of the ***exceptions*** to the warrant requirement, such as the "automobile" exception (probable cause) or consent, are met. [Almeida-Sanchez v. United States, 413 U.S. 266 (1973)]

d. Fixed Checkpoints

Border officials may stop an automobile at a fixed checkpoint inside the border for questioning of the occupants even ***without a reasonable suspicion*** that the automobile contains illegal aliens. [United States v. Martinez-Fuerte, B.3.b., *supra*] Officials may disassemble stopped vehicles at such checkpoints, even without reasonable suspicion. [United States v. Flores-Montano, 541 U.S. 149 (2004)] However, the Supreme Court has suggested that nonroutine, personal searches at the border (e.g., strip searches or body cavity searches) may require probable cause.

e. Opening International Mail

Permissible border searches include the opening of international mail, which postal regulations authorize when postal authorities have ***reasonable cause*** to suspect that the mail contains ***contraband***, although the regulations prohibit the authorities from reading any correspondence inside. [United States v. Ramsey, 431 U.S. 606 (1977)]

1) Reopening
Once customs agents lawfully open a container and identify its contents as illegal, their ***subsequent reopening*** of the container after it has been resealed and delivered to defendant is not a search within the meaning of the Fourth Amendment, unless there is a substantial likelihood that the container's contents have been changed during any gap in surveillance. [Illinois v. Andreas, 463 U.S. 765 (1983)]

f. Immigration Enforcement Actions
The Supreme Court held that the I.N.S., which has been replaced by the Citizenship and Immigration Services Division of the Department of Homeland Security, may do a "factory survey" of the entire work force in a factory, to determine citizenship of each employee, without raising Fourth Amendment issues. The "factory survey" is not "detention" or a "seizure" under the Fourth Amendment. [Immigration & Naturalization Service v. Delgado, 466 U.S. 210 (1984)] Furthermore, evidence illegally obtained, in violation of the Fourth Amendment, may be used in a civil deportation hearing. [Immigration & Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032 (1984)]

g. Detentions
If the officials have a "reasonable suspicion" that a traveler is smuggling contraband in her stomach, they may detain her for a time reasonable under the circumstances. *Rationale:* Stopping such smuggling is important, yet very difficult; stomach smuggling gives no external signs that would enable officials to meet a "probable cause" standard in order to conduct a search. [United States v. Montoya de Hernandez, 473 U.S. 531 (1985)—16-hour detention upheld until traveler, who refused an X-ray, had a bowel movement]

8. Wiretapping and Eavesdropping

a. Fourth Amendment Requirements
Wiretapping and any other form of electronic surveillance that violates a reasonable expectation of privacy constitute a search under the Fourth Amendment. [Katz v. United States, 389 U.S. 347 (1967)] In *Berger v. New York*, 388 U.S. 41 (1967), the Supreme Court indicated that for a valid ***warrant*** authorizing a wiretap to be issued, the following ***requirements*** must be met:

1) A showing of ***probable cause*** to believe that a ***specific crime*** has been or is being committed must be made;

2) The ***suspected persons*** whose conversations are to be overheard must be ***named***;

3) The warrant must ***describe with particularity*** the conversations that can be overheard;

4) The wiretap must be limited to a ***short period of time*** (although extensions may be obtained upon an adequate showing);

5) ***Provisions*** must be made for the ***termination*** of the wiretap when the desired information has been obtained; and

6) A ***return*** must be made to the court, showing what conversations have been intercepted.

b. Exceptions

1) "Unreliable Ear"
A speaker assumes the risk that the person to whom she is talking is unreliable. If the person turns out to be an informer wired for sound or taping the conversation, the speaker has no basis in the Fourth Amendment to object to the transmitting or recording of the conversation as a warrantless search. [United States v. White, 401 U.S. 745 (1971)]

2) "Uninvited Ear"
A speaker has no Fourth Amendment claim if she makes no attempt to keep the conversation private. [Katz v. United States, *supra*]

c. Judicial Approval Required for Domestic Security Surveillance
A neutral and detached magistrate must make the determination that a warrant should issue authorizing electronic surveillance, including internal security surveillance of domestic organizations. The President may not authorize such surveillance without prior judicial approval. [United States v. United States District Court, 407 U.S. 297 (1972)]

d. Federal Statute
Title III of the Omnibus Crime Control and Safe Streets Act regulates interception of private "wire, oral or electronic communications." [18 U.S.C. §§2510-2520] All electronic communication surveillance (e.g., phone taps, bugs, etc.) must comply with the requirements of this federal statute, which exhibits a legislative decision to require more than the constitutional minimum in this especially sensitive area.

e. Pen Registers
A pen register records only the numbers dialed from a certain phone. The Fourth Amendment does not require prior judicial approval for installation and use of pen registers. [Smith v. Maryland, 442 U.S. 735 (1979)] Neither does Title III govern pen registers, because Title III applies only when the ***contents*** of electronic communications are intercepted. However, by statute [18 U.S.C. §§3121 *et seq.*], police must obtain a court order finding pen register information to be relevant to an ongoing criminal investigation before utilizing a pen register. Note, however, that information obtained in violation of the statute would not necessarily be excluded from evidence in a criminal trial; the statute merely provides a criminal penalty.

f. Covert Entry to Install a Bug Permissible
Law enforcement officers do not need prior express judicial authorization for a covert entry to install equipment for electronic surveillance, which has been approved in compliance with Title III. [Dalia v. United States, 441 U.S. 238 (1979)]

D. METHODS OF OBTAINING EVIDENCE THAT SHOCK THE CONSCIENCE

Due process of law requires that state criminal prosecutions be conducted in a manner that does not offend the "sense of justice" inherent in due process. Evidence obtained in a manner offending that sense is ***inadmissible***, even if it does not run afoul of one of the specific prohibitions against particular types of misconduct.

1. Searches of the Body

Intrusions into the human body implicate a person's most deep-rooted expectations of privacy. Thus, Fourth Amendment requirements apply. Ultimately, the "reasonableness" of searches into the body depends on weighing society's need for the evidence against the magnitude of the intrusion on the individual (including the threat to health, safety, and dignity issues). [Winston v. Lee, 470 U.S. 753 (1985)]

a. Blood Tests

Taking a blood sample (e.g., from a person suspected of drunk driving) by commonplace medical procedures "involves virtually no risk, trauma, or pain" and is thus a ***reasonable*** intrusion. [Schmerber v. California, 384 U.S. 757 (1966)]

b. Compare—Surgery

But a surgical procedure under a general anesthetic (to remove a bullet needed as evidence) involves significant risks to health and a severe intrusion on privacy, and thus is ***unreasonable***—at least when there is substantial other evidence. [Winston v. Lee, *supra*]

2. Shocking Inducement

If a crime is induced by official actions that themselves shock the conscience, any conviction therefrom offends due process.

Example: D appears before a state legislative commission. Members of the commission clearly indicate that the privilege against self-incrimination is available to D, although in fact D could be convicted for failure to answer. Can D's conviction for refusal to answer be upheld? No, because the crime was induced by methods that shock the conscience. [Raley v. Ohio, 360 U.S. 423 (1959)]

III. CONFESSIONS

A. INTRODUCTION

The admissibility of a defendant's confession or incriminating admission involves analysis under the Fourth, Fifth, Sixth, and Fourteenth Amendments. We have already discussed Fourth Amendment search and seizure limitations. The Fifth Amendment gives defendants rights against testimonial self-incrimination. The Sixth Amendment gives defendants rights regarding the assistance of counsel. The Fourteenth Amendment protects against involuntary confessions.

B. FOURTEENTH AMENDMENT—VOLUNTARINESS

For confessions to be admissible, the Due Process Clause of the Fourteenth Amendment requires that they be voluntary. Voluntariness is assessed by looking at the totality of the circumstances, including the suspect's age, education, and mental and physical condition, along with the setting, duration, and manner of police interrogation. [Spano v. New York, 360 U.S. 315 (1959)]

Examples: 1) A confession will be involuntary where it was obtained by physically beating the defendant. [Brown v. Mississippi, 297 U.S. 278 (1936)]

2) D was being held for questioning. O, a young officer who was a friend of D, told D that if he did not obtain a confession, he would lose his job, which would be disastrous for his wife and children. D confessed, but the Court found the confession involuntary. [Leyra v. Denno, 347 U.S. 556 (1954)]

1. Must Be Official Compulsion

Only official compulsion will render a confession involuntary for purposes of the Fourteenth Amendment. A confession is not involuntary merely because it is the product of mental disease that prevents the confession from being of the defendant's free will. [Colorado v. Connelly, 479 U.S. 157 (1986)]

2. Harmless Error Test Applies

A conviction will not necessarily be overturned if an involuntary confession was erroneously admitted into evidence. The harmless error test applies, and the conviction will not be overturned if the government can show that there was other overwhelming evidence of guilt. [Arizona v. Fulminante, 499 U.S. 279 (1991)]

3. Can "Appeal" to Jury

A finding of voluntariness by the trial court does not preclude the defendant from introducing evidence to the jury of the circumstances of the confession in order to cast doubt on its credibility. [Crane v. Kentucky, 476 U.S. 683 (1986)]

C. SIXTH AMENDMENT RIGHT TO COUNSEL APPROACH

The Sixth Amendment provides that in all criminal prosecutions, the defendant has a right to the assistance of counsel. The right protects defendants from having to face a complicated legal system without competent help. It applies at all ***critical stages*** of a criminal prosecution after formal proceedings have begun. [Rothgery v. Gillespie, 554 U.S. 191 (2008)] The right is violated when the police deliberately elicit an incriminating statement from a defendant without first obtaining a waiver of the defendant's right to have counsel present. [*See* Fellers v. United States, 540 U.S. 519 (2004)] Since *Miranda,* below, the Sixth Amendment right has been limited to cases where ***adversary judicial proceedings*** have begun (e.g., ***formal charges have been filed***). [Massiah v. United States, 377 U.S. 201 (1964)] Thus, the right does not apply in precharge custodial interrogations.

Examples: 1) The Sixth Amendment right to counsel is violated when an undisclosed, paid government informant is placed in the defendant's cell, after defendant has been indicted, and deliberately elicits statements from the defendant regarding the crime for which the defendant was indicted. [United States v. Henry, 447 U.S. 264 (1980)] However, it is not a violation merely to place an informant in a defendant's cell—the informant must take some action, beyond mere listening, designed deliberately to elicit incriminating remarks. [Kuhlman v. Wilson, 477 U.S. 436 (1986)]

2) The right to counsel is violated when police arrange to record conversations between an indicted defendant and his co-defendant. [Maine v. Moulton, 474 U.S. 159 (1985)]

1. Stages at Which Applicable

The defendant has a Sixth Amendment right to be represented by privately retained counsel, or to have counsel appointed for him by the state if he is indigent, at the following stages:

(i) Post-indictment interrogation [Massiah v. United States, *supra*];

(ii) Preliminary hearings to determine probable cause to prosecute [Coleman v. Alabama, *infra*, VI.C.];

(iii) Arraignment [Hamilton v. Alabama, 368 U.S. 52 (1961)];

(iv) Post-charge lineups [Moore v. Illinois, IV.B.1.a., *infra*];

(v) Guilty plea and sentencing [Mempa v. Rhay, 389 U.S. 128 (1967); Moore v. Michigan, 355 U.S. 155 (1957); Townsend v. Burke, 334 U.S. 736 (1948)];

(vi) Felony trials [Gideon v. Wainwright, 372 U.S. 335 (1963)];

(vii) Misdemeanor trials when imprisonment is actually imposed or a suspended jail sentence is imposed [Scott v. Illinois, 440 U.S. 367 (1979); Alabama v. Shelton, 535 U.S. 654 (2002)];

(viii) Overnight recesses during trial [Geders v. United States, 425 U.S. 80 (1976)];

(ix) Appeals as a matter of right [Douglas v. California, 372 U.S. 353 (1963)]; and

(x) Appeals of guilty pleas and pleas of nolo contendere [Halbert v. Michigan, 545 U.S. 605 (2005); *and see* X.B.1.a., *infra*].

Note: There also is a Fifth Amendment right to counsel at all custodial police interrogations; *see infra*, D.1).

2. Stages at Which Not Applicable

The defendant does not have a constitutional right to be represented by counsel at the following stages:

a. Blood sampling [Schmerber v. California, II.D.1.a., *supra*];

b. Taking of handwriting or voice exemplars [Gilbert v. California, 388 U.S. 263 (1967)];

c. Pre-charge or investigative lineups [Kirby v. Illinois, 406 U.S. 682 (1972)];

d. Photo identifications [United States v. Ash, IV.B.1.c., *infra*];

e. Preliminary hearings to determine probable cause to detain [Gerstein v. Pugh, 420 U.S. 103 (1975)];

f. Brief recesses during the defendant's testimony at trial [Perry v. Leeke, 488 U.S. 272 (1989)];

g. Discretionary appeals [Ross v. Moffitt, 417 U.S. 600 (1974)];

h. Parole and probation revocation proceedings [Gagnon v. Scarpelli, 411 U.S. 778 (1973)]; and

i. Post-conviction proceeding (e.g., habeas corpus) [Pennsylvania v. Finley, 481 U.S. 551 (1987)] including petitions by death-row inmates [Murray v. Giarratano, 492 U.S. 1 (1989)].

3. Offense Specific

The Sixth Amendment right to counsel is "offense specific." Thus, if a defendant makes a Sixth Amendment request for counsel for one charge, he must make another request if he is subsequently charged with a separate, unrelated crime if he desires counsel for the second charge. Similarly, even though a defendant's Sixth Amendment right to counsel has attached regarding one charge, he may be questioned without counsel concerning an unrelated charge. [Illinois v. Perkins, 496 U.S. 292 (1990)]

Example: D was in jail on a battery charge. Because the police suspected D of an unrelated murder, they placed an undercover officer in D's cell. The officer elicited damaging confessions from D regarding the murder. The interrogation did not violate the Sixth Amendment because D had not been charged with the murder. [Illinois v. Perkins, *supra*] Neither did the interrogation violate D's Fifth Amendment right to counsel under *Miranda*. (*See* D.2.a., *infra*.)

a. Test for "Different Offenses"

The test for determining whether offenses are different under the Sixth Amendment is the *Blockburger* test (*see* XIII.C.1., *infra*). Under the test, two crimes are considered different offenses if each requires proof of an additional element that the other crime does not require. [Texas v. Cobb, 532 U.S. 162 (2001)]

4. Waiver

The Sixth Amendment right to counsel may be waived. The waiver must be knowing and voluntary. Moreover, the waiver does not necessarily require the presence of counsel, at least if counsel has not actually been requested by the defendant but rather was appointed by the court. [Montejo v. Louisiana, 556 U.S. 778 (2009)]

Example: Defendant was arrested, was given *Miranda* warnings (*see* D.1., *infra*), and confessed to a murder. He was then brought before a judge, who appointed counsel to represent Defendant. Later that day, police officers went to Defendant's cell and asked him to help them find the weapon he used to commit the murder. The police gave Defendant a fresh set of *Miranda* warnings and convinced him to write a letter apologizing to his victim's widow. Later, the appointed attorney met with Defendant. At trial, the attorney argued that the letter was taken in violation of Defendant's Sixth Amendment right to counsel. *Held:* Because Defendant had not requested the appointment of an attorney, his right to an attorney was not violated. [Montejo v. Louisiana, *supra*]

5. Remedy

If the defendant was entitled to a lawyer at trial, the failure to provide counsel results in ***automatic reversal of the conviction***, even without any showing of specific unfairness in the proceedings. [Gideon v. Wainwright, I.C., *supra*] Similarly, erroneous disqualification of privately retained counsel results in automatic reversal. [United States v. Gonzalez-Lopez, 548 U.S. 140 (2006)] However, at ***nontrial proceedings*** (such as a post-indictment lineup), the harmless error rule applies to deprivations of counsel. [United States v. Wade, 388 U.S. 218 (1967)]

6. Impeachment

A statement obtained in violation of a defendant's Sixth Amendment right to counsel, while

not admissible in the prosecution's case-in-chief, may be used to impeach the defendant's contrary trial testimony. [Kansas v. Ventris, 556 U.S. 586 (2009)] This rule is similar to the rule that applies to *Miranda* violations. (*See* D.4.a., *infra*.)

Example: After Defendant was charged with murder and arrested for aggravated robbery, police placed an informant in his cell, telling the informant to keep his ears open. The informant told Defendant that he looked like he had something serious on his mind (which probably was sufficient to violate Defendant's Sixth Amendment right to counsel). Defendant responded that he had just shot a man in the head and taken his money. At trial, after Defendant testified that an accomplice had shot and robbed the victim, the informant then testified as to what he heard. *Held:* The informant's testimony was admissible for impeachment purposes. [Kansas v. Ventris, *supra*]

D. FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION—*MIRANDA*

The Fifth Amendment, applicable to the states through the Fourteenth Amendment, provides that no person "shall be compelled to be a witness against himself . . . ." This has been interpreted to mean that a person shall not be compelled to give self-incriminating testimony. The scope of what is considered to be "testimony" under the amendment will be discussed later (*see* XIV., *infra*). This section explains the applicability of the amendment to confessions.

1. The Warnings

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Fifth Amendment privilege against compelled self-incrimination became the basis for ruling upon the admissibility of a confession. The *Miranda* warnings and a valid waiver are ***prerequisites to the admissibility*** of any statement made by the accused during custodial interrogation. A person in custody must, prior to interrogation, be clearly informed that:

(i) He has the right to remain silent;

(ii) Anything he says can be used against him in court;

(iii) He has the right to the presence of an attorney; and

(iv) If he cannot afford an attorney, one will be appointed for him if he so desires.

Note: The Supreme Court has held that the holding of *Miranda* was based on the ***requirements*** of the Fifth Amendment as made applicable to the states through the Fourteenth Amendment, and therefore Congress cannot eliminate the *Miranda* requirements by statute. [Dickerson v. United States, 530 U.S. 428 (2000)—invalidating a statute that purportedly eliminated *Miranda*'s requirements that persons in custody and being interrogated be informed of the right to remain silent and the right to counsel]

a. Need Not Be Verbatim

Miranda requires that all suspects be informed of their rights without considering any prior awareness of those rights. The warnings need not be given verbatim, as long as the substance of the warning is there. [Duckworth v. Eagan, 492 U.S. 195 (1989)—upholding warning that included statement, "We [the police] have no way of giving you

a lawyer, but one will be appointed for you, if you wish, if and when you go to court"] The failure to advise a suspect of his right to appointed counsel may be found to be harmless error. [Michigan v. Tucker, 417 U.S. 433 (1974); California v. Prysock, 453 U.S. 355 (1981)]

b. Rewarning Not Needed After Break
There is generally no need to repeat the warnings merely because of a break in the interrogation, ***unless*** the time lapse has been so long that a failure to do so would seem like an attempt to take advantage of the suspect's ignorance of his rights.

2. When Required
Anyone in police custody and accused of a crime, no matter how minor a crime, must be given *Miranda* warnings ***prior to interrogation*** by the police. [Berkemer v. McCarty, 468 U.S. 420 (1984)]

a. Governmental Conduct
Miranda generally applies only to interrogation by the publicly paid police. It does not apply where interrogation is by an informant who the defendant does not know is working for the police. [Illinois v. Perkins, *supra—Miranda* warnings need not be given before questioning by a cellmate covertly working for the police] *Rationale:* The warnings are intended to offset the coercive nature of police-dominated interrogation, and if the defendant does not know that he is being interrogated by the police, there is no coercive atmosphere to offset.

1) State-Ordered Psychiatric Examination
The Fifth Amendment privilege against self-incrimination forbids admission of evidence based on a psychiatric interview of defendant who was not warned of his right to remain silent. [Estelle v. Smith, 451 U.S. 454 (1981)] The admission of such evidence may, however, constitute harmless error. [Satterwhite v. Texas, 486 U.S. 249 (1988)]

2) Limits on *Miranda*
Miranda suggested that every encounter between police and citizen was inherently coercive. Hence, interrogation would result in compelled testimony for Fifth Amendment purposes. However, the Supreme Court has been narrowing the scope of *Miranda*'s application.

a) Meeting with Probation Officer
Admission of rape and murder by a probationer to his probation officer was not compelled or involuntary, despite the probationer's obligation to periodically report and be "truthful in all matters." [Minnesota v. Murphy, 465 U.S. 420 (1984)]

b) Uncharged Witness at Grand Jury Hearing
The *Miranda* requirements ***do not apply*** to a witness testifying before a grand jury, even if the witness is under the compulsion of a subpoena. Such a witness who has not been charged or indicted does not have the right to have counsel present during the questioning, but he may consult with an attorney

outside the grand jury room. A witness who gives false testimony before a grand jury may be convicted of perjury even though he was not given the *Miranda* warnings. [United States v. Mandujano, 425 U.S. 564 (1976); United States v. Wong, 431 U.S. 174 (1977)]

b. Custody Requirement

Determining whether custody exists is a two-step process: The first step (sometimes called the "freedom of movement test") requires the court to determine whether a reasonable person under the circumstances would feel that he was ***free to terminate the interrogation and leave***. All of the circumstances surrounding the interrogation must be considered. If an individual's freedom of movement was curtailed in this way, the next step considers "whether the relevant environment presents the ***same inherently coercive pressures*** as the type of station house questioning at issue in *Miranda*." [Howes v. Fields, 132 S. Ct. 1181 (2012)] Therefore, the more a setting resembles a traditional arrest (i.e., the more constrained the suspect feels), the more likely the Court will consider it to be custody. If the detention is voluntary, it does not constitute custody. [*See* Berkemer v. McCarty, *supra*; Oregon v. Mathiason, 429 U.S. 492 (1977)] If the detention is long and is involuntary, it will likely be held to constitute custody. [*See* Mathis v. United States, 391 U.S. 1 (1968)]

Example: D is in custody when he is awakened in his own room in the middle of the night by four officers surrounding his bed, who then begin to question him. [Orozco v. Texas, 394 U.S. 324 (1969)]

1) Test Is Objective

The initial determination of whether a person is in custody depends on the ***objective*** circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being interrogated. Thus, a court would consider things like the location of the questioning (e.g., suspect's home, workplace, or school; crime scene; police car; police station); whether police officers had their guns drawn; the length of the questioning; the suspect's apparent youth; whether the suspect was told he could not leave; etc.

2) Traffic Stops Generally Not Custodial

Although a routine traffic stop curtails a motorist's freedom of movement, such a stop is presumptively temporary and brief, and the motorist knows that he typically will soon be on his way; therefore, the motorist should not feel unduly coerced. Thus, *Miranda* warnings normally need not be given during a traffic stop.

Example: Officer stopped Defendant for weaving in and out of traffic. When Officer noticed Defendant had trouble standing, he performed a field sobriety test, which Defendant failed. Without giving *Miranda* warnings, Officer then asked Defendant if he had been drinking, and Defendant admitted to recent drinking and drug use. The admission is admissible. [Berkemer v. McCarty, *supra*]

3) Incarcerated Suspects

The fact that a suspect is incarcerated does not automatically mean that any interrogation of the suspect is custodial. The test still is whether the person's freedom of action is limited in a significant way. [Howes v. Fields, *supra*]

Example: Defendant, a prisoner, was escorted from his cell to a conference room in which he was questioned by two corrections officers about pre-incarceration criminal activity. He was told repeatedly that he was free to leave at any time to go back to his cell. He was not restrained and sometimes the conference room door was open. On the other hand, he was not given *Miranda* warnings and the corrections officers were armed. On balance, for purposes of *Miranda*, Defendant was not in custody. [Howes v. Fields, *supra*]

c. Interrogation Requirement

"Interrogation" refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. [Rhode Island v. Innis, 446 U.S. 291 (1980)] However, *Miranda* does not apply to ***spontaneous statements*** not made in response to interrogation, although officers must give the warnings before any follow-up questioning. Neither does *Miranda* apply to routine booking questions (e.g., name, address, age, etc.), even when the booking process is being taped and may be used as evidence. [Pennsylvania v. Muniz, 496 U.S. 582 (1990)—defendant failed sobriety test and had trouble answering booking questions]

Examples: 1) Police comments about the danger a gun would present to handicapped children, which resulted in a robbery suspect's leading them to a weapon, did not constitute interrogation when the officers were not aware that the suspect was peculiarly susceptible to an appeal to his conscience. [Rhode Island v. Innis, *supra*]

2) Allowing a suspect's wife to talk to the suspect in the presence of an officer who is taping the conversation with the spouses' knowledge does not constitute interrogation. [Arizona v. Mauro, 481 U.S. 520 (1987)]

1) Break in Interrogation—Questioning by Different Police Agencies

When a second police agency continues to question a suspect at a point when the first police department terminates its questioning, the impact of an earlier denial of rights by the first department carries over into the questioning by the second agency. [Westover v. United States, 384 U.S. 436 (1966)]

3. Right to Waive Rights or Terminate Interrogation

After receiving *Miranda* warnings, a detainee has several options: do nothing, waive his *Miranda* rights, assert the right to remain silent, or assert the right to consult with an attorney.

a. Do Nothing

If the detainee does not respond at all to *Miranda* warnings, the Court will not presume a waiver [*see* Fare v. Michael, 442 U.S. 707 (1979)], but neither will the Court presume that the detainee has asserted a right to remain silent or to consult with an attorney. Therefore, the police may continue to question the detainee. [*See* Berghuis v. Thompkins, 560 U.S. 370 (2010)]

b. Waive Rights

The detainee may waive his rights under *Miranda*. To be valid, the government must

show by a preponderance of the evidence that the waiver was***knowing and voluntary***. The Court will look to the totality of the circumstances in determining whether this standard was met. But it appears that if the government can show that the detainee received *Miranda* warnings and then chose to answer questions, that is probably sufficient. [*See* Berghuis v. Thompkins, *supra*—suspect scarcely said anything after receiving *Miranda* warnings, but was held to have voluntarily waived his right to remain silent when he responded "yes" to an incriminating question posed three hours into his interrogation]

1) Police Deception of Detainee's Lawyer
If the *Miranda* warnings are given, a voluntary confession will be admissible even if the police lie to the detainee's lawyer about their intent to question the detainee or fail to inform the detainee that his lawyer is attempting to see him, as long as adversary judicial proceedings have not commenced. [Moran v. Burbine, 475 U.S. 412 (1986)]

c. Right to Remain Silent
At any time prior to or during interrogation, the detainee may indicate that he wishes to remain silent. Such an indication must be explicit, unambiguous, and unequivocal (e.g., the detainee's failure to answer does not constitute an invocation of the right to remain silent). [Berghuis v. Thompkins, *supra*] If the detainee so indicates, all ***questioning related to the particular crime must stop***.

1) Police May Resume Questioning If They "Scrupulously Honor" Request
The police may reinitiate questioning after the detainee has invoked the right to remain silent, as long as they "scrupulously honor" the detainee's request. This means, at the very least, that the police may not badger the detainee into talking and must wait a significant time before reinitiating questioning.

Example: In the Supreme Court's only opinion directly on point, it allowed police to reinitiate questioning where: (i) the police ***immediately ceased questioning*** upon the detainee's request and did not resume questioning for several hours; (ii) the detainee was ***rewarned*** of his rights; and (iii) questioning was ***limited to a crime that was not the subject of the earlier questioning***. [Michigan v. Mosley, 423 U.S. 96 (1975)]

d. Right to Counsel
At any time prior to or during interrogation, the detainee may also invoke a *Miranda* (i.e., Fifth Amendment) right to counsel. If the detainee invokes this right, ***all questioning must cease*** until the detainee is provided with an attorney or initiates further questioning himself. [Edwards v. Arizona, 451 U.S. 477 (1981)]

1) Police May Not Resume Questioning About Any Crime
Once the detainee invokes his right to counsel under *Miranda,* all questioning must cease; the police may not even question the detainee about a totally unrelated crime, as they can where the detainee merely invokes the right to remain silent. [*See* Arizona v. Roberson, 486 U.S. 675 (1988)] *Rationale:* The right to counsel under *Miranda* is a prophylactic right designed by the Court to prevent the police

from badgering a detainee into talking without the aid of counsel, and this purpose can be accomplished only if ***all*** questioning ceases. [*See* McNeil v. Wisconsin, 501 U.S. 171 (1991)]

a) Compare—Detainee May Initiate Resumption of Questioning
The detainee may waive his right to counsel after invoking the right, and thus initiate resumption of questioning.

Example: The detainee cut off interrogation by asking for an attorney, but then asked the interrogating officer, "What is going to happen to me now?" The officer explained that the detainee did not have to talk, and the detainee said he understood. The officer then described the charge against the detainee and gave him fresh *Miranda* warnings. The detainee then confessed after taking a polygraph test. The Court upheld admission of the confession into evidence, finding that the detainee had validly waived his rights. [Oregon v. Bradshaw, 462 U.S. 1039 (1983)]

b) Scope of Right—Custodial Interrogation
The Fifth Amendment right to counsel under *Miranda* applies whenever there is custodial interrogation.

c) Compare—Sixth Amendment Right "Offense Specific"
Recall that the Sixth Amendment right to counsel (*see* C., *supra*) attaches only after formal proceedings have begun. Moreover, whereas invocation of the Fifth Amendment right prevents all questioning, the Sixth Amendment right is "offense specific." (*See* C.3., *supra*.)

2) Request Must Be Unambiguous and Specific
A Fifth Amendment request for counsel can be invoked only by an ***unambiguous*** request for counsel ***in dealing with the custodial interrogation***. [McNeil v. Wisconsin, *supra*; Davis v. United States, 512 U.S. 452 (1994)] The request must be sufficiently clear that a reasonable police officer in the same situation would understand the statement to be a request for counsel.

Examples: 1) The statement by the suspect being interrogated, "Maybe I should talk to a lawyer," is not an unambiguous request for counsel under the Fifth Amendment, and so does not prevent further questioning.

2) D was arrested and charged with robbery. At his initial appearance, he requested the aid of counsel. After D's appearance, the police came to D's cell, gave him *Miranda* warnings, and questioned D about a crime unrelated to the robbery. D made incriminating statements. D's Fifth Amendment right to counsel was not violated because D did not request counsel in dealing with the interrogation. His post-charge request for counsel at his initial appearance was a ***Sixth Amendment*** request for counsel, which is offense specific (*see* C.3., *supra*).

3) Ambiguities Relevant Only If Part of Request
Once the detainee has expressed an unequivocal desire to receive counsel, no subsequent questions or responses may be used to cast doubt on the request and all questioning of the detainee must cease. Where the request is ambiguous, police may ask clarifying questions, but are not required to do so; rather, they may continue to interrogate the detainee until an unambiguous request is received. [Davis v. United States, *supra*] Note that if the detainee agrees to answer questions orally, but requests the presence of counsel before making any written statements, the detainee's oral statements are admissible. The detainee's agreement to talk constitutes a voluntary and knowing waiver of the right to counsel. [Connecticut v. Barrett, 479 U.S. 523 (1987)]

4) Counsel Must Be Present at Interrogation
Mere consultation with counsel prior to questioning does not satisfy the right to counsel—the police cannot resume questioning the detainee in the absence of counsel. [Minnick v. Mississippi, 498 U.S. 146 (1991)] Of course, counsel need not be present if the detainee waives the right to counsel by initiating the exchange. (*See* 1)a), *supra*.)

Example: The detainee answered a few questions during interrogation, but then requested an attorney. He was allowed to meet with his attorney three times. Subsequently, in the absence of counsel, police resumed interrogating the detainee, and he made incriminating statements. The Court held that the statements must be excluded from evidence. [Minnick v. Mississippi, *supra*]

5) Duration of Prohibition
The prohibition against questioning a detainee after he requests an attorney lasts the entire time that the detainee is in custody for interrogation purposes, plus 14 more days after the detainee returns to his normal life. After that point, the detainee can be questioned regarding the same matter upon receiving a fresh set of *Miranda* warnings. [Maryland v. Shatzer, 559 U.S. 98 (2010)—while in prison, detainee was questioned about alleged sexual abuse, invoked his right to counsel, and was released back into the general prison population (his normal life); police could reinitiate questioning after 14 days without first providing counsel]

6) Statements Obtained in Violation May Be Used to Impeach
As indicated above, if the detainee requests counsel, all questioning must cease unless counsel is present or the detainee initiates a resumption of questioning. If ***the police*** initiate further questioning, the detainee's statements cannot be used by the prosecution in its case in chief, but they can be used to ***impeach the detainee's*** trial testimony, as long as the court finds that the detainee voluntarily and intelligently waived his right to counsel. [Michigan v. Harvey, 494 U.S. 344 (1990)] Note, however, that such illegally obtained evidence cannot be used to impeach trial testimony of witnesses other than the detainee. [James v. Illinois, 493 U.S. 307 (1990)]

4. Effect of Violation
Generally, evidence obtained in violation of *Miranda* is inadmissible at trial.

a. Use of Confession for Impeachment
A confession obtained in violation of the defendant's *Miranda* rights, but otherwise voluntary, may be used to ***impeach the defendant's testimony*** if he takes the stand at trial, even though such a confession is inadmissible in the state's case in chief as evidence of guilt. [Harris v. New York, 401 U.S. 222 (1971); Oregon v. Hass, 420 U.S. 714 (1975)] However, a truly involuntary confession is ***inadmissible*** for any purpose. [Mincey v. Arizona, II.C.5.f.3), *supra*]

1) Silence
The prosecutor may not use the defendant's silence after receiving *Miranda* warnings to counter the defendant's insanity defense. [Wainwright v. Greenfield, 474 U.S. 284 (1986)]

2) May Be Harmless Error
A single question by the prosecutor about the defendant's silence may constitute harmless error when followed by an objection sustained by the judge and an instruction to jurors to disregard the question. [Greer v. Miller, 483 U.S. 756 (1987)]

b. Warnings After Questioning and Confession
If the police obtain a confession from a detainee without giving him *Miranda* warnings and then give the detainee *Miranda* warnings and obtain a subsequent confession, the subsequent confession will be inadmissible if the "question first, warn later" nature of the questioning was intentional (i.e., the facts make it seem like the police used this as a scheme to get around the *Miranda* requirements). [Missouri v. Seibert, 542 U.S. 600 (2004)] However, a subsequent valid confession may be admissible if the original unwarned questioning seemed unplanned and the failure to give *Miranda* warnings seemed inadvertent. [*See* Oregon v. Elstad, 470 U.S. 298 (1985)]

c. Nontestimonial Fruits of an Unwarned Confession
If the police fail to give *Miranda* warnings and during interrogation a detainee gives the police information that leads to nontestimonial evidence, the evidence will be suppressed if the failure was purposeful, but if the failure was not purposeful, the evidence probably will not be suppressed. [*See* United States v. Patane, 542 U.S. 630 (2004)]

5. Public Safety Exception to *Miranda*
If ***police interrogation*** is reasonably prompted by ***concern for public safety***, responses to the questions may be used in court, even though the suspect is in custody and *Miranda* warnings are not given. [New York v. Quarles, 467 U.S. 649 (1984)—suspect was handcuffed and asked where he had hidden his gun; the arrest and questioning were virtually contemporaneous, and the police were reasonably concerned that the gun might be found and cause injury to an innocent person]

IV. PRETRIAL IDENTIFICATION

A. IN GENERAL
The purpose of all the rules concerning pretrial identification is to ensure that when the witness

identifies the person at trial, she is identifying the person who committed the crime and not merely the person whom she has previously seen at the police station.

B. SUBSTANTIVE BASES FOR ATTACK

1. Sixth Amendment Right to Counsel

a. When Right Exists

A suspect has a right to the presence of an attorney at any ***post-charge lineup or showup***. [Moore v. Illinois, 434 U.S. 220 (1977); United States v. Wade, 388 U.S. 218 (1967)] At a lineup, the witness is asked to pick the perpetrator of the crime from a group of persons, while a showup is a one-to-one confrontation between the witness and the suspect for the purpose of identification.

b. Role of Counsel at a Lineup

The right is simply to have an attorney present during the lineup so that the lawyer can observe any suggestive aspects of the lineup and bring them out on cross-examination of the witness. There is no right to have the lawyer help set up the lineup, to demand changes in the way it is conducted, etc.

c. Photo Identification

The accused does ***not*** have the right to counsel at photo identifications. [United States v. Ash, 413 U.S. 300 (1973)] However, as in the case of lineups, the accused may have a due process claim regarding the photo identification. (*See* 2., *infra*.)

d. Physical Evidence

The accused does ***not*** have the right to counsel when the police take physical evidence such as handwriting exemplars or fingerprints from her.

2. Due Process Standard

A defendant can attack an identification as denying due process when the identification is ***unnecessarily suggestive*** and there is a ***substantial likelihood of misidentification***. It is clear that both parts of this standard must be met for the defendant to win, and that to meet this difficult test, the identification must be shown to have been extremely suggestive.

Examples: 1) A showup at a hospital did not deny the defendant due process when such a procedure was necessary due to the need of an immediate identification, the inability of the identifying victim to come to the police station, and the possibility that the victim might die. [Stovall v. Denno, 388 U.S. 293 (1967)]

2) A photo identification with only six snapshots did not violate due process where the procedure was necessary because perpetrators of a serious felony (robbery) were at large, and the police had to determine if they were on the right track, and the Court found little danger of misidentification. [Simmons v. United States, 390 U.S. 377 (1968)]

3) No substantial likelihood of misidentification was found in the showing of a single photograph to a police officer two days after the crime. [Manson v. Brathwaite, 432 U.S. 98 (1977)]

4) A fundamentally unfair procedure, such as when the perpetrator of the crime is known to be black and the suspect is the only black person in the lineup, would violate the due process standard.

C. THE REMEDY

The remedy for an unconstitutional identification is ***exclusion*** of the in-court identification (unless it has an independent source).

1. Independent Source

A witness may make an in-court identification despite the existence of an unconstitutional pretrial identification if the in-court identification has an independent source. The factors a court will weigh in determining an independent source include the opportunity of the witness to observe the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. [Neil v. Biggers, 409 U.S. 188 (1972); Manson v. Brathwaite, 432 U.S. 98 (1977)]

2. Hearing

The admissibility of identification evidence should be determined at a suppression hearing in the absence of the jury, but exclusion of the jury is not constitutionally required. [Watkins v. Sowders, 449 U.S. 341 (1981)] The government bears the burden of proof as to the presence of counsel or a waiver by the accused, or as to an independent source for the in-court identification, while the defendant must prove an alleged due process violation.

D. NO RIGHT TO LINEUP

The defendant is not entitled to any particular kind of identification procedure. The defendant may not demand a lineup.

E. NO SELF-INCRIMINATION ISSUE

Because a lineup does not involve compulsion to give evidence ***"testimonial"*** in nature, a suspect has no basis in the Fifth Amendment privilege against compelled self-incrimination to refuse to participate in one. [United States v. Wade, B.1.a., *supra*]

V. EXCLUSIONARY RULE

A. IN GENERAL

The exclusionary rule is a judge-made doctrine that prohibits the introduction, at a criminal trial, of evidence obtained in violation of a defendant's Fourth, Fifth, or Sixth Amendment rights.

1. Rationale

The main purpose of the exclusionary rule is to deter the government (primarily the police) from violating a person's constitutional rights: If the government cannot use evidence obtained in violation of a person's rights, it will be less likely to act in contravention of those rights. The rule also serves as one remedy for deprivation of constitutional rights (other remedies include civil suits, injunctions, etc.).

2. Scope of the Rule

a. Fruit of the Poisonous Tree

Generally, not only must ***illegally obtained evidence*** be excluded, but also ***all evidence obtained or derived*** from exploitation of that evidence. The courts deem such evidence the tainted fruit of the poisonous tree. [Nardone v. United States, 308 U.S. 338 (1939); Wong Sun v. United States, 371 U.S. 471 (1963)]

Example: D was arrested ***without probable cause*** and brought to the police station. The police read D his *Miranda* warnings three times and permitted D to see two friends. After being at the station for six hours, D confessed. The confession must be excluded because it is the direct result of the unlawful arrest—if D had not been arrested illegally, he would not have been in custody and would not have confessed. [Taylor v. Alabama, 457 U.S. 687 (1982)]

Compare: Police ***have probable cause*** to arrest D. They go to D's home and improperly arrest him without a warrant, in violation of the Fourth Amendment (*see* II.B.2.b.3), *supra*). D confesses at home, and the police then take him to the station. D confesses again at the station. The home confession must be excluded from evidence because it is the fruit of the illegal arrest, but the station house confession is admissible because it is not a fruit of the unlawful arrest. Because the police had probable cause to arrest D, they did not gain anything from the unlawful arrest—they could have lawfully arrested D the moment he stepped outside of his home and then brought him to the station for his confession. Thus, the station house confession was not an exploitation of the police misconduct; i.e., it was not a fruit of the fact that D was arrested at home as opposed to somewhere else. [New York v. Harris, 495 U.S. 14 (1990)]

1) Limitations—Fruits Derived from *Miranda* Violations

The fruits derived from statements obtained in violation of *Miranda* (*see* III.D.1., *supra*) may be admissible despite the exclusionary rule. (*See* III.D.4.b., *supra*.)

b. Exception—Balancing Test

In recent cases, the Court has emphasized that in deciding whether to apply the exclusionary rule, lower courts must ***balance*** the rule's ***purpose*** (i.e., deterrence of police misconduct) ***against its costs*** (i.e., the exclusion of probative evidence). Therefore, exclusion of tainted evidence, including fruit of the poisonous tree, is ***not*** automatic; whether exclusion is warranted in a given case depends on "the culpability of the police and the potential of the exclusion to deter wrongful police conduct." [Herring v. United States, 555 U.S. 135 (2009)]

1) Independent Source

Evidence is admissible if the prosecution can show that it was obtained from a source independent of the original illegality.

Example: Police illegally search a warehouse and discover marijuana, but do not seize it. The police later return to the warehouse with a valid warrant based on information totally unrelated to the illegal search.

If police seize the marijuana pursuant to the warrant, the marijuana is admissible. [Murray v. United States, 487 U.S. 533 (1988)]

2) Intervening Act of Free Will ("Attenuation")

An intervening act of free will by the defendant will break the causal chain between the evidence and the original illegality and thus remove the taint. [Wong Sun v. United States, 371 U.S. 471 (1963)]

Example: The defendant was released on his own recognizance after an illegal arrest but later returned to the station to confess. This voluntary act of free will removed any taint from the confession. [Wong Sun v. United States, *supra*]

Compare: The reading of *Miranda* warnings, even when coupled with the passage of six hours and consultation with friends, was not sufficient to break the causal chain under the facts of *Taylor v. Alabama* (*see* 2.a., above).

3) Inevitable Discovery

If the prosecution can show that the police would have discovered the evidence whether or not they had acted unconstitutionally, the evidence will be admissible. [Nix v. Williams, 467 U.S. 431 (1984)]

4) Live Witness Testimony

It is difficult for a defendant to have live witness testimony excluded as the fruit of illegal police conduct, because a more direct link between the unconstitutional police conduct and the testimony is required than for exclusion of other evidence. The factors a court must consider in determining whether a sufficiently direct link exists include the extent to which the witness is freely willing to testify and the extent to which excluding the witness's testimony would deter future illegal conduct. [United States v. Ceccolini, 435 U.S. 268 (1978)]

5) In-Court Identification

The defendant ***may not exclude*** the witness's in-court identification on the ground that it is the fruit of an unlawful detention. [United States v. Crews, 445 U.S. 463 (1980)]

6) Out-of-Court Identifications

Unduly suggestive out-of-court identifications that create a substantial likelihood of misidentification can violate the Due Process Clause of the Fourteenth Amendment. Whether an identification procedure is unduly suggestive is judged on a case-by-case basis under the totality of the circumstances. However, the Court will not consider applying the exclusionary rule unless the unnecessarily suggestive circumstances were ***arranged by the police***. If the police do not arrange the circumstances, applying the exclusionary rule would do nothing to deter police misconduct. [Perry v. New Hampshire, 132 S. Ct. 716 (2012)]

Example: Police responded to a call that a man was trying to break into cars in a parking lot. They apprehended Defendant with speakers and an amplifier in the parking lot. An officer went to the caller's

apartment to investigate and asked the caller to describe the man she saw. She pointed out her window to Defendant, who was standing with an officer. Since the police did not arrange the unduly suggestive identification procedure, the trial judge did not have to make a preliminary inquiry into the reliability of the identification and could allow the jury to assess reliability. [Perry v. New Hampshire, *supra*]

B. LIMITATIONS ON THE RULE

1. Inapplicable to Grand Juries

A grand jury witness may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure [United States v. Calandra, 414 U.S. 338 (1974)], unless the evidence was obtained in violation of the federal wiretapping statute [Gelbard v. United States, 408 U.S. 41 (1972)].

2. Inapplicable to Civil Proceedings

The exclusionary rule does not forbid one sovereign from using in civil proceedings evidence that was illegally seized by the agent of another sovereign. [United States v. Janis, 428 U.S. 433 (1976)] Moreover, the Supreme Court would probably allow the sovereign that illegally obtained evidence to use it in a civil proceeding. The exclusionary rule does apply, however, to a proceeding for forfeiture of an article used in violation of the criminal law, when forfeiture is clearly a penalty for the criminal offense. [One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965)]

Example: Evidence that is inadmissible in a state criminal trial because it was illegally seized by the police may be used by the IRS. [United States v. Janis, *supra*]

3. Inapplicable to Violations of State Law

The exclusionary rule does not apply to mere violations of state law. [*See* Virginia v. Moore, II.C.5.a., *supra*]

Example: Police arrested D for driving on a suspended license, searched him, and found cocaine on his person. Under state law, arrest was not authorized for driving on a suspended license, and D moved to suppress the evidence found during the search. *Held:* Because it is constitutionally reasonable for the police to arrest a person if the police have probable cause to believe that the person has committed even a misdemeanor in their presence (*see* II.B.2.b.2), *infra*), and the police here had probable cause to believe that D committed the offense of driving on a suspended license, D's arrest was constitutionally reasonable and, thus, did not violate the Fourth Amendment, the state law notwithstanding. [*See* Virginia v. Moore, *supra*]

4. Inapplicable to Internal Agency Rules

The exclusionary rule applies only if there is a violation of the Constitution or federal law; it does not apply to a violation of only internal agency rules. [United States v. Caceres, 440 U.S. 741 (1979)]

5. Inapplicable in Parole Revocation Proceedings

The exclusionary rule does not apply in parole revocation proceedings. [Pennsylvania v. Scott, 524 U.S. 357 (1998)]

6. Good Faith Exception

The exclusionary rule does not apply when the police arrest or search someone erroneously but in good faith, thinking that they are acting pursuant to a valid arrest warrant, search warrant, or law. [United States v. Leon, 468 U.S. 897 (1984); Herring v. United States, A.2.b., *supra*] *Rationale:* One of the main purposes of the exclusionary rule is to deter improper police conduct, and this purpose cannot be served where police are acting in good faith.

a. Exceptions to Good Faith Reliance on Search Warrant

The Supreme Court has suggested four exceptions to the good faith defense for reliance on a defective search warrant. A police officer cannot rely on a defective search warrant in good faith if:

1) The affidavit underlying the warrant is so lacking in probable cause that no reasonable police officer would have relied on it;

2) The warrant is defective on its face (e.g., it fails to state with particularity the place to be searched or the things to be seized);

3) The police officer or government official obtaining the warrant lied to or misled the magistrate; or

4) The magistrate has "wholly abandoned his judicial role."

7. Use of Excluded Evidence for Impeachment Purposes

Some illegally obtained evidence that is inadmissible in the state's case in chief may nevertheless be used to impeach the defendant's credibility if he takes the stand at trial.

a. Voluntary Confessions in Violation of *Miranda*

An otherwise voluntary confession taken in violation of the *Miranda v. Arizona* requirements is admissible at trial for impeachment purposes. [Harris v. New York, 401 U.S. 222 (1971); Oregon v. Hass, 420 U.S. 714 (1975)] However, a truly involuntary confession is not admissible for any purpose. [Mincey v. Arizona, III.D.4.a., *supra*]

b. Fruit of Illegal Searches

The prosecution may use evidence obtained from an illegal search that is inadmissible in its direct case to impeach the defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination [United States v. Havens, 446 U.S. 620 (1980)], but such illegally obtained evidence cannot be used to impeach the trial testimony of witnesses other than the defendant [James v. Illinois, 493 U.S. 307 (1990)].

8. Knock and Announce Rule Violations

Exclusion is not an available remedy for violations of the knock and announce rule pertaining to the execution of a warrant. *Rationale:* The exclusionary remedy is too attenuated from the purposes of the knock and announce rule of protecting human life and limb, property, privacy, and dignity. Moreover, the cost of excluding relevant evidence because of claims that the knock and announce rule was violated is too high when compared to the deterrence benefit that will be gained. Finally, there are other deterrents to prevent officers

from violating the rule, such as civil suits and internal police disciplinary sanctions. [Hudson v. Michigan, 547 U.S. 586 (2006)]

C. HARMLESS ERROR TEST

A conviction will not necessarily be overturned merely because improperly obtained evidence was admitted at trial; the harmless error test applies, so a conviction can be upheld if the conviction would have resulted despite the improper evidence. On appeal, the government bears the burden of showing ***beyond a reasonable doubt*** that the admission was harmless. [Chapman v. California, 386 U.S. 18 (1967); Milton v. Wainwright, 407 U.S. 371 (1972)] In a habeas corpus proceeding, if a petitioner claims a constitutional error, the petitioner must be released if the error had ***substantial and injurious effect or influence*** in determining the jury's verdict. [Brecht v. Abrahamson, 507 U.S. 619 (1993)] If the judge is in "grave doubt" as to the harm (e.g., where the record is evenly balanced as to harmlessness), the petition must be granted. [O'Neal v. McAninch, 513 U.S. 432 (1995)]

D. ENFORCING THE EXCLUSIONARY RULE

1. Right to Hearing on Motion to Suppress

The defendant 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. [Jackson v. Denno, 378 U.S. 368 (1964)] It is permissible to let the jury reconsider the "admissibility" of the evidence if the judge finds it admissible, but there is no constitutional right to such a dual evaluation. [Lego v. Twomey, 404 U.S. 477 (1972)] And the defendant is not constitutionally entitled to have a specific finding of fact on each factual question. [LaValee v. Delle Rose, 410 U.S. 690 (1973)]

2. Burden of Proof

The government bears the burden of establishing admissibility by a preponderance of the evidence. [Lego v. Twomey, *supra*]

3. Defendant's Right to Testify

The defendant has the right to testify at the suppression hearing without his testimony being admitted against him at trial on the issue of guilt. [Simmons v. United States, 390 U.S. 377 (1968)]

VI. PRETRIAL PROCEDURES

A. PRELIMINARY HEARING TO DETERMINE PROBABLE CAUSE TO DETAIN ("*GERSTEIN* HEARINGS")

A defendant has a Fourth Amendment right to be released from detention if there is no probable cause to hold him. Thus, a defendant has a right to a determination of probable cause. A preliminary hearing is a hearing held after arrest but before trial to determine whether probable cause for detention exists. The hearing is an informal, ex parte, nonadversarial proceeding.

1. When Right Applies

If probable cause has already been determined (e.g., the arrest is pursuant to a grand jury indictment or an arrest warrant), a preliminary hearing need not be held. If no probable cause determination has been made, a defendant has a right to a preliminary hearing to

determine probable cause if "***significant pretrial constraints on the defendant's liberty***" exist. Thus, the right applies if the defendant is released only upon the posting of bail or if he is held in jail in lieu of bail. It does not apply if the defendant is released merely upon the condition that he appear for trial.

Note: The fact that the defendant has been released does not preclude a finding of a significant constraint on liberty, because many conditions can be attached to liberty.

2. Timing
The hearing must be held within a reasonable time, and the Court has determined that 48 hours is presumptively reasonable. [Riverside County v. McLaughlin, 500 U.S. 44 (1991)]

3. Remedy
There is ***no real remedy*** for the defendant for the mere denial of this hearing, because an unlawful detention, without more, has no effect on the subsequent prosecution. However, if evidence is discovered as a result of the unlawful detention, it will be suppressed under the exclusionary rule.

B. PRETRIAL DETENTION

1. Initial Appearance
Soon after the defendant is arrested, she must be brought before a magistrate who will advise her of her rights, set bail, and appoint counsel if necessary. The initial appearance may be combined with the *Gerstein* hearing, but will be held whether or not a *Gerstein* hearing is necessary. For misdemeanors, this appearance will be the trial.

2. Bail
Most state constitutions or statutes create a right to be released on appropriate bail (either on personal recognizance or on a cash bond).

a. Due Process Concerns
Because denial of release on bail deprives a person of liberty, such denials must comply with the Due Process Clause. In upholding the Federal Bail Reform Act (which permits a court to detain an arrestee if the judge determines that no condition of release would ensure the arrestee's appearance or the safety of any person or the community), the Court held that denial of bail does not violate substantive due process (by imposing punishment before a defendant is found guilty), because the denial of bail is not punishment but a regulatory solution to the problem of persons committing crimes while out on bail. The Court also held that the federal act does not violate procedural due process because it provides detainees with a right to a hearing on the issue, expedited review, etc. [United States v. Salerno, 479 U.S. 1026 (1987)] Similar state statutes would likely be upheld, but a state statute that arbitrarily denies bail (e.g., by not allowing the detainee to present evidence or denying release to a whole class of detainees) would probably violate the Due Process Clause.

b. Right to Be Free from Excessive Bail
Where the right to release exists, state constitutions and state statutes—and perhaps the Eighth Amendment as well—prohibit "excessive" bail. This has traditionally been

interpreted to require that bail be set no higher than is necessary to ensure the defendant's appearance at trial.

c. Bail Issues Are Immediately Appealable
In most jurisdictions and under federal law, a refusal to grant bail or the setting of excessive bail may be appealed immediately, as an exception to the final judgment rule for appeals. If not immediately appealable, the denial of bail can be reached by an immediate petition for a writ of habeas corpus. Once the defendant is convicted, an appeal of a pretrial bail decision is moot. [Murphy v. Hunt, 455 U.S. 478 (1982)]

d. Defendant Incompetent to Stand Trial
As to deprivation of pretrial liberty by commitment of one who is not competent to stand trial, the standards for commitment and subsequent release must be essentially identical with those for the commitment of persons not charged with crime; otherwise, there is a denial of equal protection. [Jackson v. Indiana, 406 U.S. 715 (1972)]

3. Pretrial Detention Practices
Pretrial detention practices that are reasonably related to the interest of maintaining jail security, such as double-bunking, prohibiting inmates from receiving from the outside food and personal items or books not mailed directly from the publisher, routine inspections while the detainees remain outside their rooms, and body cavity searches following contact visits, do not violate due process or the Fourth Amendment and without more do not constitute punishment. [Bell v. Wolfish, 441 U.S. 520 (1979)]

C. PRELIMINARY HEARING TO DETERMINE PROBABLE CAUSE TO PROSECUTE

A later preliminary hearing may be held to determine whether probable cause to prosecute exists. The accused has the ***right to counsel*** at this hearing [Coleman v. Alabama, 399 U.S. 1 (1970)], and both the prosecutor and the accused may present evidence for the record. The accused may waive the hearing. Either side may use this hearing to preserve testimony of a witness unavailable at trial (e.g., the witness testifies at the preliminary hearing and dies before trial) provided there was some opportunity to cross-examine the witness at the preliminary hearing. [Ohio v. Roberts, 448 U.S. 56 (1980)]

D. GRAND JURIES

The Fifth Amendment right to indictment by grand jury has not been incorporated into the Fourteenth Amendment, but some state constitutions require grand jury indictment.

1. Charging Grand Juries
Most states east of the Mississippi and the federal system use the grand jury as a regular part of the charging process. The charging grand jury ***determines probable cause to prosecute*** by returning the bill of indictment submitted by the prosecutor as a "true bill." Western states generally charge by filing an information, a written accusation of crime prepared and presented by the prosecutor. Informations also are used when the defendant waives her right to grand jury indictment.

2. Special or Investigative Grand Juries
Special or investigative grand juries are used almost everywhere. This type of grand jury investigates, on its own motion, crime in the particular jurisdiction, and can initiate a criminal case by bringing an indictment.

3. Grand Jury Proceedings

a. Secrecy and Defendant's Lack of Access

Grand jury proceedings are conducted in secret. In most jurisdictions, a defendant has no right to notice that a grand jury is considering an indictment against her, to be present and confront witnesses at the proceeding, or to introduce evidence before the grand jury.

b. Particularized Need Required for Prosecutor's Access to Grand Jury Materials

The "particularized need" standard generally required under Rule 6(e) of the Federal Rules of Criminal Procedure in order to obtain access to grand jury materials must be shown by state attorneys general [Illinois v. Abbott, 460 U.S. 557 (1983)], as well as Justice Department attorneys [United States v. Sells Engineering, Inc., 463 U.S. 418 (1983)]. The disclosure of such materials to the Internal Revenue Service for the purpose of assessing tax liability, rather than for litigation, is not permitted. [United States v. Baggot, 463 U.S. 476 (1983)]

c. Subpoena Powers of Grand Jury

The grand jury may use its subpoena power to investigate the matters before it or to initiate criminal investigations of its own. Rather than returning an indictment, grand juries sometimes issue a report.

1) Government Need Not Prove Relevance

A grand jury subpoena may be quashed only if the opposing party can prove that there is no reasonable possibility that the material sought will be relevant to the grand jury investigation. The government has no initial burden of proving that the material is relevant. [United States v. R. Enterprises, Inc., 498 U.S. 292 (1991)]

2) Defamatory Reports

If the defendant or any other person believes that she has been defamed by a grand jury report, she may make a motion to seal the report.

d. No Right to Counsel or *Miranda* Warnings

A witness subpoenaed to testify before a grand jury does not have the right to receive the *Miranda* warnings, and the witness may be convicted of perjury despite the lack of warnings if she testifies falsely. A grand jury witness does not have the right to have an attorney present, but she may consult with an attorney outside the grand jury room. [United States v. Mandujano, III.D.2.a.2)b), *supra*; United States v. Wong, III.D.2.a.2) b), *supra*]

e. No Right to "Potential Defendant" Warnings

A witness who is under investigation and may well become a defendant is not entitled to a warning that she is a "potential defendant" when called to testify before the grand jury. [United States v. Washington, 431 U.S. 181 (1977)]

f. No Right to Have Evidence Excluded

A grand jury may base its indictment on evidence that would not be admissible at trial [Costello v. United States, 350 U.S. 359 (1956)], and a grand jury witness may not

refuse to answer questions on the grounds that they are based upon unconstitutionally obtained evidence [United States v. Calandra, 414 U.S. 338 (1974)]. Nor may an indicted defendant have the indictment quashed on the grounds that it is based upon illegally obtained evidence.

g. No Right to Challenge Subpoena on Fourth Amendment Grounds
A suspect-witness (or any witness, for that matter) subpoenaed before a grand jury cannot attack the subpoena on the ground that the grand jury lacked "probable cause"—or any reason at all—to call her for questioning. No such attack can be made even if the subpoena also requires the witness to provide a handwriting exemplar, a voice sample, or otherwise cooperate with law enforcement officials in a manner not violating the self-incrimination privilege.

h. Exclusion of Minorities
Minorities may not be excluded from grand jury service. 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 the harmlessness of the error. [Vasquez v. Hillery, 474 U.S. 254 (1986)] Note that the defendant and the excluded members need not be of the same race. [Campbell v. Louisiana, 523 U.S. 392 (1998)]

i. Dismissal Seldom Required for Procedural Defect
An indicted defendant is seldom entitled to dismissal of an indictment upon a showing that procedural error occurred during the grand jury proceedings. Generally, she is entitled to dismissal only upon a showing that the error substantially influenced the grand jury's decision to indict. [Bank of Nova Scotia v. United States, 487 U.S. 250 (1988)—defendant failed to show that prosecutorial misconduct before grand jury substantially influenced its decision to indict]

j. Exculpatory Evidence
An indictment may not be dismissed by a federal court for a prosecutor's failure to present exculpatory evidence to the grand jury unless the prosecutor's conduct violates a preexisting constitutional, legislative, or procedural rule. [United States v. Williams, 504 U.S. 36 (1992)]

E. SPEEDY TRIAL

1. Societal Interest
The Sixth Amendment right to a speedy trial is an unusual one in that the interests of society and the defendant coincide.

2. Constitutional Standard
A determination of whether the defendant's right to a speedy trial has been violated will be made by an evaluation of the totality of the circumstances. The following factors should be considered:

(i) Length of the delay;

(ii) Reason for the delay;

(iii) Whether the defendant asserted his right; and

(iv) Prejudice to the defendant.

[Barker v. Wingo, 407 U.S. 514 (1972)]

Example: A defendant who was arrested 8½ years after his federal indictment due solely to the government's neglect and who promptly asserted his right to a speedy trial claim was ***presumptively prejudiced*** so that an actual showing of prejudice was not necessary. [Doggett v. United States, 505 U.S. 647 (1992)]

a. Delays Caused by Assigned Counsel
Delays caused by counsel assigned by the court to the defendant should ordinarily be attributed to the defendant and not to the state. [Vermont v. Brillon, 556 U.S. 81 (2009)]

3. Remedy—Dismissal
The remedy for a violation of the constitutional right to a speedy trial is dismissal with prejudice. [Strunk v. United States, 412 U.S. 434 (1973)]

4. When Right Attaches
The right to a speedy trial does not attach until the defendant has been ***arrested or charged***. It is very difficult to get relief for a pre-arrest delay under this standard, because the defendant must show prejudice from a delay, and good faith investigative delays do not violate due process. [United States v. Lovasco, 431 U.S. 783 (1977)]

A defendant is not entitled to speedy trial relief for the period between the dismissal of charges and later refiling. [United States v. MacDonald, 456 U.S. 1 (1982)] The only limitation on pre-arrest delay (other than general due process requirements) seems to be the statute of limitations for the particular crime.

a. Knowledge of Charges Unnecessary
The Speedy Trial Clause attaches even if the defendant does not know about the charges against him and is thus not restrained in any way. [Doggett v. United States, *supra*]

5. Special Problems
Two situations create special speedy trial problems:

a. Detainees
A defendant incarcerated in one jurisdiction who has a charge pending in another jurisdiction has a right to have the second jurisdiction exert reasonable efforts to obtain his presence for trial of these pending charges. Failure to exert such efforts violates his right to speedy trial. [Smith v. Hooey, 393 U.S. 374 (1969)]

b. Indefinite Suspension of Charges
It is a violation of the right to speedy trial to permit the prosecution to indefinitely suspend charges, such as permitting the government to dismiss "without prejudice," which permits reinstatement of the prosecution ***at any time***. [Klopfer v. North Carolina, 386 U.S. 213 (1967)—nolle prosequi that indefinitely suspended the statute of limitations violated speedy trial requirements]

F. PROSECUTORIAL DUTY TO DISCLOSE EXCULPATORY INFORMATION AND NOTICE OF DEFENSES

1. Prosecutor's Duty to Disclose Exculpatory Evidence

The government has a duty to disclose material, exculpatory evidence to the defendant. [Brady v. Maryland, 373 U.S. 83 (1963)] Failure to disclose such evidence—whether willful ***or inadvertent***—violates the Due Process Clause and is grounds for reversing a conviction if the defendant can prove that:

(i) The evidence at issue is ***favorable to the defendant*** because it impeaches or is exculpatory; and

(ii) ***Prejudice has resulted*** (i.e., there is a ***reasonable probability*** that the result of the case would have been different if the undisclosed evidence had been presented at trial).

[Strickler v. Greene, 527 U.S. 263 (1999); United States v. Bagley, 473 U.S. 667 (1985)] *Note:* If the prosecution can show that the verdict is strongly supported by other evidence, sufficient prejudice will not be found.

Example: Defendant was convicted on the testimony of a single eyewitness. After trial, Defendant obtained police files containing statements of the eyewitness that contradicted his trial testimony and were favorable to Defendant. Since Defendant was convicted solely on the eyewitness's testimony, it is likely the result of the case would have been different had the statements been disclosed. Therefore, the failure to disclose violates *Brady*, and the conviction must be overturned and a new trial granted. [Smith v. Cain, 132 S. Ct. 627 (2012)]

a. Exception—Reports on Sexually Abused Minors

A defendant may not automatically obtain investigative reports made by a state agency in charge of investigating sexually abused minors because of the confidentiality of the minors' records. Such reports can be obtained only if they are ***favorable*** to the defendant and are ***material*** to guilt or punishment. [Pennsylvania v. Ritchie, 480 U.S. 39 (1987)]

b. Probably Must Be Relevant to Merits

The duty to disclose appears to extend only to evidence relevant to the prosecution's case in chief. Material going to a defense not on the merits probably need not be disclosed. [*See* United States v. Armstrong, 517 U.S. 456 (1996)—material relevant to defendant's claim that he was selected for prosecution because of his race need not be disclosed]

c. Duty Does Not Apply at Post-Conviction Proceedings

A prosecutor's obligation to disclose material, exculpatory evidence under *Brady* does not apply at post-conviction proceedings. [District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52 (2009)—a convicted offender has no federal due process right to obtain post-conviction access to a state's evidence for DNA testing in the absence of any indication that available state post-conviction relief procedures are fundamentally unfair]

2. Notice of Alibi and Intent to Present Insanity Defense

a. Reciprocity Required

The prosecution may demand to know whether the defendant is going to plead insanity or raise an alibi as a defense. If the defendant is going to raise an alibi, he must list his witnesses. In return, the prosecution is required to list the witnesses it will call to rebut the defendant's defense. [Williams v. Florida, 399 U.S. 78 (1970); Wardius v. Oregon, 412 U.S. 470 (1973)]

b. Commenting on Failure to Present the Alibi

The prosecutor may not comment at trial on the defendant's failure to produce a witness named as supporting the alibi or on the failure to present the alibi itself. But the prosecutor may use the notice of an alibi to ***impeach*** a defendant who takes the stand and testifies to a different alibi.

G. COMPETENCY TO STAND TRIAL

1. Competency and Insanity Distinguished

Competency to stand trial must be carefully distinguished from the insanity defense, although both rest on a defendant's abnormality. Insanity is a defense to the criminal charge; a defendant acquitted by reason of insanity may not be retried and convicted, although she may be hospitalized under some circumstances. ***Incompetency*** to stand trial depends on a defendant's mental condition at the ***time of trial***, unlike ***insanity***, which turns upon a defendant's mental condition at the ***time of the crime***. Incompetency is not a defense but rather a bar to trial. A defendant who is incompetent to stand trial cannot be tried. But if she later regains her competency, she can then be tried and—unless she has a defense—convicted. Note that a defendant who is competent to stand trial is competent to plead guilty.

2. Due Process Standard

Due process of law, as well as the state law of most jurisdictions, prohibits the trial of a defendant who is incompetent to stand trial. A defendant is incompetent to stand trial under the due process standard if, because of her present mental condition, she either:

(i) Lacks a rational as well as a factual ***understanding of the charges and proceedings***; or

(ii) Lacks sufficient present ***ability to consult with her lawyer*** with a reasonable degree of understanding.

[Dusky v. United States, 362 U.S. 402 (1960)]

a. Forced "Cure"

Under the Due Process Clause, the government may ***involuntarily*** administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to make him competent to stand trial if: (i) the treatment is medically appropriate, (ii) the treatment is substantially unlikely to cause side effects that may undermine the fairness of the trial, and (iii) considering less intrusive alternatives, the treatment is necessary to further important governmental trial-related interests. [Sell v. United States, 539 U.S. 166 (2003)]

3. Trial Judge's Duty to Raise Competency Issue

If evidence of a defendant's incompetency appears to the trial judge, the judge has a constitutional obligation to conduct further inquiry and determine whether in fact the defendant is incompetent. If a defendant is tried and convicted but it later appears she was incompetent to stand trial, the judge's failure to raise the issue or to request a determination of competency does not constitute a "waiver." [Pate v. Robinson, 383 U.S. 375 (1966)]

Example: During preliminary proceedings at X's trial for robbery, X, while in open court, speaks irrationally and repeatedly interrupts the proceedings by shouting to a nonexistent dog in the courtroom. What, if anything, must the trial judge do before proceeding to trial? The facts here clearly require the trial judge to investigate and determine X's competency to stand trial. The judge must hold a hearing and determine whether X is mentally ill and, if so, whether she can consult with her lawyer and understand the charges and proceedings. This must be done even if neither X nor her lawyer raises the issue.

4. Burden Can Be Placed on Defendant

A state can require a criminal defendant to prove that he is not competent to stand trial by a preponderance of the evidence; this does not violate due process. [Medina v. California, 505 U.S. 437 (1992)] However, requiring a defendant to prove incompetence by ***clear and convincing evidence*** violates due process. [Cooper v. Oklahoma, 517 U.S. 348 (1996)]

5. Detention of Defendant

a. Based on Incompetency

A defendant who has been found incompetent may be detained in a mental hospital for a brief period of time for evaluation and treatment. But she cannot be hospitalized indefinitely or for a long period of time simply because she has been found incompetent. This can be done only if independent "civil commitment" proceedings are begun and result in her commitment. [Jackson v. Indiana, 406 U.S. 715 (1972)]

b. Based on Insanity

A defendant who has made a successful insanity defense can be confined in a mental hospital for a term longer than the maximum period of incarceration for the offense. The insanity acquittee is not entitled to any separate civil commitment hearing at the expiration of the maximum sentence. [Jones v. United States, 463 U.S. 354 (1983)] However, a defendant acquitted by reason of insanity who is determined to have recovered sanity cannot be indefinitely committed in a mental facility merely because he is unable to prove himself not dangerous to others. [Foucha v. Louisiana, 504 U.S. 71 (1992)]

H. PRETRIAL PUBLICITY AND THE RIGHT TO A FAIR TRIAL

Excessive pretrial publicity prejudicial to the defendant may require change of venue or retrial.

Examples: 1) Defendant sought and was improperly denied a change of venue on the ground of local prejudice. His trial by a jury that was familiar with the material facts and had formed an opinion as to his guilt before the trial began (on the basis of unfavorable newspaper publicity) denied him due process. [Irvin v. Dowd, 366 U.S. 717 (1961)] However, due process will be satisfied if the judge asks the venirepersons whether they were exposed to pretrial publicity, and if so, whether it would

affect their impartiality and ability to hear the case with an open mind. The judge does not have to ask about the specific source or content of the pretrial information. [Mu'Min v. Virginia, 500 U.S. 415 (1991)]

2) A new trial is required where defendant sought and was denied a change of venue after a televised interview in which defendant admitted that he had perpetrated the crimes with which he was charged, and the jury was drawn from the people who had seen the interview. [Rideau v. Louisiana, 373 U.S. 723 (1963)—jurors' claims that they could be neutral were inherently implausible]

3) Defendant's request for a change of venue because of pretrial publicity was denied because state law did not permit a change of venue in misdemeanor cases. *Held:* The law violates the right to trial by an impartial jury; a defendant must be given the opportunity to show that a change of venue is required in his case. [Groppi v. Wisconsin, 400 U.S. 505 (1971)]

VII. TRIAL

A. BASIC RIGHT TO A FAIR TRIAL

1. Order of Arguments

Trial begins with the opening argument of the prosecution followed by the opening argument of the defense. Closing arguments proceed in the following order: (i) the government argues, (ii) the defense argues, and (iii) the government rebuts. [Fed. R. Crim. Pro. 29.1]

2. Right to Public Trial

The Sixth and Fourteenth Amendments guarantee the right to a public trial. [*In re* Oliver, 333 U.S. 257 (1948); Herring v. New York, 422 U.S. 853 (1975)] However, the extent of this right varies according to the stage of the proceeding involved.

a. Preliminary Probable Cause Hearing

Preliminary hearings to determine whether there is probable cause on which to prosecute are presumptively open to the public and the press. [Press Enterprise Co. v. Superior Court, 478 U.S. 1 (1986)]

b. Suppression Hearings

The Sixth Amendment right to a public trial extends to ***pretrial suppression hearings***. Such hearings may not be closed to the public unless:

(i) The party seeking closure shows an ***overriding interest*** likely to be prejudiced by a public hearing;

(ii) The closure is ***no broader than necessary*** to protect such an interest;

(iii) ***Reasonable alternatives*** to closure have been considered; and

(iv) ***Adequate findings*** to support closure are entered by the trial court.

[Waller v. Georgia, 467 U.S. 39 (1984)]

c. Voir Dire of Prospective Jurors
The right to a public trial includes voir dire of prospective jurors. Trial courts must make every reasonable effort to accommodate public attendance. [Presley v. Georgia, 558 U.S 209 (2010)—Sixth Amendment violated when judge did not allow defendant's uncle to remain in courtroom during voir dire, stating that prospective jurors could not mingle with the uncle and needed all of the rows of seats in the courtroom]

d. Trial
The press and the public have a right under the First Amendment to attend the trial itself, even when the defense and prosecution agree to close it. A judge may not exclude the press and the public from a criminal trial without first finding that closure is necessary for a fair trial. [Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)]

1) Televising Permissible
The state may constitutionally permit televising criminal proceedings over the defendant's objection. [Chandler v. Florida, 449 U.S. 560 (1981)]

3. Right to an Unbiased Judge
Due process is violated if the judge is shown to have ***actual malice*** against the defendant or to have had a ***financial interest*** in having the trial result in a verdict of guilty.

Example: D is tried before a "mayor's court" presided over by a judge who is also the mayor of the town. Half of the town's income comes from fines imposed in the court after convictions. Is the trial permissible? No. The judge has too great a financial interest in the outcome to meet due process standards. [Ward v. City of Monroeville, 409 U.S. 57 (1972)]

4. Must Judge Be a Lawyer?
A defendant in a minor misdemeanor prosecution has no right to have the trial judge be a lawyer, if upon conviction he has a right to trial de novo in a court with a lawyer-judge. [North v. Russell, 427 U.S. 328 (1976)] It is likely, however, that in serious crime cases the Supreme Court will require that the judge be law-trained.

5. Right to Be Free of Trial Disruption
Due process is violated if the trial is conducted in a manner or atmosphere making it unlikely that the jury gave the evidence reasonable consideration. Televising and broadcasting parts of a trial, for example, may interfere with courtroom proceedings and influence the jury by emphasizing the notoriety of the trial to such an extent that it infringes the defendant's right to a fair trial. [Estes v. Texas, 381 U.S. 532 (1965)]

6. Trial in Prison Clothing
It is unconstitutional for the state to ***compel*** the defendant to stand trial in prison clothing. If the defendant does not wish to be tried in prison clothing, he must make a timely objection. [Estelle v. Williams, 425 U.S. 501 (1976)] Similarly, the Due Process Clause prohibits the use of visible shackles during the trial and penalty phase of a capital proceeding unless the court makes a specific finding that their use is justified by concerns about courtroom security or risk of escape. [Deck v. Missouri, 544 U.S. 622 (2005)]

7. Right to Have Jury Free from Unfair Influences
If the jury is exposed to influences favorable to the prosecution, due process is violated.

Example: During X's trial, two sheriffs, who were also prosecution witnesses, were in constant and intimate association with the jurors, eating with them, running errands for them, etc. Did the trial violate due process standards? Yes, since this association must have influenced the jurors' assessment of the credibility of the witnesses. [Turner v. Louisiana, 379 U.S. 466 (1965)]

8. No Right to Preservation of Potentially Exculpatory Evidence
Defendants have no right to have the police preserve all evidence for trial, at least where it is not certain that the evidence would have been exculpatory. Due process is violated, however, if the police ***in bad faith*** destroy evidence potentially useful to the defense at trial. [Arizona v. Youngblood, 488 U.S. 51 (1988)—no due process violation where police failed to preserve seminal fluid on sodomy victim's clothing; California v. Trombetta, 467 U.S. 479 (1984)—same result where police failed to preserve samples of defendant's breath]

B. RIGHT TO TRIAL BY JURY

The Sixth Amendment right to trial by jury applies to the states. [Duncan v. Louisiana, 391 U.S. 145 (1968)] The cases after *Duncan,* while zealously guarding the jury trial right, have permitted the states great latitude in the details of jury use and conduct because of (i) the view that many of the details of the jury were historical accidents, (ii) the belief that the jury will act rationally, and (iii) the cost.

1. Right to Jury Trial Only for "Serious" Offenses
There is no constitutional right to jury trial for petty offenses, but only for serious offenses. Also, there is no right to jury trial in juvenile delinquency proceedings. [McKeiver v. Pennsylvania, 403 U.S. 528 (1971)]

a. What Constitutes a Serious Offense?
For purposes of the right to jury trial, an offense is serious if ***imprisonment for more than six months*** is authorized. If imprisonment of six months or less is authorized, the offense is presumptively petty, and there is no right to a jury trial. [Blanton v. City of North Las Vegas, 489 U.S. 538 (1989)] The presumption may be overcome by showing additional penalties, but a possibility of a $5,000 fine and five years' probation is not sufficient to overcome the presumption that the crime is petty. [United States v. Nachtigal, 507 U.S. 1 (1993)]

1) Aggregation of Petty Offenses
The right to a jury trial does not arise when in a single proceeding, sentences for multiple petty offenses are imposed which result in an aggregate prison sentence of more than six months. [Lewis v. United States, 518 U.S. 322 (1996)]

b. Contempt

1) Civil Contempt—No Jury Trial Right
If a penalty is imposed for purposes of compelling future compliance with a court order and the witness can avoid further penalty by complying with the order (e.g., judge sentences witness to prison until she is willing to testify), the proceeding is one of "civil" contempt and no jury trial is required.

2) Criminal Contempt—"Six Months" Rule
When there is no statutorily authorized penalty for a crime, such as criminal contempt, the actual sentence governs the right to jury trial. Cumulative penalties totaling more than six months cannot be imposed in a ***post-verdict contempt adjudication*** without affording the defendant the right to a jury trial. [Codispoti v. Pennsylvania, 418 U.S. 506 (1974)]

3) Summary Contempt Punishment During Trial
If the judge summarily imposes punishment for contempt during trial, the penalties may aggregate more than six months without a jury trial. [Codispoti v. Pennsylvania, *supra*]

4) Appellate Modification Sufficient
An appellate court may reduce the sentence imposed for contempt to six months or less and thereby protect the conviction and sentence imposed without a jury from constitutional attack. [Taylor v. Hayes, 418 U.S. 488 (1974)]

5) Probation
A judge may place a contemnor on probation for a term of up to five years without affording him the right to jury trial as long as revocation of probation would not result in imprisonment for more than six months. [Frank v. United States, 395 U.S. 147 (1969)]

2. Number and Unanimity of Jurors

a. No Right to Jury of Twelve
There is no constitutional right to a jury of 12, but there must be ***at least six*** jurors to satisfy the right to jury trial under the Sixth and Fourteenth Amendments. [Ballew v. Georgia, 435 U.S. 223 (1978)]

b. No Absolute Right to Unanimity
There is no right to a unanimous verdict. The Supreme Court has upheld convictions based upon 11-1, 10-2, and 9-3 votes [Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972)], but probably would not approve an 8-4 vote for conviction. Six-person juries must be unanimous. [Burch v. Louisiana, 441 U.S. 130 (1979); Brown v. Louisiana, 447 U.S. 323 (1980)]

3. Right to Venire Selected from Representative Cross-Section of Community

A defendant has a right to have the venire from which the jury is selected be from a representative cross-section of the community. A defendant can complain of an exclusion of a significant segment of the community from the venire, even if he is not a member of that excluded segment. [Taylor v. Louisiana, 419 U.S. 522 (1975); Holland v. Illinois, 493 U.S. 474 (1990)]

a. Showing of Exclusion of Significant Group Sufficient
To make out a case for exclusion, the defendant need only show the underrepresentation of a distinct and numerically significant group. [Taylor v. Louisiana, *supra*]

b. No Right to Proportional Representation on Particular Jury
The cross-sectional requirement applies only to the venire from which the jury is selected. A defendant does not have the right to proportional representation of all groups on his particular jury. [Holland v. Illinois, *supra*]

c. Use of Peremptory Challenges for Racial and Gender-Based Discrimination
In contrast to striking potential jurors for cause, a prosecutor generally may exercise peremptory challenges for any rational ***or irrational*** reason. However, the Equal Protection Clause forbids the use of peremptory challenges to exclude potential jurors solely on account of their race or gender. [Batson v. Kentucky, 476 U.S. 79 (1989); J.E.B. v. Alabama, 511 U.S. 127 (1994)]

1) Proving Strike Improper
An equal protection-based attack on peremptory strikes involves three steps: (i) The defendant must show ***facts or circumstances that raise an inference*** that the exclusion of potential jurors was based on race or gender. (ii) If such a showing is made, the prosecutor must then come forward with a ***race-neutral explanation*** for the strike. The reason for the strike need not be reasonable, as long as it is race-neutral. [Purkett v. Elem, 514 U.S. 765 (1995)—explanation that potential jurors were struck because of their long hair and beards was sufficient] (iii) The judge then determines whether the prosecutor's explanation was the genuine reason for striking the juror, or merely a pretext for purposeful discrimination. If the judge believes that the ***prosecutor was sincere***, the strike may be upheld. [Purkett v. Elem, *supra*]

Example: That a stricken juror was young, had no ties to the community, and was disrespectful were sufficient grounds to support a peremptory strike. [Rice v. Collins, 546 U.S. 333 (2006)]

Compare: During voir dire in a murder case, an African-American college student voiced concern that the trial might interfere with his student teaching, which he needed to fulfill to graduate college. The student's dean was called and agreed to work with him on rescheduling. The prosecutor asked no further questions about the matter. Nevertheless, the prosecutor used a peremptory challenge to exclude the student. When the peremptory strike was challenged, the prosecutor explained that he was concerned that, because of the student's pressing educational needs, he would find the defendant guilty of a lesser charge to avoid a lengthy capital sentencing hearing. As a result of peremptory challenges and challenges for cause, no African-Americans were included in the final jury. *Held:* Because white jurors also stated that they had pressing needs but were not excluded, and because it is unlikely that one juror could shorten the trial (he would have to convince the other jurors to follow his lead), the prosecutor's rationale for the strike was just a pretext and should not have been upheld. [Snyder v. Louisiana, 552 U.S. 472 (2008)]

Note: The defendant need not be a member of the group excluded. [Powers v. Ohio, 499 U.S. 400 (1991)]

2) Defendants
It is also unconstitutional for a criminal ***defendant*** or the defendant's attorney to use peremptory challenges in a racially discriminatory manner. [Georgia v. McCollum, 505 U.S. 42 (1992)] The same rule probably applies to a defendant's peremptory strike based on gender.

d. Distinct and Significant Groups
A fair cross-section of the community must include minorities and women, and possibly other distinct and significant groups. A state may neither exclude women from jury duty nor automatically exempt them upon request. [Duren v. Missouri, 439 U.S. 357 (1979)]

4. Right to Impartial Jury

a. Right to Questioning on Racial Bias
A defendant is entitled to questioning on voir dire specifically directed to racial prejudice whenever race is inextricably bound up in the case. [Ham v. South Carolina, 409 U.S. 524 (1973)] In ***noncapital*** cases, the mere fact that the victim is white and the defendant is black is not enough to permit such questioning. [Ristaino v. Ross, 424 U.S. 589 (1976); Rosales-Lopez v. United States, 451 U.S. 182 (1982)] However, a ***capital*** defendant accused of an interracial crime is entitled to have prospective jurors informed of the victim's race and is entitled to voir dire questioning regarding the issue of racial prejudice. [Turner v. Murray, 476 U.S. 28 (1986)]

b. Juror Opposition to Death Penalty
In cases involving capital punishment, a state may not automatically exclude for cause all prospective jurors who express a doubt or scruple about the death penalty. [Witherspoon v. Illinois, 391 U.S. 510 (1968); Adams v. Texas, 448 U.S. 38 (1980)]

1) Standard—Impair or Prevent Performance
The standard for determining when a prospective juror should be excluded for cause is whether the juror's views would ***prevent or substantially impair*** the performance of his duties in accordance with his instructions and oath. [Wainwright v. Witt, 469 U.S. 412 (1985)] Thus, if a juror's doubts or scruples about the death penalty prevent or substantially impair the performance of his duties, he may be excluded from the jury, and the fact that this may result in a "death qualified" jury does not infringe on a defendant's constitutional rights. [Lockhart v. McCree, 476 U.S. 162 (1986)] However, if a juror has scruples about the death penalty, but could perform her duties and follow instructions, it is error to exclude the juror.

2) Improper Exclusion May Result in Reversal
A death sentence imposed by a jury from which a juror was improperly excluded is subject to automatic reversal. [Gray v. Mississippi, 481 U.S. 648 (1987)]

c. Juror Favoring Death Penalty
If a jury is to decide whether a defendant in a capital case is to be sentenced to death, the defendant must be allowed to ask potential jurors at voir dire if they would automatically give the death penalty upon a guilty verdict. A juror who answers affirmatively

should be excluded for cause because such a juror has indicated the same type of inability to follow jury instructions (as to mitigating circumstances) as a juror who has indicated an inability to impose the death penalty under any circumstances (*see supra*). [Morgan v. Illinois, 504 U.S. 719 (1992)]

d. Use of Peremptory Challenge to Maintain Impartial Jury

Peremptory challenges are not constitutionally required. Therefore, if a trial court refuses to exclude a juror for cause whom the court should have excluded, and the defendant uses a peremptory challenge to remove the juror, there is no constitutional violation. [Ross v. Oklahoma, 487 U.S. 81 (1988); United States v. Martinez-Salazar, 528 U.S. 304 (2000)]

5. Inconsistent Verdicts

Inconsistent jury verdicts (e.g., finding defendant guilty of some counts but not guilty on related counts or one defendant guilty and a co-defendant not guilty on the same evidence) are not reviewable. A challenge to an inconsistent verdict would be based upon pure speculation because it is impossible to tell on which decision the jury erred. [United States v. Powell, 469 U.S. 57 (1984)]

6. Sentence Enhancement

If substantive law provides that a sentence may be increased beyond the statutory maximum for a crime if additional facts (other than prior conviction) are proved, proof of the facts must be submitted to the jury and proved beyond reasonable doubt; the defendant's right to jury trial is violated if the judge makes the determination. [Apprendi v. New Jersey, 530 U.S. 466 (2000)] Moreover, because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. [Alleyne v. United States, 133 S. Ct. 2151 (2013)]

Examples: 1) The right to jury trial was violated where a statute allowed a defendant's sentence to be increased by 10 years if the sentencing judge found by a preponderance of the evidence that the crime was motivated by hate. [Apprendi v. New Jersey, *supra*]

2) Following a jury adjudication of a defendant's guilt of first degree murder, a trial judge is prohibited by the Sixth Amendment from determining whether aggravating factors justify imposition of the death penalty. The jury must make such a determination. [Ring v. Arizona, 536 U.S. 584 (2002)]

a. Guilty Pleas

The same general rule applies to sentencing enhancements after guilty pleas.

Example: Defendant pleaded guilty to kidnapping. Based on the facts admitted, under state law Defendant's maximum penalty was 53 months' imprisonment, but the judge found that Defendant acted with deliberate cruelty—an additional factor that allowed adding time to the standard sentence range—and imposed a 90-month sentence. Because the facts supporting Defendant's exceptional sentence were neither admitted by him nor found by a jury, his sentence violated the Sixth Amendment right to a trial by jury. [Blakely v. Washington, 542 U.S. 296 (2004)]

b. Fines
Determination of fines must also be based on facts found by a jury. [Southern Union Co. v. United States, 132 S. Ct. 2344 (2012)]
Example: Defendant was found guilty of storing a hazardous liquid on its property. The maximum fine for the violation was $50,000 per day. The sentencing officer found that the liquid had been stored on the property for 762 days and imposed a fine of over $38 million. The fine violated Defendant's Sixth Amendment right to a jury; Defendant had a right to have a jury determine how many days the liquid was stored. [Southern Union Co. v. United States, *supra*]

c. Harmless Error Test Applies
In deciding whether to overturn a sentence for failure to submit a sentencing factor to the jury, the harmless error test is applied. [Washington v. Recuenco, 548 U.S. 212 (2006)]

d. Distinguish—Judge May Decide Whether Sentences Run Consecutively
The Supreme Court has refused to extend the *Apprendi/Blakely* doctrine to the decision of whether sentences for multiple crimes are to run consecutively or concurrently. A state legislature may give to its judges (rather than the jury) the power to make such a decision even though it is based on the facts of the case. *Rationale:* Historically, judges have been entrusted with such decisions. The framers of the Constitution probably did not intend the Sixth Amendment's right to a jury trial to supplant this practice. [Oregon v. Ice, 555 U.S. 160 (2009)]

C. RIGHT TO COUNSEL

A defendant has a right to counsel under the Fifth and Sixth Amendments. The Fifth Amendment right applies at all custodial interrogations (*see* III.D., *supra*). The Sixth Amendment right applies at all ***critical stages*** of a prosecution after formal proceedings have begun (*see* III.C., *supra*), including trial. This includes the right of a defendant who does not require appointed counsel to choose who will represent him.

1. Remedy
Recall that if the defendant was entitled to a lawyer at trial, the failure to provide counsel results in ***automatic reversal of the conviction***, even without any showing of specific unfairness in the proceedings. Similarly, erroneous disqualification of privately retained counsel results in automatic reversal. However, at ***nontrial proceedings*** (such as a post-indictment lineup), the harmless error rule applies to deprivations of counsel. (*See* III.C.5., *supra*.)

2. Waiver of Right to Counsel at Trial and Right to Defend Oneself
A defendant has a right to represent himself ***at trial*** as long as his waiver is ***knowing and intelligent*** [Faretta v. California, 422 U.S. 806 (1975); Godinez v. Moran, 509 U.S. 389 (1993)] and he is ***competent*** to proceed pro se [Indiana v. Edwards, 554 U.S. 135 (2008)]. The Court has held that a waiver will be held to be voluntary and intelligent if the trial court finds—after carefully scrutinizing the waiver—that the defendant has a rational and factual understanding of the proceeding against him. The Court has not established the standard for determining whether the defendant is mentally competent. It has noted that a defendant may be mentally competent to stand trial and yet incompetent to represent himself, based on the trial judge's consideration of the defendant's emotional and psychological state.

Note: On appeal, a defendant has no right to represent himself. [Martinez v. Court of Appeal, 528 U.S. 152 (2000)]

3. Indigence and Recoupment of Cost

As indicated above, if the defendant is indigent, the state will provide an attorney. Indigence involves the present financial inability to hire counsel, but none of the right to counsel cases defines indigence precisely. In any case, judges generally are reluctant to refuse to appoint counsel because of the risk of reversal should the defendant be determined indigent. The state generally provides counsel in close cases of indigence, but it may then seek reimbursement from those convicted defendants who later become able to pay. [Fuller v. Oregon, 417 U.S. 40 (1974)]

4. Effective Assistance of Counsel

The Sixth Amendment right to counsel includes the right to effective counsel. The ineffective assistance claim is the most commonly raised constitutional claim. With this claim, the defendant seeks to secure not malpractice damages, but rather a reversal of his conviction and a new trial.

a. Effective Assistance Presumed

Effective assistance of counsel is ***presumed*** unless the adversarial process is so undermined by counsel's conduct that the trial cannot be relied upon to have produced a just result. [Strickland v. Washington, 466 U.S. 668 (1984)]

b. Right Extends to First Appeal

Effective assistance of counsel is also guaranteed on a first appeal as of right. [Evitts v. Lucey, 469 U.S. 387 (1985)]

c. Circumstances Constituting Ineffective Assistance

An ineffective assistance claimant must show:

(i) ***Deficient performance*** by counsel; and that

(ii) But for such deficiency, the ***result of the proceeding would have been different*** (e.g., defendant would not have been convicted or his sentence would have been shorter).

[Strickland v. Washington, *supra*] Typically, such a claim can be made out only by specifying particular errors of trial counsel, and cannot be based on mere inexperience, lack of time to prepare, gravity of the charges, complexity of defenses, or accessibility of witnesses to counsel. [United States v. Cronic, 466 U.S. 648 (1984)]

Example: The Sixth Amendment right to counsel was violated when an attorney failed to timely file a motion to suppress evidence [Kimmelman v. Morrison, 477 U.S. 365 (1986)]; or failed to file a timely notice of appeal [Evitts v. Lucey, 469 U.S. 387 (1985)]. Sixth Amendment rights were also violated in a death penalty case when trial counsel failed to fully investigate the defendant's life history and had reason to believe that the investigation would turn up mitigating circumstances [Wiggins v. Smith, 539 U.S. 510 (2003)], and when defense counsel failed to look at the case

file of defendant's prior crime that the prosecution had indicated would be central to proving aggravating circumstances justifying imposition of the death penalty, even when family members and the defendant himself have suggested that no mitigating evidence is available [Rompilla v. Beard, 545 U.S. 374 (2005)].

1) Plea Bargain Cases

The Sixth Amendment requires effective assistance at all critical stages of a prosecution. Because the plea stage is a critical stage, *Strickland* applies to plea bargain cases as well as cases that go to trial. In a plea bargain case, the defendant must show deficient performance and a reasonable possibility that the outcome of the plea process would have been different with competent advice. An attorney's failure to notify a defendant of a plea offer can constitute deficient performance if the defendant can show that had the plea agreement been communicated he likely would have accepted, and the plea likely would have been entered without the prosecutor's canceling it. [Missouri v. Frye, 132 S. Ct. 1399 (2012)] Moreover, deficiencies in counsel at this stage are not obviated by the fact that the defendant subsequently has a fair trial (after turning down a plea offer). [Lafler v. Cooper, 132 S. Ct. 1376 (2012)]

Example: Defendant was charged with assault with intent to murder. He was offered a sentence of 51 - 85 months in exchange for a guilty plea. His attorney advised him to reject the plea, erroneously suggesting that the state could not prove intent to kill, since the victim was shot below the waist. At trial, Defendant was found guilty and received the minimum 185 - 360 month sentence. Defendant's Sixth Amendment right to counsel was violated. [Lafler v. Cooper, *supra*]

2) Deportation Risk

It is constitutionally deficient for counsel not to inform a client whether his plea carries a risk of deportation. When the deportation risk is clear under the law, counsel has a duty to give correct advice. If the law is not straightforward, counsel must advise the client that pending criminal charges may carry a risk of deportation. [Padilla v. Kentucky, 559 U.S. 356 (2010)]

d. Circumstances Not Constituting Ineffective Assistance

Circumstances not constituting ineffective assistance include:

1) Trial Tactics

Courts will not grant relief for any acts or omissions by counsel that they view as trial tactics.

Examples: 1) It was not ineffective assistance in a capital murder trial to fail to obtain a client's affirmative consent to the strategy of going to trial and not challenging guilt (rather than pleading guilty) in hopes of having more credibility at sentencing. [Florida v. Nixon, 543 U.S. 175 (2005)]

2) It was not ineffective assistance when appointed counsel for an indigent defendant refused to argue nonfrivolous issues that

the attorney had decided, in the exercise of her judgment, not to present. [Jones v. Barnes, 463 U.S. 745 (1983)]

3) It was not ineffective assistance when an attorney failed to present mitigating evidence or make a closing argument at a capital sentencing proceeding when counsel asserted that mitigating evidence had just been presented at trial, the defendant's mother and other character witnesses would not have been effective and might have revealed harmful information, and a closing argument would have allowed rebuttal by a very persuasive lead prosecutor. [Bell v. Cone, 535 U.S. 685 (2002)]

2) Failure to Raise Constitutional Claim that Is Later Invalidated
The failure of a defendant's counsel to raise a federal constitutional claim that was the law at the time of the proceeding but that was later overruled does not prejudice the defendant within the meaning of the Sixth Amendment and does not constitute ineffective assistance of counsel. [Lockhart v. Fretwell, 506 U.S. 364 (1993)]

5. Conflicts of Interest
Joint representation (i.e., a single attorney representing co-defendants) is not per se invalid. However, if an attorney advises the trial court of a resulting conflict of interest at or before trial, and the court refuses to appoint separate counsel, the defendant is entitled to ***automatic reversal***. [Holloway v. Arkansas, 435 U.S. 475 (1978); Cuyler v. Sullivan, 446 U.S. 335 (1980)] If the defendant does not object to joint representation in a timely manner, to obtain reversal the defendant must show that the attorney ***actively*** represented conflicting interests and thereby prejudiced the defendant. [Burger v. Kemp, 483 U.S. 776 (1987)]

a. Conflict with Attorney Is Rarely Ground for Relief
A defendant can rarely obtain relief by claiming a conflict of interest between himself and counsel. Conflicts between a defendant and his attorney are best analyzed as claims of ineffective assistance of counsel. To be successful, the defendant must demonstrate that the conflict with his attorney was so severe that the attorney could not effectively investigate or present the defendant's claims.

b. No Right to Joint Representation
While a defendant ordinarily has the right to counsel of her own choosing, a defendant has no right to be jointly represented with her co-defendants. Trial courts have the authority to limit joint representation to avoid potential and actual conflicts of interest. Even when all of the defendants waive any claim to conflicts of interest, the trial court can still prohibit the joint representation. [Wheat v. United States, 486 U.S. 153 (1988)]

6. Right to Support Services for Defense
Where a defendant has made a preliminary showing that he is likely to be able to use the insanity defense, the state must provide a psychiatrist for the preparation of the defense. Where a state presents evidence that the defendant is likely to be dangerous in the future, the defendant is entitled to psychiatric examination and testimony in the sentencing proceeding. [Ake v. Oklahoma, 470 U.S. 68 (1985)]

7. Seizure of Funds Constitutional
The right to counsel does not forbid the seizure—under the federal drug forfeiture statute [21 U.S.C. §853]—of drug money and property obtained with drug money, even when such money and property were going to be used by the defendant to pay his attorney of choice. [Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989)]

8. Right Limited While Testifying
A defendant has a general right to consult with his attorney during the course of trial; however, he has no right to consult with his attorney while he is testifying. Whether a defendant has a right to consult with his attorney during breaks in his testimony depends on the character of the break. Generally, the longer the break, the more likely the Court will find the right. [*Compare* Geders v. United States, III.C.1., *supra*—defendant must be allowed to talk with attorney during overnight break in defendant's testimony because ordinary trial tactics can be, and usually are, discussed during such breaks—*with* Perry v. Leeke, 488 U.S. 272 (1989)—sequestration during 15-minute break between defendant's direct testimony and cross-examination permissible because cross-examination of uncounseled witness more likely to lead to truth]

D. RIGHT TO CONFRONT WITNESSES

The Sixth Amendment grants to the defendant in a criminal prosecution the right to confront adverse witnesses. This right, held applicable to the states in *Pointer v. Texas*, 380 U.S. 400 (1965), seeks to ensure that:

(i) The fact finder and the defendant ***observe the demeanor*** of the testifying witness; and

(ii) The defendant has the opportunity to ***cross-examine*** any witness testifying against him.

The defendant is entitled to a face-to-face encounter with the witness, but absence of face-to-face confrontation between the defendant and the accuser does not violate the Sixth Amendment when preventing such confrontation serves an important public purpose (such as insulating a child witness from trauma) and the reliability of the witness's testimony is otherwise assured. [Maryland v. Craig, 497 U.S. 836 (1990)]

1. Right Not Absolute

a. Disruptive Defendant
A defendant has no absolute right to confront witnesses, as a judge may remove a disruptive defendant. [Illinois v. Allen, 397 U.S. 337 (1970)]

b. Voluntarily Leaving Courtroom
A defendant has not been deprived of his right of confrontation if he voluntarily leaves the courtroom during the trial, and the trial continues in his absence. [Taylor v. United States, 414 U.S. 17 (1974)]

c. Government May Discourage Attendance
Government action that has an effect of discouraging a defendant's attendance at trial will not necessarily violate the right to attend and confront witnesses.

Example: Defendant attended his trial and testified in his own defense as the last witness. On summation, the prosecutor commented to the jury that they should consider that by choosing to testify last, defendant had an opportunity to listen to all of the other witnesses and adjust his testimony accordingly. After he was convicted, defendant claimed that the prosecutor's summation was unconstitutional because it used defendant's constitutionally protected right to attend trial as a tool to impeach his credibility and so would have the effect of discouraging attendance. The Supreme Court held that the right to attend may be burdened and upheld the conviction. [Portuondo v. Agard, 529 U.S. 61 (2000)]

2. Introduction of Co-Defendant's Confession

A right of confrontation problem develops with the introduction of a co-defendant's confession because of the inability of the nonconfessing defendant to compel the confessing co-defendant to take the stand for cross-examination at their joint trial.

a. General Rule—Confession Implicating Co-Defendant Prohibited

If two persons are tried together and one has given a confession that implicates the other, the right of confrontation prohibits the use of that statement, even with instructions to the jury to consider it only as going to the guilt of the "confessing" defendant. [Bruton v. United States, 391 U.S. 123 (1968)] A co-defendant's confession is inadmissible even when it interlocks with the defendant's own confession, which is admitted. [Cruz v. New York, 481 U.S. 186 (1987)]

b. Exceptions

Such a statement may be admitted if:

1) All portions referring to the other defendant can be eliminated. *Note:* It is not sufficient merely to insert a blank or some other substitution for the name of the other defendant; the redaction must not indicate the defendant's involvement. [*Compare* Richardson v. Marsh, 481 U.S. 200 (1987)—after redaction, confession indicated that defendant and a third party (who was not a co-defendant) participated in the crime and contained no indication of co-defendant's involvement, *with* Gray v. Maryland, 523 U.S. 185 (1998)—redaction "me, deleted, deleted, and a few other guys killed" the victim held to clearly refer to co-defendant];

2) The confessing defendant takes the stand and subjects himself to cross-examination with respect to the truth or falsity of what the statement asserts. This rule applies even if he denies having ever made the confession. [Nelson v. O'Neil, 402 U.S. 622 (1973)] In effect, an opportunity at trial to cross-examine the hearsay declarant with respect to the underlying facts makes the declaration nonhearsay for purposes of the Confrontation Clause; or

3) The confession of the nontestifying co-defendant is being used to rebut the defendant's claim that his confession was obtained coercively. The jury must be instructed as to the purpose of the admission. [Tennessee v. Street, 471 U.S. 409 (1985)]

3. Prior Testimonial Statement of Unavailable Witness

Under the Confrontation Clause, prior testimonial evidence (e.g., statements made at prior judicial proceedings) may ***not*** be admitted unless:

(i) The declarant is ***unavailable***; and

(ii) The defendant had an ***opportunity to cross-examine*** the declarant at the time the statement was made.

[Crawford v. Washington, 541 U.S. 36 (2004)]

Example: Crawford and his wife, Sylvia, confronted Lee at his apartment after Lee allegedly attempted to rape Sylvia. A fight ensued and Crawford stabbed Lee. Crawford was charged with assault and attempted murder. At trial, Crawford testified that he thought that Lee had reached for something in his pocket before Crawford stabbed him and that the stabbing was in self-defense. To negate this claim, the prosecution introduced a recording of Sylvia's statement to the police indicating that Lee's hands may have been out and open while he was being stabbed. Under state law, Crawford has a privilege that prevents Sylvia from testifying at trial. Crawford objects to introduction of the recording. Although Sylvia's statement would be admissible under the hearsay exception for statements made against penal interest—because she led Crawford to Lee's apartment and facilitated the assault—it is inadmissible under the Confrontation Clause because there was no opportunity for cross-examination here (i.e., Crawford was not present and able to examine Sylvia when the police were questioning her). [Crawford v. Washington, *supra*]

a. What Is "Testimonial"?

In *Crawford*, the Supreme Court did not provide a comprehensive definition of the term "testimonial," raising many questions for both state and federal judges as to the reach of the Court's ruling. However, the Court held that, at a minimum, the term includes testimony from a preliminary hearing, grand jury hearing, former trial, or police interrogation.

1) Police Interrogation

Statements made in response to police interrogation are nontestimonial when made under circumstances indicating that the primary purpose of the interrogation is to enable the police to respond to an ongoing emergency, but statements are testimonial when there is no ongoing emergency and the primary purpose of the interrogation is to establish or prove past acts.

Example: A domestic battery victim called 911 to report that she was being beaten. The operator asked whether the victim knew the name of her assailant, and the victim provided defendant's name. Defendant was apprehended and charged. The victim did not appear at defendant's trial, but the prosecutor sought to introduce the 911 tape. Defendant objected, claiming a Confrontation Clause violation. The Supreme Court held that the response to the question about the assailant's name was nontestimonial because it was given to

enable the police to respond to an ongoing emergency. [Davis v. Washington, 547 U.S. 813 (2006)]

Compare: In a companion case to *Davis*, the police had responded to a domestic battery complaint. When they arrived at defendant's home, his wife—the complainant—met them at the door and told them that everything was fine. She nevertheless invited the officers into the home. While one officer kept defendant busy in the kitchen, the other officer questioned the wife and got her to fill out and sign a battery affidavit. Defendant was then arrested. The wife did not appear at defendant's trial but the prosecutor offered her affidavit of battery into evidence over defendant's Confrontation Clause objection. *Held:* The wife's statements were testimonial, as the affidavit was made as part of an investigation into past criminal conduct and no emergency was in progress when the police arrived. [Hammon v. Indiana, 547 U.S. 813 (2006)]

2) Statements to Individuals Who Are Not Law Enforcement

Statements to individuals other than law enforcement officers are subject to the Confrontation Clause. However, statements made to individuals who are not principally charged with uncovering and prosecuting crimes are significantly less likely to be testimonial than statements given to police officers. [Ohio v. Clark, 135 S. Ct. 2173 (2015)]

Example: Defendant watched his girlfriend's children while she was out of town. Preschool teachers noticed that one of the children, a three-year-old boy, had injuries and asked him who caused them. The boy identified Defendant as his abuser. At Defendant's trial, the prosecution introduced the boy's statements to his teachers as evidence of Defendant's guilt, but the boy did not testify. Defendant moved to exclude the boy's statements under the Confrontation Clause. The Supreme Court held that the boy's statements were nontestimonial because the purpose of the conversation with his teachers was to protect the boy from further abuse rather than to gather evidence for Defendant's prosection. [Ohio v. Clark, *supra*]

3) Results of Forensic Lab Testing

If results of forensic lab tests are offered for proof of the matter asserted, they are testimonial in nature and inadmissible unless the person who did the testing is made available for cross-examination. [Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009)] However, lab test results that are not offered for the proof of the matter asserted raise no Confrontation Clause issue. [Williams v. Illinois, 132 S. Ct. 2221 (2012)]

Example: A report was offered into evidence that a white powder obtained from Defendant was cocaine. Such a report is offered to prove the truth of the matter asserted in the report. Therefore, it is testimonial and inadmissible under the Confrontation Clause unless the person who did the testing is made available for cross-examination. [Melendez-Diaz v. Massachusetts, *supra*]

Compare: At trial, an expert testified that the results of a DNA test of a sample from a crime victim performed at a private lab matched the DNA test of a sample obtained from Defendant and performed at a state forensic lab. The state forensic technician had testified as to her procedures. Since the expert was not testifying as to the truth of the private lab's results, but rather only that the lab's results matched the results from that state lab, the private lab results were not being offered to prove the truth of the matter asserted, so there was no Confrontation Clause issue as to the results. It has long been the rule that scientific experts can render opinions on facts they do not personally know but that are made known to them for purposes of litigation. [Williams v. Illinois, *supra*]

b. Forfeiture by Wrongdoing

A defendant can be held to have forfeited a Confrontation Clause claim by wrongdoing. However, the Court will not find a forfeiture by wrongdoing unless the wrongdoing was intended to keep the witness from testifying. [Giles v. California, 554 U.S. 353 (2008)]

Example: Defendant shot Victim, his ex-girlfriend, six times, and she died as a result. At Defendant's murder trial, he claimed that Victim threatened him first and was coming toward him to mount an attack. To rebut this claim, the prosecution offered testimony that Victim had made in a complaint to the police three weeks before her death, alleging that Defendant beat her and choked her. Defendant objected to introduction of Victim's statements to the police, claiming that their admission would violate his confrontation rights. *Held:* Absent a finding that Defendant killed Victim with the intent to keep her from testifying, the forfeiture by wrongdoing exception to the Confrontation Clause's requirements does not apply and it would, therefore, be improper to admit Victim's statements into evidence. [Giles v. California, *supra*]

E. BURDEN OF PROOF, SUFFICIENCY OF EVIDENCE, AND JURY INSTRUCTIONS

1. Burden of Proof

a. Proof Beyond a Reasonable Doubt

The Due Process Clause requires in all criminal cases that the state prove guilt beyond a reasonable doubt. [*In re* Winship, 397 U.S. 358 (1970)] The prosecution must have the burden of proving the elements of the crime charged. Thus, the Supreme Court has held that if "malice aforethought" is an element of murder, the state may not require the defendant to prove that he committed the homicide in the heat of passion, on the rationale that this would require the defendant to disprove the element of malice aforethought. [Mullaney v. Wilbur, 421 U.S. 684 (1975)] However, a state may impose the burden of proof upon the defendant in regard to an ***affirmative defense*** such as insanity [Leland v. Oregon, 343 U.S. 790 (1952)] or self-defense [Martin v. Ohio, 480 U.S. 228 (1987)].

Example: Under state law, in a prosecution for second degree murder, the state must prove intentional causing of death. A defendant is entitled to acquittal of second degree murder and conviction of manslaughter if

he proves by a preponderance of the evidence that he acted under the influence of "an extreme emotional disturbance." May the burden of proving that be placed on the defendant? Yes, because it does not affect the state's obligation to prove all elements of the crime of second degree murder. [Patterson v. New York, 432 U.S. 197 (1977)]

b. Presumption of Innocence

Although not mentioned in the Constitution, the presumption of innocence is a basic component of a fair trial. A defendant does not have an absolute right to a jury instruction on the presumption of innocence, but the trial judge should evaluate the totality of the circumstances, including (i) the other jury instructions, (ii) the arguments of counsel, and (iii) whether the weight of the evidence was overwhelming, to determine whether such an instruction is necessary for a fair trial. [Kentucky v. Whorton, 441 U.S. 786 (1979)]

2. Presumptions

A permissive presumption allows, but does not require, the jury to infer an element of an offense from proof by the prosecutor of the basic fact, while the jury must accept a mandatory presumption even if it is the sole evidence of the elemental fact.

a. Permissive Presumptions—Rational Relation Standard

A permissive presumption must comport with the standard that there be a rational connection between the basic facts that the prosecution proved and the ultimate fact presumed, and that the latter is more likely than not to flow from the former. [Ulster County Court v. Allen, 442 U.S. 140 (1979)]

b. Mandatory Presumptions Unconstitutional

A mandatory presumption or a presumption that shifts the burden of proof to the defendant violates the Fourteenth Amendment's requirement that the state prove every element of a crime beyond a reasonable doubt. [Sandstrom v. Montana, 442 U.S. 510 (1979)]

Examples: 1) A mandatory presumption was created by jury instructions in a "malice murder" trial which stated that the "acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted," and a "person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." These instructions are unconstitutional because they would lead a reasonable juror to conclude that the state's burden of proof on intent to kill may be inferred from proof of the defendant's acts unless the defendant proves otherwise. [Francis v. Franklin, 471 U.S. 307 (1985)]

2) In a criminal contempt proceeding for failure to pay child support, the state may not presume that the defendant was able to pay the amount due. One of the elements of contempt is the ability to comply with the court's order. Thus, the state may not presume ability to pay, but rather ability to pay must be proved beyond a reasonable doubt. [Hicks v. Feiock, 485 U.S. 624 (1988)]

3. Sufficiency of Evidence

The requirement of proof beyond a reasonable doubt in the Due Process Clause means that the sufficiency of the evidence supporting a criminal conviction in state court is, to some extent, a federal constitutional issue. Due process is violated if, viewing all the evidence in the light most favorable to the prosecution, no rational judge or jury would have found the defendant guilty of the crime of which he was convicted. [Jackson v. Virginia, 443 U.S. 307 (1979)]

a. Confessions Must Be Corroborated

A criminal conviction cannot rest entirely on an uncorroborated extrajudicial confession. If the defendant does not admit guilt in court, the prosecution must introduce extrinsic evidence that, at the least, tends to establish the trustworthiness of the admission. [Wong Sun v. United States, V.A.2.b.2),*supra;* Opper v. United States, 384 U.S. 84 (1954)]

4. Prior Act Evidence

Under the Due Process Clause, as a general constitutional rule, prior act evidence is admissible for various purposes if it is probative and relevant. Thus in a criminal trial evidence of prior bodily injury was admissible to show that a child victim had sustained repeated and/or serious injuries by nonaccidental means (the "battered child syndrome") to infer that the victim's death was not accidental, even though there was no direct evidence linking the prior injuries to the defendant. [Estelle v. McGuire, 502 U.S. 62 (1991)]

5. Right to Present Defensive Evidence

Due process requires an opportunity to establish innocence.

Example: The arbitrary exclusion of a class of defense witnesses violates both due process and the right to compel the production of witnesses on one's own behalf.

a. Application—Barring Claim that Third Party Committed Crime

A state cannot impose a rule prohibiting a defendant from suggesting that a third party committed the crime whenever there is strong forensic evidence of the defendant's guilt. [Holmes v. South Carolina, 547 U.S. 319 (2006)] Proffered evidence can be excluded if it is shown to be flawed, but not merely because of the perceived strength of the prosecutor's case.

b. Application—Exclusionary Rules of Evidence

Even exclusionary rules of evidence that are valid on their face may combine to deprive a defendant of a fair opportunity to rebut the prosecution's case.

Examples: 1) Given the right to an acquittal if there is reasonable doubt on any element of a criminal charge, a defendant is denied a fair trial when the state's hearsay rule prevents him from showing that another person has confessed to the crime for which he is being tried, and where the state's rule against impeaching one's own witness prevents the defendant from even using the prior confession to cast doubt on the credibility of the confessor's unexpectedly damning testimony. [Chambers v. Mississippi, 410 U.S. 284 (1973)]

2) A state's per se rule excluding hypnotically refreshed testimony unconstitutionally infringes on a defendant's right to present testimony on his own behalf. A per se rule excludes even testimony that may be reliable. [Rock v. Arkansas, 483 U.S. 44 (1987)]

c. Exclusion as Sanction
A trial court may, however, exclude defense evidence as a sanction for the defendant's violation of discovery rules or procedures. For example, if the defendant's attorney fails to give advance notice that a witness will testify, the trial court may prohibit that witness from testifying. [Taylor v. Illinois, 484 U.S. 400 (1988)]

6. Jury Instructions
A judge is to give a jury instruction requested by the defendant or the prosecution if: the instruction (i) is correct, (ii) has not already been given, and (iii) is supported by some evidence. If an instruction fails any of the above tests, it need not be given merely because it is the defendant's theory of defense.

VIII. GUILTY PLEAS AND PLEA BARGAINING

A. GUILTY PLEA WAIVES RIGHT TO JURY TRIAL
A guilty plea is a waiver of the Sixth Amendment right to jury trial. Between 70% and 95% of all criminal cases are settled by guilty pleas.

B. BASIC TRENDS

1. Intelligent Choice Among Alternatives
The Court from 1970 to the present has indicated an unwillingness to disturb a guilty plea it views as an intelligent choice among the defendant's alternatives on the advice of counsel.

2. Contract View
There is a trend toward the contract view of plea negotiation and bargaining. In this view, the plea agreement should be revealed in the record of the taking of the plea and its terms enforced against both the prosecutor and the defendant. [Ricketts v. Adamson, 483 U.S. 1 (1987)]

C. TAKING THE PLEA

1. Advising Defendant of the Charge, the Potential Penalty, and His Rights
The judge must determine that the plea is ***voluntary and intelligent.*** This must be done by addressing the defendant personally in open court ***on the record***. [McCarthy v. United States, 394 U.S. 459 (1969); Boykin v. Alabama, 395 U.S. 238 (1969)] Specifically, the judge must be sure that the defendant knows and understands things like:

(i) ***The nature of the charge*** to which the plea is offered and the ***crucial elements*** of the crime charged [Henderson v. Morgan, 426 U.S. 637 (1976)—plea involuntary if defendant not informed that intent is an element of the murder charge against him];

(ii) The ***maximum possible penalty*** and any ***mandatory minimum*** (but the failure to explain special parole terms is not fatal [United States v. Timmreck, 441 U.S. 780 (1979)]); and

(iii) That he has a ***right not to plead guilty*** and that, if he does, he ***waives the right to trial***.

a. Attorney May Inform Defendant
The judge need not personally explain the elements of each charge to the defendant on the record. Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own counsel. [Bradshaw v. Stumpf, 545 U.S. 175 (2005)]

b. Unfairly Informed Defendant Not Bound
If counsel makes unfair representations to the defendant concerning the result of the defendant's pleading guilty, and the defendant can prove this, the defendant is not bound by her record answer, obtained at the plea taking, that her counsel made no such representations. [Blackledge v. Allison, 431 U.S. 63 (1977)]

2. Remedy
The remedy for a failure to meet the standards for taking a plea is withdrawal of the plea and ***pleading anew***.

3. Factual Basis for Plea Not Constitutionally Required
There is no general requirement that the record contain evidence of the defendant's guilt or other factual basis for the plea. (*But see* D.1., below.)

D. COLLATERAL ATTACKS ON GUILTY PLEAS AFTER SENTENCE

Those pleas that are seen as an intelligent choice among the defendant's alternatives are immune from collateral attack.

Examples: 1) A plea is not involuntary merely because it was induced by a fear of the death penalty, which could be imposed only after a jury trial. Fear of the death penalty is like fear of any other penalty, which is the reason defendants plead guilty. [Brady v. United States, 397 U.S. 742 (1970)]

2) Fear of a coerced confession in the hands of the state will not support a collateral attack, and the defendant will be bound to his choice to plead guilty. If the defendant thought the confession was coerced, he should have made a motion to suppress; if he did not, the court will think it was because he believed he could not win. [McMann v. Richardson, 397 U.S. 759 (1970)]

3) Unconstitutional, systematic, racial exclusion in the indicting grand jury will not entitle the defendant to collateral relief. Here also, the Court views the choice not to object and to plead guilty as the result of the defendant's informed decision as to what course would be in his best interest. [Tollett v. Henderson, 411 U.S. 258 (1973)]

1. Plea Offered by Defendant Who Denies Guilt
When a defendant pleads guilty despite protesting his innocence, the plea will be seen as an

intelligent choice by the defendant, and withdrawal of the plea will not be permitted when there is other strong evidence of guilt in the record. Admission of guilt is not a constitutional requisite to imposition of criminal penalty. [North Carolina v. Alford, 400 U.S. 25 (1970)]

2. Bases for an Attack on a Guilty Plea After Sentence

a. Plea Involuntary
Failure to meet the constitutional standards for taking a guilty plea will support a post-sentence attack on the plea.

b. Lack of Jurisdiction
The defendant may withdraw his plea if the court lacked jurisdiction to take the plea, or if prosecution for the offense for which the plea was offered is barred by double jeopardy. [Menna v. New York, 423 U.S. 61 (1975)]

c. Ineffective Assistance of Counsel
Ineffective assistance of counsel undercuts the assumption of an intelligent choice among the defendant's alternatives on the advice of counsel. Therefore, a defendant may successfully attack a guilty plea on the ground that he received ineffective assistance of counsel if, ***but for counsel's errors, the defendant probably would not have pleaded guilty*** and instead would have insisted on going to trial. [Hill v. Lockhart, 474 U.S. 52 (1985)]

d. Failure to Keep the Plea Bargain
See E.1., below.

E. PLEA BARGAINING

1. Enforcement of the Bargain
A defendant who enters into a plea bargain has a right to have that bargain kept. The plea bargain will be ***enforced against the prosecutor and the defendant***, ***but not against the judge***, who does not have to accept the plea.

a. Prosecution
If the prosecution does not keep the bargain, the court should decide whether the circumstances require specific performance of the plea agreement or whether the defendant should be granted an opportunity to withdraw her guilty plea. [Santobello v. New York, 404 U.S. 257 (1971)] However, if the prosecutor withdraws a proposed plea bargain and the accused subsequently pleads guilty on other terms, the original offer cannot be specifically enforced despite the accused's attempt to "accept" the offer. [Mabry v. Johnson, 467 U.S. 504 (1984)]

b. Defendant
If the defendant does not live up to the plea agreement, his plea and sentence can be vacated.

Example: D agrees to testify against a co-defendant in exchange for a reduction in charges from first to second degree murder. If D fails to testify, the prosecution can have D's plea and sentence vacated and reinstate the first degree murder charge. [Ricketts v. Adamson, B.2., *supra*]

2. Power of the State to Threaten More Serious Charge
Consistent with the contract theory of plea negotiation, the state has the power to drive a hard bargain. A guilty plea is not involuntary merely because it was entered in response to the prosecution's threat to charge the defendant with a more serious crime if she does not plead guilty. [Bordenkircher v. Hayes, 434 U.S. 357 (1978)]

3. Power to Charge More Serious Offense
The Supreme Court has held that there is no prosecutorial vindictiveness in charging a more serious offense when defendant demands a jury trial. [United States v. Goodwin, 457 U.S. 368 (1982)]

4. Admission of Statements Made in Connection with Plea Bargaining
Under the Federal Rules of Evidence and of Criminal Procedure, statements made by a defendant in the course of unsuccessful plea negotiations are inadmissible at trial. However, such statements can be admitted ***if*** the defendant has knowingly and voluntarily waived the Federal Rules' exclusionary provisions. [United States v. Mezzanatto, 513 U.S. 196 (1995)]

5. No Right to Impeachment or Affirmative Defense Evidence
Defendants are ***not*** entitled either to impeachment evidence or to evidence relevant to affirmative defenses prior to entering a plea agreement. Failure to provide such evidence does not make a plea involuntary. [United States v. Ruiz, 536 U.S. 622 (2002)]

F. COLLATERAL EFFECTS OF GUILTY PLEAS

1. Conviction May Be Used in Other Proceedings
The Supreme Court has held that evidence of a defendant's conviction, based on a guilty plea in one state, may be introduced at trial in a second state for the purpose of proving a "specification" allowing imposition of the death penalty [Marshall v. Lonberger, 459 U.S. 422 (1983)], and a defendant is "convicted" within the meaning of the firearms disabilities provisions of the 1968 Gun Control Act when the defendant pleads guilty to a state charge punishable by more than one year, even if no formal judgment is entered and the record has been expunged. [Dickerson v. New Banner Institute, 460 U.S. 103 (1983)]

2. Does Not Admit Legality of Search
The Court has decided that a defendant's guilty plea neither admits the legality of the incriminating search nor waives Fourth Amendment claims in a subsequent civil damages action challenging the constitutionality of the incriminating search. [Haring v. Prosise, 462 U.S. 306 (1983)]

IX. CONSTITUTIONAL RIGHTS IN RELATION TO SENTENCING AND PUNISHMENT

A. PROCEDURAL RIGHTS IN SENTENCING

1. Right to Counsel
Sentencing is usually a "critical stage" of a criminal proceeding, thus requiring the assistance of counsel, as substantial rights of the defendant may be affected.

Examples: 1) The absence of counsel during sentencing after a plea of guilty, coupled with the judge's materially untrue assumptions concerning a defendant's criminal record, deprived the defendant of due process. [Townsend v. Burke, 334 U.S. 736 (1984)]

2) The absence of counsel at the time of sentencing where no sentence of imprisonment was imposed, but the defendant was put on probation, deprived the defendant of due process because certain legal rights (i.e., the right to appeal) might be lost by failing to assert them at this time. [Mempa v. Rhay, III.C.1., *supra*]

2. Right to Confrontation and Cross-Examination
The ***usual*** sentence may be based on hearsay and uncross-examined reports. [Williams v. New York, 337 U.S. 241 (1949)]

a. "New" Proceeding
Where a magnified sentence is based on a statute (e.g., one permitting indeterminate sentence) that requires new findings of fact to be made (e.g., that defendant is a habitual criminal, mentally ill, or deficient, etc.), those facts must be found in a context that grants the right to confrontation and cross-examination. [Specht v. Patterson, 386 U.S. 605 (1966)]

b. Capital Sentencing Procedures
It is clear that a defendant in a death penalty case must have more opportunity for confrontation than need be given a defendant in other sentencing proceedings. [Gardner v. Florida, 430 U.S. 349 (1977)—sentence of death based in part upon report not disclosed to defendant invalid]

B. RESENTENCING AFTER SUCCESSFUL APPEAL AND RECONVICTION

1. General Rule—Record Must Show Reasons for Harsher Sentence
If a judge imposes a greater punishment than at the first trial after the defendant has successfully appealed and then is reconvicted, she must set forth in the record the reasons for the harsher sentence based on "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceedings." [North Carolina v. Pearce, 395 U.S. 711 (1969)] The purpose of this requirement is to ensure that the defendant is not vindictively penalized for exercising his right to appeal.

Note: When a defendant successfully appeals, an exception to the Double Jeopardy Clause permits retrial. (*See* XIII.B.3., *infra*.)

2. Exceptions

a. Reconviction upon Trial De Novo
Some jurisdictions grant the defendant the right to a trial de novo as a matter of course after a trial in an inferior court. A trial de novo involves a fresh determination of guilt or innocence without reference to the lower conviction or fact of appeal. The rationale of *Pearce* does not apply when the defendant receives a greater sentence upon a trial

de novo, because the new judge reduces the likelihood of vindictiveness. [Colten v. Kentucky, 407 U.S. 104 (1972)]

b. Jury Sentencing
Pearce does not apply to states that use jury sentencing, unless the second jury was told of the first jury's sentence. [Chaffin v. Stynchcombe, 412 U.S. 17 (1973)]

3. Recharging in a Trial De Novo
The prosecutor may not obtain an indictment for a more serious charge in a trial de novo, because of the possibility of prosecutorial vindictiveness and retaliation for exercising the statutory right to a trial de novo. [Blackledge v. Perry, 417 U.S. 21 (1974)]

C. SUBSTANTIVE RIGHTS IN REGARD TO PUNISHMENT

1. Criminal Penalties Constituting "Cruel and Unusual Punishment"
The Eighth Amendment prohibition against cruel and unusual punishment places several limitations upon criminal punishments.

a. Punishment Grossly Disproportionate to Offense
A penalty that is grossly disproportionate to the seriousness of the offense committed is cruel and unusual.

Examples: 1) D, convicted of falsifying a public record, received a sentence of 20 years' imprisonment at hard labor. Did this violate the Eighth Amendment? Yes, because the penalty was so disproportionate to the offense. [Weems v. United States, 217 U.S. 349 (1910)]

2) A sentence of life imprisonment without the possibility of parole imposed upon a recidivist following conviction of his seventh nonviolent felony, the uttering of a bad check, is significantly disproportionate to the crime and is thus a violation of the Eighth Amendment. The unconstitutional taint is not eliminated by the possibility of commutation which, unlike parole, is granted on an ad hoc, standardless basis. [Solem v. Helm, 463 U.S. 277 (1983)]

Compare: 1) A mandatory life sentence for possession of a certain quantity of cocaine (650 grams—indicating that the defendant was a dealer) is ***not*** cruel and unusual, even though the statute did not allow consideration of mitigating factors (*compare* death penalty cases, below). [Harmelin v. Michigan, 501 U.S. 957 (1991)]

2) A California "three strikes" law requires imposition of an indeterminate life sentence after a person is found guilty of a felony if the person has previously been convicted of two or more serious or violent felonies. Defendant was convicted of stealing three golf clubs worth $399 each. Although the trial judge had discretion to treat the crime as either felony grand theft or a misdemeanor, she treated the theft as a felony and sentenced Defendant to 25 years to life because he had four previous serious felony convictions. *Held:* The sentence does not constitute cruel and unusual punishment. [Ewing v. California, 538 U.S. 11 (2003)]

b. Proportionality—No Right to Comparison of Penalties in Similar Cases
The Eighth Amendment does not require state appellate courts to compare the death sentence imposed in a case under appeal with other penalties imposed in similar cases. [Pulley v. Harris, 465 U.S. 37 (1984)]

c. Death Penalty

1) For Murder
The death penalty is not inherently cruel and unusual punishment, but the Eighth Amendment requires that it be imposed only under a ***statutory scheme*** that gives the judge or jury reasonable ***discretion,*** full ***information*** concerning defendants, and ***guidance*** in making the decision. [Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976)]

a) Discretion
A jury must be allowed discretion to consider mitigating circumstances in death penalty cases. Thus, a statute cannot make the death penalty mandatory upon conviction of first degree murder [Woodson v. North Carolina, 428 U.S. 280 (1976)], or for the killing of a police officer or firefighter [Roberts v. Louisiana, 431 U.S. 633 (1977)], or for a killing by an inmate who is serving a life sentence [Sumner v. Shuman, 483 U.S. 66 (1987)]. Moreover, it is not sufficient to allow the jury to consider only some mitigating circumstances; they must be allowed to consider any aspect of the defendant's character or any circumstance of his crime as a factor in mitigation. [Penry v. Lynaugh, 492 U.S. 302 (1989)—death sentence reversed because jury was not allowed to consider defendant's intellectual disability and abused childhood in mitigation] In addition, a death sentence must be reversed if the jurors may have been confused by jury instructions regarding their right to consider mitigating circumstances. [Mills v. Maryland, 486 U.S. 367 (1988)]

Examples: 1) A statute requires the jury to impose the death penalty if a defendant is convicted of specific crimes with aggravation, but also requires the trial judge to hear evidence of aggravating and mitigating circumstances before sentencing the defendant. The statute is constitutional. [Baldwin v. Alabama, 472 U.S. 372 (1985)]

2) A statute that instructs jurors to impose the death penalty if they find it probable that the defendant would commit criminal acts in the future, considering all aggravating or mitigating evidence presented at trial, was upheld against an argument that the instruction foreclosed consideration of the defendant's youth. The court found that consideration of future dangerousness leaves open ample room for considering youth as a mitigating factor because "the signature qualities of youth are transient." [Johnson v. Texas, 509 U.S. 350 (1993)]

(1) Evidence Required for Mitigation Instruction
Nothing in the Constitution requires state courts to give mitigating

circumstance instructions where the jury has heard no evidence on mitigating circumstances. [Delo v. Lashley, 507 U.S. 272 (1993)]

b) Information

(1) Instructions on Lesser Included Offenses
A defendant is not entitled to a jury instruction on every possible lesser included offense supported by the facts in a capital case [Schad v. Arizona, 501 U.S. 624 (1991)], but a statute cannot prohibit instructions on ***all*** lesser included offenses [Beck v. Alabama, 447 U.S. 625 (1980)]. *Rationale:* If the jurors are not instructed on any lesser included offense and believe that the defendant is guilty of a crime other than murder, they might impose the death penalty rather than let the defendant go unpunished. But if the jury is given instructions on a lesser included offense (e.g., second degree murder), they will not have to make an all or nothing choice, and so a resulting death penalty will stand.

(2) Victim Impact Statements
A "victim impact statement" (i.e., an assessment of how the crime affected the victim's family) may be considered during the sentencing phase of a capital case. *Rationale:* The defendant has long been allowed to present mitigating factors, so the jury must be allowed to counterbalance the impact on the victim's family in order to "assess meaningfully the defendant's moral culpability and blameworthiness." [Payne v. Tennessee, 501 U.S. 808 (1991)]

c) Guidance
A statute providing for the death penalty may not be vague.

Example: A statute that permits imposition of the death penalty when a murder is "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" is unconstitutionally vague. [Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988)]

Compare: A statute that imposes the death penalty where the murderer displayed "utter disregard for human life" provides sufficiently clear and objective standards for imposition of the death penalty where the state supreme court had construed the statute to apply only where the killing was committed by a "cold-blooded, pitiless slayer." [Arave v. Creech, 507 U.S. 463 (1993)]

d) Prior Crimes
Most states provide that prior crimes by the defendant, particularly those involving force or violence, are aggravating factors that either make the defendant eligible for the death penalty or are weighed by the jurors in reaching their decision on whether to impose the death penalty. If a death sentence

is based in any part on a defendant's prior conviction, the sentence must be reversed if the prior conviction is invalidated. [Johnson v. Mississippi, 486 U.S. 578 (1988)]

e) Standard of Review
Where a death sentence has been affected by a vague or otherwise unconstitutional factor, the death sentence can still be upheld, but only if all aggravating and mitigating factors involved are reweighed by all of the judges to whom the sentence is appealed and death is still found to be appropriate. [Richmond v. Lewis, 506 U.S. 40 (1993)]

2) For Rape
The Eighth Amendment prohibits imposition of the death penalty for the crime of raping an adult woman, because the penalty is disproportionate to the offense. [Coker v. Georgia, 433 U.S. 584 (1977)] Nor may a death sentence be imposed for the rape of a child that was neither intended to result in, nor did result in, death. [Kennedy v. Louisiana, 554 U.S. 407 (2008)]

3) For Felony Murder
The death penalty may not be imposed for felony murder where the defendant, as an accomplice, "did not take or attempt or intend to take life, or intend that lethal force be employed." [Enmund v. Florida, 458 U.S. 782 (1982)] However, the death penalty may be imposed on a felony murderer who neither killed nor intended to kill where he participated in a major way in a felony that resulted in murder, and acted with ***reckless indifference to the value of human life***. [Tison v. Arizona, 481 U.S. 137 (1987)—defendants helped prisoner escape and provided him with weapons]

4) Jury Responsibility for Verdict
It is unconstitutional to diminish the jury's sense of responsibility for its role in determining a death sentence. [Caldwell v. Mississippi, 472 U.S. 320 (1985)—prosecutor's comment to the jury that its verdict is reviewable and that the verdict is not the final decision is sufficient to diminish the jury's sense of responsibility; Ring v. Arizona, VII.B.6., *supra*—unconstitutional for judge to determine after jury verdict of guilt whether aggravating factors justify imposition of the death penalty]

a) Compare—Instruction Regarding Failure to Agree
Even at the defendant's request, the court need not instruct the jury of the consequences of its failure to agree on a verdict. [Jones v. United States, 527 U.S. 373 (1999)—Eighth Amendment was not violated where court denied defendant's request that jury be instructed that judge would impose sentence if jury could not unanimously agree]

5) Racial Discrimination
Statistical evidence that black defendants who kill white victims are more likely to receive the death penalty does not establish that the penalty was imposed as a result of unconstitutional discrimination. [McCleskey v. Kemp, 481 U.S. 279 (1987)]

6) Sanity Requirement
The Eighth Amendment prohibits states from inflicting the death penalty upon a prisoner who is insane (i.e., one who was sane at the time the crime was committed and was properly sentenced to death, but is insane at the time of execution). [Ford v. Wainwright, 477 U.S. 399 (1986)]

7) Intellectual Disability
It is cruel and unusual punishment to impose the death penalty on a person who is intellectually disabled. [Atkins v. Virginia, 536 U.S. 304 (2002)] The state determines, under its own standards, whether an individual is intellectually disabled. However, the states do not have unfettered discretion to define the full scope of the constitutional protection. [Hall v. Florida, 134 S. Ct. 1986 (2014)—a state statutory requirement of showing an IQ score of 70 or below before being permitted to introduce other evidence of intellectual disability is unconstitutional]

8) For Minors
Execution of persons who were under 18 years old at the time they committed their offense (including murder) violates the Eighth Amendment. [Roper v. Simmons, 543 U.S. 551 (2005)]

9) Lethal Injection
The mere possibility that the three-drug lethal injection protocol used by many states to carry out executions ***might*** be administered improperly and thus cause the condemned unnecessary pain does not make the procedure cruel and unusual punishment. It would be cruel and unusual only if the condemned can prove that there is a serious risk of inflicting unnecessary pain or that an alternative procedure is feasible, may be readily implemented, and in fact significantly reduces substantial risk of severe pain. [Baze v. Rees, 553 U.S. 35 (2008)]

d. "Status" Crimes
A statute that makes it a crime to have a given "status" violates the Eighth Amendment because it punishes a mere propensity to engage in dangerous behavior. But it is no violation of the amendment to make specific activity related to a certain status criminal.

Example: A statute makes it criminal to "be a common drunkard" and to appear in public in an intoxicated condition. May a chronic alcoholic be convicted of both of these? No. He may not be convicted of being a common drunkard, because this is a prohibited status crime. But he may be convicted of appearing in public while intoxicated, because this crime prohibits the act of "appearing." [Powell v. Texas, 392 U.S. 514 (1968)]

e. Minors
As indicated above, the Supreme Court has found the execution of a person who was a minor (under age 18) when he committed his offense to be cruel and unusual under the Eighth Amendment. The Court has also found an Eighth Amendment violation in a sentencing scheme that imposes mandatory life imprisonment without the possibility of parole on a person who was a minor when the crime was committed. [Miller v. Alabama, 132 S. Ct. 2455 (2012)]

2. Recidivist Statutes
A mandatory life sentence imposed pursuant to a recidivist statute does ***not*** constitute cruel and unusual punishment, even though the three felonies that formed the predicate for the sentence were nonviolent, property-related offenses. [Rummel v. Estelle, 445 U.S. 263 (1980)] (There is an apparent conflict with *Solem v. Helm, supra*, C.1.a. While *Solem* is inconsistent with *Rummel*, the Supreme Court declined to distinguish *Rummel* in reaching its holding in *Solem*.)

3. Punishing the Exercise of Constitutional Rights
A punishment of greater length or severity cannot constitutionally be reserved by statute for those who assert their right to plead innocent and to demand trial by jury. [United States v. Jackson, 390 U.S. 570 (1968)—death penalty available only for federal kidnapping defendants who insist on jury trial; penalty of death in such circumstances cannot be carried out, but guilty pleas induced by such a scheme are not automatically involuntary]

4. Consideration of Defendant's Perjury at Trial
In determining sentence, a trial judge may take into account a belief that the defendant, while testifying at trial on his own behalf, committed perjury. This is important in evaluating the defendant's prospects for rehabilitation and does not impose an improper burden upon a defendant's right to testify. [United States v. Grayson, 438 U.S. 41 (1978)]

5. Imprisonment of Indigents for Nonpayment of Fines Violates Equal Protection Clause
Where the aggregate imprisonment exceeds the maximum period fixed by statute and results directly from an involuntary nonpayment of a fine or court costs, there is an impermissible discrimination and a violation of the Equal Protection Clause. [Williams v. Illinois, 399 U.S. 235 (1970)] It is also a violation of equal protection to limit punishment to payment of a fine for those who are able to pay it, but to convert the fine to imprisonment for those who are unable to pay it. [Tate v. Short, 401 U.S. 395 (1971)—30 days or $30]

a. Imprisonment of Parolee for Nonpayment of Fine
A trial court may not revoke a defendant's probation and imprison him for the remainder of the probation term for failure to pay a fine and make restitution without showing that the defendant actually was capable of payment or that there were no alternative forms of punishment available to meet the state's interest in punishment and deterrence. [Bearden v. Georgia, 461 U.S. 660 (1983)]

X. CONSTITUTIONAL PROBLEMS ON APPEAL

A. NO RIGHT TO APPEAL
There is apparently no federal constitutional right to an appeal. Several Supreme Court opinions suggest that all appeals could constitutionally be abolished.

B. EQUAL PROTECTION AND RIGHT TO COUNSEL ON APPEAL

1. First Appeal
If an avenue of post-conviction review (appellate or collateral) is provided, conditions that

make the review less accessible to the poor than to the rich violate equal protection. [Griffin v. Illinois, 351 U.S. 12 (1956)—indigent entitled to free transcript on appeal]

Examples: 1) The Equal Protection Clause was violated where a statute requiring the payment of fees for a transcript of a preliminary hearing was applied to deny a free transcript to an indigent. [Roberts v. LaValle, 389 U.S. 40 (1968)]

2) Requiring reimbursement for costs of a trial transcription only of those incarcerated (not from those fined, given suspended sentence, or placed on probation) violates equal protection. [Rinaldi v. Yaeger, 384 U.S. 305 (1966)] But a state can distinguish between convicted and acquitted defendants in this context and require reimbursement only from those convicted. [Fuller v. Oregon, 417 U.S. 40 (1974)]

3) Illinois rule providing for trial transcript on appeal only in felony cases is an unreasonable distinction in violation of equal protection. Even in misdemeanor cases punishable by fine only, a defendant must be afforded as effective an appeal as a defendant who can pay, and where the grounds of the appeal make out a colorable need for a complete transcript, the burden is on the state to show that something less will suffice. [Mayer v. City of Chicago, 404 U.S. 189 (1971)]

a. Right to Appointed Counsel

Indigents must be given counsel at state expense during a first appeal granted to all as a matter of right. [Douglas v. California, III.C.1., *supra*] This rule also extends to appeals by defendants who plead guilty or nolo contendere and who must (under state law) seek leave of the court before bringing an appeal. [Halbert v. Michigan, III.C.1., *supra*]
Rationale: Although such appeals are discretionary, they present the first (and likely only) chance for review on the merits that such defendants have. Mere failure to request appointment of counsel does not constitute waiver of the right to assistance of counsel on appeal.

b. Attorney May Withdraw If Appeal Frivolous

An appellate court can permit withdrawal of counsel who concludes that appeal would be frivolous. However, before doing so, the state must take steps to ***ensure that the defendant's right to counsel is not being denied.***

Examples: 1) It is sufficient to (i) require counsel to file a brief referring to anything in the record that might arguably support an appeal (an *Anders* brief) and (ii) require the appellate court to determine that counsel has correctly concluded that appeal is frivolous. [Anders v. California, 386 U.S. 738 (1967)—striking California procedure that allowed counsel to withdraw upon filing a conclusory letter that simply stated the appeal had no merit]

2) It is sufficient to require counsel to (i) summarize the procedural and factual history of the case but (ii) remain silent on the merits of the case unless the appellate court directs otherwise. [Smith v. Robbins, 528 U.S. 259 (2000)—reasoning that this procedure ensures that a "trained legal eye" will search the record and provide some assistance to the reviewing court]

2. Discretionary Appeals

In a jurisdiction using a two-tier system of appellate courts with discretionary review by the highest court, an indigent defendant need not be provided with counsel during the second, discretionary appeal. Representation also need not be provided for an indigent seeking to invoke the United States Supreme Court's discretionary authority to review criminal convictions. [Ross v. Moffit, 417 U.S. 600 (1974)]

C. NO RIGHT TO SELF-REPRESENTATION

On appeal, a defendant has no right to represent himself. [Martinez v. Court of Appeal, 528 U.S. 152 (2000)]

D. RETROACTIVITY

If the Court announces a new rule of criminal procedure (i.e., one not dictated by precedent) in a case on direct review, the rule must be applied to ***all other cases on direct review***. [Griffith v. Kentucky, 479 U.S. 314 (1987)] *Rationale:* It would be unfair to allow the one defendant whose case the Supreme Court happened to choose to hear to benefit from the new rule, while denying the benefit to other similarly situated defendants simply because they were not lucky enough to have their case chosen.

XI. COLLATERAL ATTACK UPON CONVICTIONS

A. AVAILABILITY OF COLLATERAL ATTACK

After appeal is no longer available or has proven unsuccessful, defendants may generally still attack their convictions collaterally, usually by beginning a new and separate civil proceeding involving an application for a writ of habeas corpus. This proceeding focuses on the lawfulness of a detention, naming the person having custody as the respondent.

B. HABEAS CORPUS PROCEEDING

1. No Right to Appointed Counsel

An indigent does not have the right to appointed counsel to perfect her petition for a writ of habeas corpus.

2. Burden of Proof

Because the proceeding for a writ of habeas corpus is civil in nature, the petitioner has the burden of proof by a ***preponderance of the evidence*** to show an unlawful detention.

3. State May Appeal

The state may appeal the granting of a writ of habeas corpus, and double jeopardy bars neither the appeal nor retrial after the granting of the writ.

4. Requirement of Custody

The state defendant must be "in custody," but it is sufficient if he is out on bail, probation, or parole. [Hensley v. Municipal Court, 411 U.S. 345 (1973)] Generally, the "in custody" requirement is ***not*** met by a petitioner whose sentence has expired, even if his prior conviction is used to enhance a later one [Maleng v. Cook, 490 U.S. 488 (1989)], but a petitioner who remains in jail on a ***consecutive sentence*** is in custody, even if the jail time for the crime being challenged has expired [Garlotte v. Fordice, 515 U.S. 39 (1995)].

XII. RIGHTS DURING PUNISHMENT—PROBATION, IMPRISONMENT, PAROLE

A. RIGHT TO COUNSEL AT PAROLE AND PROBATION REVOCATIONS

1. Probation Revocation Involving Resentencing

If revocation of probation also involves the imposition of a new sentence, the defendant is entitled to representation by counsel in all cases in which she is entitled to counsel at trial. [Mempa v. Rhay, *supra*, IX.A.1.]

2. Other Situations

If, after probation revocation, an already imposed sentence of imprisonment springs into application, ***or*** the case involves parole revocation, the right to counsel is much more limited.

There is a right to be represented by counsel only if, on the facts of the case, such representation is ***necessary to a fair hearing***. Generally, it will be necessary if the defendant denies commission of the acts alleged or asserts an argument as to why revocation should not occur that is "complex or otherwise difficult to develop or present." In addition, each defendant must be told of her right to request appointment of counsel, and if a request is refused, the record must contain a succinct statement of the basis for the refusal. [Gagnon v. Scarpelli, 411 U.S. 778 (1973)]

B. PRISONERS' RIGHTS

1. Due Process Rights

Prison regulations and operations may create liberty interests protected by the Due Process Clause, but due process is violated only where the regulations and operations ***impose "atypical and significant hardship"*** in relation to the ordinary incidents of prison life. [Sandin v. Conner, 515 U.S. 472 (1995)]

Example: Assignment for an indefinite period to a "supermax" prison (i.e., a maximum security prison with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population), in which prisoners rarely have visitors, are deprived of almost any environmental or human contact, and from which there is no eligibility for parole, ***is*** "atypical and extreme hardship." [Wilkinson v. Austin, 545 U.S. 209 (2005)]

Compare: Disciplinary segregation for 30 days does not implicate a liberty interest that triggers due process protections. [Sandin v. Conner, *supra*]

2. No Fourth Amendment Protections in Search of Cells

Prisoners have no reasonable expectation of privacy in their cells, or in personal property in their cells, and hence no Fourth Amendment protection therein. [Hudson v. Palmer, 468 U.S. 517 (1984)] Additionally, prisoners have no right to be present when prison officials search their cells. [Block v. Rutherford, 468 U.S. 576 (1984)]

3. Right of Access to Courts

Prison inmates must have reasonable access to courts, and no unreasonable limitations may be put upon their ability to develop and present arguments. Inmates may not be prevented from consulting with other inmates, unless a reasonable substitute (such as a law library) is provided. [Bounds v. Smith, 430 U.S. 817 (1977); Johnson v. Avery, 393 U.S. 483 (1969)]

No absolute bar against law students and other paraprofessionals interviewing inmates for lawyers may be imposed. [Procunier v. Martinez, 416 U.S. 396 (1974)]

Note: A prisoner's *Bounds* claim of inadequate prison legal resources must include a showing that the alleged deficiencies in the legal resources have resulted in a hindrance of access to court. [Lewis v. Casey, 518 U.S. 343 (1996)]

4. First Amendment Rights

Prison officials need some discretion to limit prisoners' First Amendment activities (e.g., speech and assembly) in order to run a safe and secure prison. Therefore, generally prison regulations ***reasonably related to penological interests*** will be upheld even though they burden First Amendment rights. [Turner v. Safley, 482 U.S. 78 (1987)] For example, prison officials have broad discretion to regulate incoming mail to prevent contraband and even sexually explicit materials from entering the prison. Officials may even open letters from a prisoner's attorney, as long as they do so in the prisoner's presence and the letters are not read. [*See* Thornburgh v. Abbott, 490 U.S. 401 (1989); Wolff v. McDonnell, 418 U.S. 539 (1974)] However, prison officials have less discretion to regulate outgoing mail, because it usually does not have an effect on prison safety. [Procunier v. Martinez, *supra*]

Example: Pennsylvania housed its most dangerous and recalcitrant inmates in a special unit in which inmates start at level 2 but can graduate to level 1 with good behavior. Level 2 prisoners are very restricted and are prohibited from receiving any newspapers, magazines, or photographs. A prisoner sued, claiming that these prohibitions deprived him of his First Amendment rights. The prison justified the ban as a tool to encourage better behavior and argued that it was limited in the privileges that it could take away, because these prisoners had already lost most of their privileges. Under these conditions, the prohibition serves a legitimate penological interest and is reasonably related to that interest. [Beard v. Banks, 548 U.S. 521 (2006)]

Note: As a matter of federal ***statutory*** law (the Religious Land Use and Institutionalized Persons Act of 2000), no state that accepts federal funding for its prisons (and all states do) may place a burden on the ***religious exercise*** of prisoners unless the burden furthers a ***compelling government interest*** (e.g., a restriction that is necessary to ensure safety or discipline) and does so by the least restrictive means. [Cutter v. Wilkinson, 544 U.S. 709 (2005)] However, this standard should ***not be applied on the MBE***, as that exam focuses on Constitutional Criminal Procedure (i.e., the constitutional standard) rather than on federal statutory standards.

5. Right to Adequate Medical Care

"Deliberate indifference to serious medical needs of prisoners" constitutes cruel and unusual punishment in violation of the Eighth Amendment, as does severe overcrowding that results in inadequate medical care. [Brown v. Plata, 131 S. Ct. 1910 (2011)] However, simple negligent failure to provide care—"medical malpractice"—does not violate the amendment. [Estelle v. Gamble, 429 U.S. 97 (1976)] And while prisoners have a liberty interest in refusing medication, they can be forced to take antipsychotic drugs if an unbiased and qualified decisionmaker finds it necessary to protect the prisoner or others. [Washington v. Harper, 494 U.S. 210 (1990)]

C. NO RIGHT TO BE FREE FROM DISENFRANCHISEMENT UPON COMPLETION OF SENTENCE

There is no right to be free from state disenfranchisement upon conviction of a felony, even if this continues after completion of the sentence imposed. [Richardson v. Ramirez, 418 U.S. 24 (1974)]

XIII. DOUBLE JEOPARDY

A. WHEN JEOPARDY ATTACHES

The Fifth Amendment right to be free of double jeopardy for the same offense has been incorporated into the Fourteenth Amendment. [Benton v. Maryland, 395 U.S. 784 (1969)] The general rule is that once jeopardy attaches, the defendant may not be retried for the same offense.

1. Jury Trials

Jeopardy attaches in a jury trial at the ***empaneling and swearing*** of the jury. [Crist v. Bretz, 437 U.S. 28 (1978)]

2. Bench Trials

In bench trials, jeopardy attaches when the ***first witness is sworn***.

3. Juvenile Proceedings

The ***commencement*** of an adjudicatory juvenile proceeding (i.e., a hearing at which the court begins to hear evidence regarding the charged act) bars a subsequent criminal trial for the same offense. [Breed v. Jones, 421 U.S. 519 (1975)]

4. Not in Civil Proceedings

Jeopardy generally does not attach in civil proceedings other than juvenile proceedings. [One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232 (1972)]

Example: After the defendant is acquitted of criminal charges of smuggling, the government may still seek forfeiture of the items that the defendant allegedly smuggled into the country. [One Lot Emerald Cut Stones & One Ring v. United States, *supra*]

B. EXCEPTIONS PERMITTING RETRIAL

Certain exceptions permit retrial of a defendant even if jeopardy has attached.

1. Hung Jury

The government may retry a defendant whose trial ends in a hung jury. Note that it does not matter that the jury had agreed that the defendant could not be found guilty of a more severe charge before hanging on a lesser charge—if the jury does not return a verdict, double jeopardy does not bar retrial on any of the charges. [Blueford v. Arkansas, 132 S. Ct. 2044 (2012)]

Example: Defendant was tried for capital murder, first degree murder, manslaughter, and negligent homicide. The jury was instructed to consider the most serious crime first, and the lesser included crimes only if they agreed Defendant could not be found guilty of the greater charge. The jury reported to the judge that they agreed Defendant was not guilty of capital murder or first degree murder, but that they had reached an impasse on the lesser charges. The judge

sent the jury back for further deliberations. When the jury later could not agree on a verdict, the judge declared a mistrial. The jury did not return a partial verdict—it merely reported on its progress. Therefore, Defendant can be re-charged with all of the crimes. [Blueford v. Arkansas, *supra*]

2. Mistrial for Manifest Necessity

A trial may be discontinued and the defendant reprosecuted for the same offense when there is a manifest necessity to abort the original trial [United States v. Perez, 22 U.S. 579 (1824); Illinois v. Somerville, 410 U.S. 458 (1973)] or when the termination occurs at the behest of the defendant on any grounds not constituting an acquittal on the merits [United States v. Scott, 437 U.S. 82 (1978)]. Thus, double jeopardy is not an absolute bar to two trials.

3. Retrial After Successful Appeal

The state may retry a defendant who has successfully appealed a conviction, unless the ground for the reversal was insufficient evidence to support the guilty verdict. [Burks v. United States, 437 U.S. 1 (1978)] On the other hand, retrial is permitted when reversal is based on the ***weight***, rather than ***sufficiency***, of the evidence [Tibbs v. Florida, 457 U.S. 31 (1982)], or where a case is reversed because of erroneously admitted evidence [Lockhart v. Nelson, 488 U.S. 33 (1988)].

Example: If, after weighing the evidence in the record, an appellate court reversed a conviction on appeal, holding that the record did not support a finding of guilt beyond a reasonable doubt, a retrial would be permitted. However, if the appellate court reversed, holding that even if all of the evidence is taken as true, it was not sufficient to prove all of the elements of the crime charged, a retrial would not be permitted.

a. Charges on Retrial

The Double Jeopardy Clause prohibits retrying a defendant whose conviction has been reversed on appeal for any offense more serious than that for which she was convicted at the first trial. This right is violated by ***retrial for the more serious offense***, even if at the second trial the defendant is convicted only of an offense no more than that for which she was convicted at the first trial. [Price v. Georgia, 398 U.S. 323 (1970)]

Example: X is charged with murder. She is convicted of manslaughter and her conviction is reversed on appeal. She is again tried for murder and again convicted of manslaughter. May this conviction stand? No, because she could not be retried for anything more serious than manslaughter. This is not harmless error, because the charge of murder in the second trial may have influenced the jury toward conviction of manslaughter.

b. Sentencing on Retrial

The Double Jeopardy Clause generally does ***not*** prohibit imposition of a ***harsher sentence*** on conviction after retrial, and such a sentence is valid provided it does not run afoul of the vindictiveness concerns discussed at IX.B.1., *supra*.

1) Death Penalty Cases

When there is a formalized, separate process for imposing the death penalty (e.g., when guilt is first determined and then the jury is presented with evidence on whether to impose death), if at the first trial the jury finds that a death sentence is

not appropriate, a death sentence cannot be imposed at a second trial. [Bullington v. Missouri, 451 U.S. 430 (1981)] However, if the jury makes no such finding (e.g., when a judge imposes a life sentence pursuant to a statute providing for such a sentence when the jury is deadlocked on sentencing), a death sentence can be imposed at a second trial. [Sattazahn v. Pennsylvania, 537 U.S. 101 (2003)—"the relevant inquiry . . . is not whether the defendant received a life sentence the first time around, but whether a first life sentence was an 'acquittal' based on findings sufficient to establish legal entitlement to the life sentence—i.e., findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt"] In any case, note that these special rules apply only to capital sentencing proceedings. [Monge v. California, 524 U.S. 721 (1998)]

4. Breach of Plea Bargaining
When a defendant breaches a plea bargain agreement, his plea and sentence can be vacated and the original charges can be reinstated. [Ricketts v. Adamson, VIII.E.1.b., *supra*]

C. SAME OFFENSE

1. General Rule—When Two Crimes Do Not Constitute Same Offense
Two crimes do not constitute the same offense if ***each crime requires proof of an additional element*** that the other crime does not require, even though some of the same facts may be necessary to prove both crimes. [Blockburger v. United States, 284 U.S. 299 (1932)]

Example: D is arrested after the car he is driving strikes and kills a pedestrian. D is tried on the charges of reckless homicide and driving while intoxicated. D can receive separate punishments for both of the offenses because each crime requires proof of an additional element not required by the other: the homicide charge requires proof of a death but not proof of intoxication, while the driving while intoxicated charge requires proof of intoxication but not proof of a death.

a. Application of *Blockburger*
Under *Blockburger*, the following do ***not*** constitute the same offenses:

1) Manslaughter with an automobile and hit-and-run;

2) Reckless driving and drunk driving;

3) Reckless driving and failure to yield the right of way; and

4) Uttering a forged check and obtaining money by false pretenses by using the forged check.

2. Cumulative Punishments for Offenses Constituting Same Crime
Imposition of cumulative punishments for two or more statutorily defined offenses, ***specifically intended by the legislature to carry separate punishments***, even though constituting the "same" crime under the *Blockburger* test, *supra*, does not violate the prohibition of multiple punishments for the same offense of the Double Jeopardy Clause, when the punishments are ***imposed at a single trial***. [Missouri v. Hunter, 459 U.S. 359 (1983)]

Example: D robs a store at gunpoint. D can be sentenced to cumulative punishments for both the robbery and for violating a "Use a gun, go to jail" statute.

Note: Absent a clear intention, it will be presumed that multiple punishments are not intended for offenses constituting the same crime under *Blockburger.* Also, imposition of multiple punishments is prohibited even if the sentences for the two crimes run concurrently. [Rutledge v. United States, 517 U.S. 292 (1996)]

3. Lesser Included Offenses

a. Retrial for Lesser Included Offense Barred
Attachment of jeopardy for the greater offense bars retrial for lesser included offenses. [Harris v. Oklahoma, 433 U.S. 682 (1977)]

Example: D is convicted of felony murder based on proof that he and an accomplice shot and killed a store clerk during an armed robbery. D cannot then be tried for the armed robbery because it is a lesser included offense of the felony murder. [Harris v. Oklahoma, *supra*]

b. Retrial for Greater Offense
Attachment of jeopardy for a lesser included offense bars retrial for the greater offense. [Brown v. Ohio, 432 U.S. 161 (1977)]

1) Exception—New Evidence
An exception to the double jeopardy bar exists if unlawful conduct that is subsequently used to prove the greater offense (i) has not occurred at the time of the prosecution for the lesser offense, or (ii) has not been discovered despite due diligence. [Garrett v. United States, 471 U.S. 773 (1985)] Similarly, retrial for murder is permitted if the victim dies after attachment of jeopardy for battery. [Diaz v. United States, 223 U.S. 442 (1912)]

2) Effect of Plea on Related Offense
A state may continue to prosecute a charged offense, despite the defendant's guilty plea to lesser included or "allied" offenses stemming from the same incident. [Ohio v. Johnson, 467 U.S. 493 (1984)—defendant charged with murder and manslaughter, and robbery and theft, arising from the same incident, can be prosecuted for murder and robbery after pleading guilty to manslaughter and theft over state's objection]

4. Conspiracy and Substantive Offense
A prosecution for ***conspiracy*** is not barred merely because some of the alleged ***overt acts*** of that conspiracy have already been prosecuted. [United States v. Felix, 503 U.S. 378 (1992)]

5. Prior Act Evidence
The introduction of evidence of a substantive offense as prior act evidence is not equivalent to ***prosecution*** for that substantive offense, and therefore subsequent prosecution for that conduct is not barred. [United States v. Felix, *supra*]

6. Conduct Used as a Sentence Enhancer
The Double Jeopardy Clause is not violated when a person is indicted for a crime the conduct of which was already used to enhance the defendant's sentence for another crime. [Witte v.

United States, 515 U.S. 389 (1995)—defendant indicted for conspiring to import cocaine after the conduct of the conspiracy was used to enhance his earlier sentence when he pleaded guilty to possession of marijuana]

7. Civil Actions

The Double Jeopardy Clause prohibits only repetitive ***criminal*** prosecutions. Thus, a state generally is free to bring a civil action against a defendant even if the defendant has already been criminally tried for the conduct out of which the civil action arises. Similarly, the government may bring a criminal action even though the defendant has already faced civil trial for the same conduct. However, if there is clear proof from the face of the statutory scheme that its purpose or effect is to impose a criminal penalty, the Double Jeopardy Clause applies. [Hudson v. United States, 522 U.S. 93 (1998)—finding no clear proof of such purpose or effect where a civil statute allowed a government agency to impose a fine and bar defendants from working in banking industry for improperly approving loans]

D. SEPARATE SOVEREIGNS

The constitutional prohibition against double jeopardy ***does not apply*** to trials by separate sovereigns. Thus, a person may be tried for the same conduct by both a state and the federal government [United States v. Lanza, 260 U.S. 377 (1922)] or by two states [Heath v. Alabama, 474 U.S. 82 (1986)], but not by a state and its municipalities [Waller v. Florida, 397 U.S. 387 (1970)].

E. APPEALS BY PROSECUTION

Even after jeopardy has attached, the prosecution ***may appeal any dismissal*** on the defendant's motion ***not constituting an acquittal on the merits***. [United States v. Scott, 437 U.S. 82 (1978)] Also, the Double Jeopardy Clause does not bar appeals by the prosecution if a ***successful appeal would not require a retrial***, such as when the trial judge granted a motion to set aside the jury verdict. [United States v. Wilson, 420 U.S. 332 (1975)]

1. Appeal of Sentence

Government appeal of a sentence, ***pursuant*** to a congressionally enacted ***statute*** permitting such review, does not constitute multiple punishment in violation of the Double Jeopardy Clause. [United States v. DiFrancesco, 449 U.S. 117 (1980)]

F. ISSUE PRECLUSION (COLLATERAL ESTOPPEL)

The notion of collateral estoppel is embodied in the guarantee against double jeopardy. A defendant may not be tried or convicted of a crime if a prior prosecution by that sovereignty resulted in a ***factual determination inconsistent with one required for conviction***. However, this doctrine has limited utility because of the general verdict in criminal trials.

Examples: 1) Where three or four armed men robbed six poker players in the home of one of the victims and the defendant was charged in separate counts with robbery of each of the six players and was tried on one count and was acquitted for insufficient evidence in a prosecution in which identity was the single rationally conceivable issue in dispute, he may not thereafter be prosecuted for robbery of a different player. [Ashe v. Swenson, 397 U.S. 436 (1970)] A second trial would not have been barred if there had been dispute at the first trial regarding whether the alleged victim was robbed. The court did not adopt the "same transaction" test proposed by some justices, under which a defendant could not be more than once put in jeopardy for offenses arising out of the "same transactions."

2) Where the ultimate issue of identity of the person who mailed a package with a bomb that killed two persons was decided at the first trial at which defendant was acquitted, the defendant may not thereafter be convicted of the second murder, even if the jury in the first trial (for the first murder) did not have all the relevant evidence before it and the state acted in good faith. [Harris v. Washington, 404 U.S. 55 (1971)]

1. Inconsistent Verdicts

If the defendant has been charged with multiple counts and there is an inconsistency in the verdicts among the counts (e.g., the jury acquitted the defendant on some and deadlocked on others), the focus should be on what was decided rather than on what was not decided. That is, the issues necessarily decided in the acquittal will have preclusive effect even if the same issues were involved in the counts on which the jury deadlocked. [Yeager v. United States, 557 U.S. 110 (2009)]

Example: Defendant was charged with several counts of fraud and insider trading. A necessary element in each count was that Defendant possessed material, nonpublic information and used it unlawfully. He was acquitted of the fraud charges but the jury failed to reach a verdict on the insider trading charges. Retrial is barred on the insider trading counts under the issue preclusion component of the Double Jeopardy Clause. The jury's failure to decide the insider trading counts does not affect the preclusive force of the acquittals on the fraud counts, even though both relied on the same factual elements. [Yeager v. United States, *supra*]

XIV. PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION

A. APPLICABLE TO THE STATES

As discussed above (*see* III.D., *supra*), the Fifth Amendment prohibits the government from compelling self-incriminating testimony. The Fifth Amendment prohibition against compelled self-incrimination was made applicable to the states through the Fourteenth Amendment in *Malloy v. Hogan*, 378 U.S. 1 (1964).

B. WHO MAY ASSERT THE PRIVILEGE

Only ***natural persons*** may assert the privilege, not corporations or partnerships. [Bellis v. United States, 417 U.S. 85 (1974)] The privilege is personal, and so may be asserted by a defendant, witness, or party only if the answer to the question might tend to incriminate him.

C. WHEN PRIVILEGE MAY BE ASSERTED

A person may refuse to answer a question whenever his response might furnish a link in the chain of evidence needed to prosecute him.

1. Proceedings Where Potentially Incriminating Testimony Sought

A person may assert the privilege in ***any*** proceeding in which testimony that could tend to incriminate is sought. The privilege must be claimed in civil proceedings to prevent the privilege from being waived for a later criminal prosecution. If the individual responds to the questions instead of claiming the privilege during a civil proceeding, he cannot later bar

that evidence from a criminal prosecution on compelled self-incrimination grounds. [United States v. Kordel, 397 U.S. 1 (1970)]

2. Privilege Not a Defense to Civil Records Requirements

The government may require that certain records be kept and reported on where the records are relevant to an ***administrative purpose***, unrelated to enforcement of criminal laws. Such records acquire a public aspect and are not protected by the Fifth Amendment.

Examples: 1) The government may require people to keep tax records and to report their income on tax forms, because this serves a legitimate administrative purpose. Thus, a person may be prosecuted for failure to file a tax form. However, there is a Fifth Amendment privilege to refuse to answer specific questions on such forms that might be incriminating (e.g., source of income). [United States v. Sullivan, 274 U.S. 259 (1927)] Therefore, if a person chooses to answer incriminating questions on such forms, the answers may be used against him in court, because they were not compelled. [Garner v. United States, 424 U.S. 648 (1976)]

2) A person charged with being an unfit parent in a proceeding to determine whether she should maintain custody of her child may be compelled to produce the child in court. Even though the production might be testimonial in nature (admits control), the state's interest here is civil (protecting the child) rather than punitive in nature. [Baltimore City Department of Social Services v. Bouknight, 493 U.S. 549 (1990)] Note, however, that the state might have to grant immunity to the parent for the production. (*See* H.1., *infra*.)

3) A person may not claim the privilege and fail to comply with a law requiring motorists to stop at the scene of an accident and leave their name and address. [California v. Byers, 402 U.S. 424 (1971)]

a. Limitation—Criminal Law Enforcement Purpose

If the registration requirement is directed not at the general public but at a ***select group inherently suspect of criminal activities*** and the inquiry is in an area permeated with criminal statutes, the person may assert the privilege to avoid prosecution for failure to comply with the requirement. [Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965)]

Example: The government may not require registration of a sawed-off shotgun [Haynes v. United States, 390 U.S. 85 (1968)], payment of a wagering excise tax [Grosso v. United States, 390 U.S. 62 (1968)], payment of an occupational tax for engaging in the business of accepting wagers [Marchetti v. United States, 390 U.S. 39 (1968)], individual registration as a member of the Communist Party [Albertson v. Subversive Activities Control Board, *supra*], or the registration of transfer of marijuana [Leary v. United States, 395 U.S. 6 (1969)] if compliance would require self-incrimination.

Note: Such cases as *Marchetti* and *Grosso* do not bar conviction for making false statements on the registration form; to avoid incriminating himself, the individual must instead claim the privilege. [United States v. Knox, 396 U.S. 77 (1969)]

3. Privilege Not Applicable to Identification Request After *Terry* Stop

Merely being required to furnish one's name after a *Terry* stop (*see* II.B.3.a., *supra*) generally does not violate the Fifth Amendment because disclosure of one's name generally poses no danger of incrimination. [*See* Hiibel v. Sixth Judicial District Court, II.B.3.a.3)a), *supra*]

D. METHOD FOR INVOKING THE PRIVILEGE

How the privilege may be invoked depends upon whether the person seeking to invoke it is a criminal defendant or simply a witness.

1. Privilege of a Defendant

A criminal defendant has a right not to take the witness stand at trial and not to be asked to do so. It is even impermissible to call the jury's attention to the fact that he has chosen not to testify. (*See* G.1., *infra*.)

2. Privilege of a Witness

In any other situation, the privilege does not permit a person to avoid being sworn as a witness or being asked questions. Rather, the person must listen to the questions and specifically invoke the privilege rather than answer the questions.

E. SCOPE OF PROTECTION

1. Testimonial But Not Physical Evidence

The Fifth Amendment privilege protects only testimonial or communicative evidence and not real or physical evidence. Thus, the state may require a person to produce ***blood samples*** [Schmerber v. California, III.C.2., *supra*], ***handwriting exemplars*** [Gilbert v. California, III.C.2., *supra*], or ***voice samples*** [United States v. Wade, IV.E., *supra*] without violating the Fifth Amendment, even though such evidence may be incriminating. In addition, a court may order a suspect to authorize foreign banks to disclose records of any accounts he may possess. Merely signing an authorization form is not testimonial if it does not require the suspect to acknowledge the existence of any account. For a suspect's communication to be considered testimonial, it must explicitly or implicitly relate a factual assertion or disclose information. [Doe v. United States, 487 U.S. 201 (1988)]

Likewise, admission into evidence of a defendant's ***refusal to submit to a blood-alcohol test*** does not offend the right against self-incrimination even though he was not warned that his refusal might be introduced against him. [South Dakota v. Neville, 459 U.S. 553 (1983)]

2. Compulsory Production of Documents

A person served with a subpoena requiring the production of documents tending to incriminate him generally has no basis in the privilege to refuse to comply, because the act of producing the documents ***does not involve testimonial self-incrimination***. Thus, there is also no attorney-client privilege violation by production of the documents by the attorney, because the documents were not privileged under the Fifth Amendment in the hands of the client. However, if the document in the hands of the attorney is within the Fifth Amendment privilege, the attorney-client privilege would permit the attorney to refuse to comply with the subpoena. [Fisher v. United States, 425 U.S. 391 (1976)]

a. Corporate Records

A custodian of corporate records may not resist a subpoena for such records on the

ground that the production would incriminate him in violation of the Fifth Amendment. The production of the records by the custodian is not considered a personal act, but rather an act of the corporation, which possesses no Fifth Amendment privilege. [Braswell v. United States, 487 U.S. 99 (1988)]

3. Seizure and Use of Incriminating Documents

The Fifth Amendment does not prohibit law enforcement officers from searching for and seizing documents tending to incriminate a person. The privilege protects only against being compelled to communicate information, not against disclosure of communications made in the past. [Andresen v. Maryland, II.C.4.c., *supra*]

4. When Does Violation Occur?

A violation of the Self-Incrimination Clause does not occur until a person's compelled statements are used against him in a criminal case. [Chavez v. Martinez, 538 U.S. 760 (2003)]

Example: While Martinez was being treated for a gunshot wound that he received in an altercation with the police, he was interrogated by an officer without having been given *Miranda* warnings. Although Martinez admitted to using heroin and that he had taken an officer's gun during the incident in which he was shot, he was never charged with a crime. Nevertheless, Martinez sued police officers for violating his Fifth Amendment right against compelled self-incrimination. *Held:* Because Martinez had not been charged with a crime, there was no Fifth Amendment violation because his statements were not used against him in a criminal case. [Chavez v. Martinez, *supra*]

F. RIGHT TO ADVICE CONCERNING PRIVILEGE

A lawyer may not be held in contempt of court for her good faith advice to her client to invoke the privilege and refuse to produce materials demanded by a court order. Because a witness may require the advice of counsel in deciding how to respond to a demand for testimony or evidence, subjecting the lawyer to potential contempt citation for her advice would infringe upon the protection accorded the witness by the Fifth Amendment. [Maness v. Meyers, 419 U.S. 449 (1975)]

G. PROHIBITION AGAINST BURDENS ON ASSERTION OF THE PRIVILEGE

1. Comments on Defendant's Silence

A prosecutor may not comment on a defendant's silence after being arrested and receiving *Miranda* warnings. The warnings carry an implicit assurance that silence will carry no penalty. [Greer v. Miller, 483 U.S. 756 (1987)] Neither may the prosecutor ordinarily comment on the defendant's failure to testify at trial. [Griffin v. California, 380 U.S. 609 (1965)] However, where the defendant does not testify at trial, upon timely motion she is constitutionally entitled to have the trial judge instruct the jury that they are to draw no adverse inference from the defendant's failure to testify. [Carter v. Kentucky, 450 U.S. 288 (1981)] Moreover, a judge may warn the jury not to draw an adverse inference from the defendant's failure to testify, without violating the Fifth Amendment privilege, even where the defendant objects to such an instruction. [Lakeside v. Oregon, 435 U.S. 333 (1978)]

a. Exception

The prosecutor can comment on the defendant's failure to take the stand when the comment is in response to defense counsel's assertion that the defendant was not allowed to explain his side of the story. [United States v. Robinson, 485 U.S. 25 (1988)]

b. Silence Before *Miranda* Warnings
Note that if a suspect chooses to remain silent ***before*** police read him his *Miranda* rights, that silence can be used against him in court. [Salinas v. Texas, 133 S. Ct. 2174 (2013)]

c. Harmless Error Test Applies
When a prosecutor impermissibly comments on a defendant's silence, the harmless error test applies. Thus, the error is not fatal where the judge instructs the jury to disregard a question on the defendant's post-arrest silence. [Greer v. Miller, *supra*] Similarly, the error is not fatal where there is overwhelming evidence against the defendant and the prosecutor comments on the defendant's failure to proffer evidence rebutting the victim's testimony. [United States v. Hasting, 461 U.S. 499 (1987)]

2. Penalties for Failure to Testify Prohibited
The state may not chill the exercise of the Fifth Amendment privilege against compelled self-incrimination by imposing penalties for the failure to testify or cooperate with authorities.

Example: The state may not fire a police officer [Garrity v. New Jersey, 385 U.S. 493 (1967)], take away state contracts [Lefkowitz v. Turley, 414 U.S. 70 (1973)], or prohibit a person from holding party office [Lefkowitz v. Cunningham, 431 U.S. 801 (1977)] for failure to cooperate with investigating authorities.

Compare: There was no Fifth Amendment violation where a prisoner was required to disclose all prior sexual activities, including activities that constitute uncharged criminal offenses, in order to gain entry into a sexual abuse treatment program, even though refusal resulted in transfer from a medium security facility to a maximum security facility and curtailment of visitation rights, prison work and earnings opportunities, and other prison privileges. [McKune v. Lile, 536 U.S. 24 (2002)]

H. ELIMINATION OF THE PRIVILEGE

1. Grant of Immunity
A witness may be compelled to answer questions if granted adequate immunity from prosecution.

a. "Use and Derivative Use" Immunity Sufficient
The Supreme Court has held that a grant of "use and derivative use" immunity is sufficient to extinguish the privilege. [Kastigar v. United States, 406 U.S. 441 (1972)] This type of immunity guarantees that the testimony obtained and evidence located by means of the testimony will not be used against the witness. This type of immunity is not as broad as "transactional" immunity, which guarantees immunity from prosecution for any crimes related to the transaction about which the witness testifies, because the witness may still be prosecuted if the prosecutor can show that her evidence was derived from a ***source independent*** of the immunized testimony.

b. Immunized Testimony Involuntary
Testimony obtained by a ***promise of immunity*** is, by definition, coerced and therefore

involuntary. Thus, immunized testimony may not be used for impeachment of the defendant's testimony at trial. [New Jersey v. Portash, 440 U.S. 450 (1979)] Immunized testimony may be introduced to supply the context for a perjury prosecution. Any immunized statements, whether true or untrue, can be used in a trial for making false statements. [United States v. Apfelbaum, 445 U.S. 115 (1980)]

c. Use of Testimony by Another Sovereign Prohibited
The privilege against self-incrimination prohibits a state from compelling incriminating testimony under a grant of immunity unless the testimony and its fruits cannot be used by the prosecution in a federal prosecution. Therefore, federal prosecutors may not use evidence obtained as a result of a state grant of immunity, and vice versa. [Murphy v. Waterfront Commission, 378 U.S. 52 (1964)]

2. No Possibility of Incrimination
A person has no privilege against compelled self-incrimination if there is no possibility of incrimination, as, for example, when the statute of limitations has run.

3. Scope of Immunity
Immunity extends only to the offenses to which the question relates and does not protect against perjury committed during the immunized testimony. [United States v. Apfelbaum, *supra*]

I. WAIVER OF PRIVILEGE

The nature and scope of a waiver depends upon the situation.

1. Waiver by Criminal Defendant
A criminal defendant, by taking the witness stand, waives the privilege to the extent necessary to subject her to any cross-examination proper under the rules of evidence.

2. Waiver by Witness
A witness waives the privilege only if she discloses incriminating information. Once such disclosure has been made, she can be compelled to disclose any additional information as long as such further disclosure does not increase the risk of conviction or create a risk of conviction on a different offense.

XV. JUVENILE COURT PROCEEDINGS

A. IN GENERAL

Some—but not all—of the rights developed for defendants in criminal prosecutions have also been held applicable to children who are the subjects of proceedings to have them declared "delinquents" and possibly institutionalized.

B. RIGHTS THAT MUST BE AFFORDED

The following rights must be given to a child during the trial of a delinquency proceeding:

(i) Written ***notice*** of the charges with sufficient time to prepare a defense;

(ii) The ***assistance of counsel*** (court-appointed if the child is indigent);

(iii) The ***opportunity to confront*** and cross-examine witnesses;

(iv) The ***right not to testify*** (and other aspects of the privilege against self-incrimination); and

(v) The right to have ***"guilt"*** (the commission of acts making the child delinquent) established by proof ***beyond a reasonable doubt***.

[*In re* Gault, 387 U.S. 1 (1967); *In re* Winship, 397 U.S. 358 (1970)]

C. RIGHTS NOT APPLICABLE

1. Jury Trial

The Supreme Court has held inapplicable to delinquency proceedings the right to trial by jury. In the juvenile court context, jury trial is not necessary to assure "fundamental fairness." [McKeiver v. Pennsylvania, 403 U.S. 528 (1971)]

2. Pretrial Detention Allowable

A finding that a juvenile is a "serious risk" to society and likely to commit a crime before trial is adequate to support pretrial detention of the juvenile, and does not violate the Due Process Clause as long as the detention is for a strictly limited time before trial may be held. [Schall v. Martin, 467 U.S. 253 (1984)]

D. DOUBLE JEOPARDY AND "TRANSFER" OF JUVENILE TO ADULT COURT

In many jurisdictions, a juvenile court may, after inquiry, determine that a juvenile is not an appropriate subject for juvenile court processing and "transfer" the juvenile to adult court for trial as an adult on criminal charges. If the juvenile court begins to hear evidence on the alleged delinquent act, however, jeopardy has attached and the prohibition against double jeopardy prevents the juvenile from being tried as an adult for the same behavior. [Breed v. Jones, XIII.A.3., *supra*]

XVI. FORFEITURE ACTIONS

A. INTRODUCTION

State and federal statutes often provide for the forfeiture of property such as automobiles used in the commission of a crime. Actions for forfeiture are brought directly against the property and are generally regarded as quasi-criminal in nature. Certain constitutional rights may exist for those persons whose interest in the property would be lost by forfeiture.

B. RIGHT TO PRE-SEIZURE NOTICE AND HEARING

The owner of ***personal*** property (and others with interests in it) is not constitutionally entitled to notice and hearing before the property is seized for purposes of a forfeiture proceeding. [Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)] A hearing is, however, required before final forfeiture of the property. Where ***real property*** is seized, notice and an opportunity to be heard is required before the seizure unless the government can prove that exigent circumstances justify immediate seizure. [United States v. James Daniel Good Real Property, 510 U.S. 43 (1994)]

C. FORFEITURES MAY BE SUBJECT TO EIGHTH AMENDMENT

The Eighth Amendment provides that excessive fines shall not be imposed. The Supreme Court has held that this Excessive Fines Clause applies only to fines imposed as punishment, i.e., penal fines. The Clause does not apply to civil fines. Thus forfeitures that are penal are subject to the Clause, but forfeitures that are civil are not.

1. Penal Forfeitures

Generally, a forfeiture will be considered penal only if it is provided for in a criminal statute. If it is penal and the Clause applies, a forfeiture will be found to be excessive only if it is ***grossly disproportionate to the gravity of the offense.*** [United States v. Bajakajian, 524 U.S. 321 (1998)]

Example: The Court held that forfeiture of $357,144 for the crime of merely failing to report that that sum was being transported out of the country was grossly disproportionate, because the crime caused little harm (it would have been legal to take the money out of the country; the only harm was that the government was deprived of a piece of information). [United States v. Bajakajian, *supra*]

2. Compare—Nonpenal Forfeitures

a. Civil In Rem Forfeitures

Civil in rem forfeitures treat the property forfeited as a "wrongdoer" under a legal fiction; the action is against the property and not against an individual, and therefore this type of forfeiture is ***not*** subject to the Excessive Fines Clause.

b. Monetary Forfeitures

Monetary forfeitures (e.g., forfeiture of twice the value of illegally imported goods) have also been found to be remedial in nature where they are brought in civil actions. They are seen as a form of liquidated damages to reimburse the government for losses resulting from the offense. Therefore, they are not subject to the Eighth Amendment. [*See* United States v. Bajakajian, *supra*]

D. PROTECTION FOR "INNOCENT OWNER" NOT REQUIRED

The Due Process Clause does ***not*** require forfeiture statutes to provide an "innocent owner" defense, e.g., a defense that the owner took all reasonable steps to avoid having the property used by another for illegal purposes, at least where the innocent owner ***voluntarily entrusted*** the property to the wrongdoer. [Bennis v. Michigan, 517 U.S. 292 (1996)—due process not violated by forfeiture of wife's car that husband used while engaging in sexual acts with a prostitute even though wife did not know of use] In justifying its holding in *Bennis*, the Court also noted that the statute was not absolute, because the trial judge had discretion to prevent inequitable application of the statute.

CRIMINAL PROCEDURE MULTIPLE CHOICE QUESTIONS

INTRODUCTORY NOTE

You can use the sample multiple choice questions below to review the law and practice your understanding of important concepts that you will likely see on your law school exam. To do more questions, access StudySmart Law School software from the BARBRI website.

Question 1

A thief sold some stolen goods to a dealer. Several weeks later, the police raided the dealer's store and arrested him. In this raid, the police seized the goods the thief sold to the dealer and a record book in which the dealer had recorded this transaction. However, at the dealer's subsequent trial for receiving stolen goods, the charges against him were dismissed when the court ruled that the search warrant had been improperly issued.

The police were able to trace the stolen goods to the thief because of fingerprint identification and the information contained in the dealer's record book. At his trial, the thief made a motion to suppress the stolen goods and record book.

The judge should:

(A) Grant the motion, because the evidence is the fruit of the poisonous tree in that the search of the dealer's store was improper.

(B) Grant the motion, because the trial court in the dealer's case has already ruled that the evidence was improper.

(C) Deny the motion, because the thief has no standing to object to the search.

(D) Deny the motion, because the thief's fingerprints on the stolen goods were what led to his identification.

Question 2

A factory foreman was suspected of having murdered, for pay, the rival of a local union leader. After the police arrested the foreman at his home and he was taken to the police station, the officers who remained at the house asked the foreman's aunt, who was visiting him for the week, if she knew where any firearms could be found in the house. She went into the bedroom and returned with a pistol. Ballistics experts established that the pistol had been used to murder the victim, and the foreman's fingerprints were all over the pistol. At a subsequent grand jury proceeding, the district attorney introduced the pistol and the related ballistics and fingerprint evidence, and the grand jury indicted the foreman.

If the foreman seeks to quash the indictment, will he prevail?

(A) No, because the evidence was offered before a grand jury, not a court.

(B) No, because the pistol was obtained by a private citizen, not the police.

(C) Yes, because the police did not have probable cause to seize the pistol.

(D) Yes, because the foreman's aunt was acting as an agent of the police when she obtained the pistol.

Question 3

A man beat his girlfriend and fled. The girlfriend called the police and told them about the beating. She also told them that the man likely fled to his best friend's house. The police obtained a valid arrest warrant for the man and went to the friend's house. They knocked and the friend answered the door. The friend told the police that the man was not there. The police pushed past the friend and began searching for the man. The police did not find the man, but they did find a package of cocaine on a small end table in plain view. The police arrested the friend for possession of cocaine. Prior to trial, the friend moves to suppress the cocaine, claiming that it was unconstitutionally seized.

Should the court grant the motion?

(A) Yes, because the man could not have been hiding on the table.

(B) Yes, because the police did not have a search warrant.

(C) No, because the cocaine was in plain view.

(D) No, because the police found the cocaine while executing a valid arrest warrant.

Question 4

A police officer witnessed a bar patron exit a bar with an open bottle in his hand, get into a car, and turn the wrong way from the bar's parking lot onto a one-way street. The officer immediately turned on his siren and pursued the car for a couple of miles. During that pursuit, the car repeatedly weaved in and out of its lane of traffic. Eventually, the car pulled over, and the officer placed the driver under arrest for drunk driving. After handcuffing the driver and placing him in the back seat of his squad car, the officer looked under a blanket lying on the floor of the car's passenger compartment. Under the blanket, he found an open bottle of beer. Before his trial on charges of drunk driving and driving with an open container of alcohol in the car, the defendant moves to suppress from evidence the open bottle of beer.

Should the motion be granted?

(A) No, because incident to the arrest of the driver of an automobile, the police may search the passenger compartment of the automobile.

(B) No, because the officer had reason to believe that the car contained evidence of the crime for which the defendant was arrested.

(C) Yes, because the officer did not have probable cause to look under the blanket.

(D) Yes, because, after arresting the driver and placing him in the squad car, the car should have been impounded and a warrant obtained before the search.

Question 5

During the investigation of a large gambling operation, the police obtained a warrant to search a bookie's home based on the affidavit of an informant. The informant was a rival bookie who had never acted as an informant before, and much of the substance of the rival's information came from third-party sources. During the search, the police seized a variety of gambling evidence, including betting slips and a check from the defendant. The bookie and the defendant were arrested for violating the state's gambling laws, and separate trials were ordered. At a suppression hearing for the bookie, the court held that the search warrant for the bookie's home was not supported by probable cause and suppressed introduction of the evidence seized. The defendant moved to suppress introduction of the betting slips and the check on the same basis.

If the court agrees that the search warrant of the bookie's home was not supported by probable cause, should the defendant's motion be granted?

(A) Yes, because the rival bookie was not a reliable informant.

(B) Yes, because the evidence is the fruit of an unlawful search.

(C) No, because the client's reasonable expectation of privacy was not constitutionally violated.

(D) No, because the police acted reasonably in relying on the issuance of the warrant.

Question 6

Police went to a warehouse in response to a report of a gunshot. There they found the defendant standing over the victim's body. They immediately arrested the defendant and gave him *Miranda* warnings. The defendant said nothing other than that he wanted an attorney. The defendant eventually was charged with murder and brought to trial. At trial, the defendant testified in his own defense. He claimed that he was in the warehouse alone when he was attacked by the victim, and that he shot the victim in self-defense. The prosecution, on cross-examination, asked the defendant why he did not tell the police when they arrived there that he had shot the victim in self-defense. The defendant's attorney objected to this question, but he was overruled. The defendant was unable to give a satisfactory answer, and the prosecution suggested that he was lying. The defendant was convicted.

Does the defendant have grounds to appeal his conviction on the basis of the prosecutor's cross-examination?

(A) Yes, because the defendant's request for an attorney relieved him of the obligation to talk with the police while he was in custody.

(B) Yes, because the *Miranda* warnings carry an implicit assurance that silence will carry no penalty.

(C) No, because the defendant's silence when the police arrived is tantamount to a prior inconsistent statement that may be used for impeachment purposes.

(D) No, because by taking the stand, the defendant waived any right he may have had not to testify against himself.

Question 7

Right before the beginning of the defendant's trial for arson, a bailiff approached the defendant and got him to admit that he had burned down the house in question. When the trial began, the defendant testified that he had nothing to do with the fire in question. In rebuttal, the prosecution seeks to put the bailiff on the stand to testify as to the defendant's statements, but the defendant's attorney objects.

How should the court rule regarding the objection?

(A) Sustained, because the bailiff did not give the defendant *Miranda* warnings.

(B) Sustained, because the statements were made in the absence of the defendant's counsel.

(C) Overruled, because the prosecution is seeking only to impeach the defendant's testimony.

(D) Overruled, because the defendant knew he was talking to a law enforcement officer.

Question 8

A defendant is on trial for a federal offense. The government has subpoenaed crucial documents from the defendant's bookkeeper that will clearly incriminate the defendant.

May the defendant invoke her Fifth Amendment privilege against self-incrimination to prevent the documents from being admitted?

(A) Yes, because the documents will incriminate the defendant.

(B) Yes, because the documents belong to the defendant; the bookkeeper merely has custody of them.

(C) No, because the Fifth Amendment privilege applies only to compelled testimony.

(D) No, unless the documents contain records that the defendant was required by law to maintain.

Question 9

A state statute allows for criminal trials by a jury composed of six jurors. Five of the six jurors must concur for a guilty verdict. The defendant is charged with petty larceny, which carries a maximum sentence of one year's imprisonment, plus a fine of $2,500. Before voir dire begins, the defendant objects to both the six-member jury and the fact that only five of six jurors are needed for a conviction.

Should the trial judge overrule the objection?

(A) No, because the use of a six-person jury is unconstitutional for this offense.

(B) No, because the number of jurors needed for a conviction is unconstitutional for this offense.

(C) Yes, because the right to a trial by jury does not constitutionally require a jury of 12.

(D) Yes, because a state is permitted to set its own jury trial requirements for petty offenses.

Question 10

As part of a plea agreement, the defendant pleaded guilty at a pretrial hearing to possession of stolen goods, because she knew that the police had recovered the goods and could thereby link her to the crime. Unbeknownst to the defendant, however, the search and seizure of the stolen property was conducted without a warrant, and no exception to the warrant requirement applied. During the negotiation of the plea agreement, the defendant admitted her guilt and provided considerable factual details of the crime, but she was never provided with *Miranda* warnings before making the statements. At the hearing, the defendant's attorney failed to recognize that the search and seizure was unconstitutional or request a copy of the warrant, and thus failed to advise the defendant that the stolen property could be suppressed. The defendant was convicted and sentenced in accordance with the plea agreement.

Can the defendant move to withdraw her guilty plea?

(A) Yes, because no *Miranda* warnings were given before the defendant provided details of the commission of the crime.

(B) Yes, because the representation by the defendant's attorney was ineffective.

(C) No, because the defendant's statement in which she admits guilt would make the admission of the stolen property cumulative.

(D) No, because a guilty plea may not be withdrawn after sentencing if the government lives up to its end of the plea agreement.

Question 11

A farmer was arrested after selling her surplus fruits and vegetables for several days at a vacant lot in the nearby town. A statute provides that it is a misdemeanor, punishable by a fine of up to $500 and/or imprisonment in county jail for up to one year, to sell any product without a business license, except for informal sales held on the property of the seller no more often than once every three months. At the farmer's trial, she requested but was refused appointed counsel.

Assuming that she would otherwise qualify as indigent, if she is convicted of violating the statute, what is the maximum penalty that may be imposed on her?

(A) Imprisonment for six months.

(B) A $500 fine.

(C) Imprisonment for six months and a $500 fine.

(D) No penalty, because her conviction is void as having been obtained in violation of her right to counsel under the Sixth Amendment.

Question 12

A masked gunman held up a convenience store. Due to the poor quality of the surveillance recording, it was very difficult to identify the masked gunman. Nonetheless, the defendant was arrested and charged with the robbery. At the preliminary hearing, the magistrate, on seeing the poor quality of the tape, determined that there was not probable cause to prosecute the defendant. After that, the county prosecutor presented the case to a grand jury, but the grand jury refused to indict the defendant. After waiting a couple of months, the prosecutor presented the case to a different grand jury. The grand jury indicted the defendant and the case went to trial. At trial, the jury was unable to reach a verdict. After this trial, the county prosecutor again tried the case before a jury; in this instance, the jury acquitted the defendant of all charges. At a third trial, the county prosecutor was finally successful in having the defendant convicted. The defendant appeals on double jeopardy grounds. On appeal, the court overturned the conviction because jeopardy had attached.

After what point in the proceedings did jeopardy attach?

(A) When the magistrate determined that there was insufficient evidence to prosecute.

(B) When the first grand jury refused to indict the defendant.

(C) When the first trial had ended in a hung jury.

(D) When the second trial had ended in an acquittal.

ANSWERS TO MULTIPLE CHOICE QUESTIONS

Answer to Question 1

(C) The court should deny the motion because the thief had no standing to object to the search. A person challenging the admissibility of seized evidence must have standing to do so. As a general rule, standing requires a person to have a reasonable expectation of privacy in the place being searched or the item being seized. One may not challenge a search or seizure by claiming that another person's constitutional rights have been violated. Here, the thief had no ownership interest in the dealer's store. He had no reasonable expectation of privacy with respect to it; i.e., he was not present when the search was made, and he had no ownership interest in the stolen goods. Thus, he lacks the standing to object to their illegal seizure. (A) and (B) are incorrect because, while the dealer does have such standing and was successful in having the evidence suppressed at his trial, what occurred at the dealer's trial is not relevant to the thief's motion. (D) is incorrect because the only evidence containing the thief's fingerprints were the stolen goods. If it is found that these items were illegally seized, it would follow that the evidence arising out of this illegal seizure, including the thief's fingerprints, was also illegally seized.

Answer to Question 2

(A) The factory foreman will not succeed in quashing the indictment even though it may be based on illegally obtained evidence. A grand jury may consider any evidence available to it in determining whether probable cause exists to return an indictment against the defendant. Because the exclusionary rule does not apply, a grand jury may base its indictment on evidence that would not be admissible at trial. Thus, even if the pistol was the product of an illegal search and seizure, and the grand jury based its indictment on this evidence, the foreman will not prevail in his attempt to quash the indictment. (B) is incorrect because it is irrelevant. If the foreman's aunt could be characterized as an "agent" of the police because she was acting at their request, the search may have been illegal, but the evidence would still be admissible at the grand jury proceeding. (C) is incorrect because, as discussed above, the grand jury may consider evidence obtained without probable cause. (D) is incorrect regardless of whether the foreman's aunt could be characterized as an agent of the police. As discussed above, even if the search is treated as a police search, the evidence can be considered by the grand jury.

Answer to Question 3

(B) The court should grant the motion. Generally, evidence obtained from an unconstitutional search must be suppressed. The Fourth Amendment requires searches to be reasonable, and generally a search of a home is reasonable only if the police have a search warrant for the home. The police may not execute an arrest warrant in a third party's home without a search warrant or exigent circumstances. Nothing in the facts indicates that the police obtained a search warrant or that there were exigent circumstances. Thus, the search violated the Fourth Amendment and the cocaine should be suppressed. (A) is incorrect because it is irrelevant. The search was invalid because the police lacked a warrant for the search. If they had a warrant to search for the man in the friend's home, the "plain view" exception to the warrant requirement would have applied to contraband sitting on a small table. It does not matter that the person for whom they were searching could not have been hiding on the table. (C) is incorrect. The "plain view" exception to the warrant requirement applies only if the item is in plain view from a place the police are lawfully allowed to be. Here, the police were not lawfully in the home because they did not have

a search warrant. Therefore, the plain view exception does not apply. (D) is incorrect because, as discussed above, the arrest warrant does not give the police the right to search the home of a third party.

Answer to Question 4

(B) The driver's motion should be denied. As a general matter, to conduct a constitutionally valid search, the police must have a search warrant based on probable cause unless the case falls under one of the exceptions to the warrant requirement. One exception to this rule is applicable here. After arresting a person who was recently in an automobile, the police may search the passenger compartment of the automobile if they reasonably believe that evidence of the offense for which the person was arrested may be found in the automobile. That is the case here, as the officer arrested the driver for drunk driving and saw the driver leave a bar with an open bottle in his hand and get into the automobile. (A) is incorrect because it is overbroad. The police may not search an automobile's passenger compartment incident to any arrest of an occupant. Such a warrantless search is valid only if: (i) the arrestee is unsecured and still may gain access to the interior of the automobile or (ii) the police reasonably believe that the automobile contains evidence of the crime for which the occupant was arrested. (C) is incorrect because: (i) probable cause is not necessarily required—only "reason to believe" as discussed above; and (ii) factually, the officer likely did have probable cause. An officer has probable cause to search if he has reasonable grounds to believe that legitimately seizable evidence is located at the place to be searched. Here, the officer saw the driver exit a bar carrying an open bottle, get into a car, pull out the wrong way on a one-way street, and cross into the wrong lane while driving. Hence, the officer had reasonable grounds to believe both that the driver had an open bottle of alcohol in his car and that he was driving drunk. (D) is wrong. As discussed above, a warrantless search of the passenger compartment of an automobile is permissible after an occupant is arrested if, as here, the police have reason to believe that evidence of the crime for which the occupant was arrested may be found in the automobile.

Answer to Question 5

(C) The defendant's motion should be denied because his constitutional rights were not violated by the search and seizure of the bookie's home based on an invalid warrant. To have a Fourth Amendment right to be free from unreasonable search and seizure, a person must have a reasonable expectation of privacy in the place searched or the item seized. Standing to challenge a search on Fourth Amendment grounds does not exist merely because a person will be harmed by introduction of evidence seized during an illegal search of a third person's property; the defendant's ***own*** expectation of privacy must be violated. Here, the defendant had no right of possession of the place searched and no property interest in the items seized; thus, he had no standing to object to the search of the bookie's home and the seizure of the betting slips and check. (D) is incorrect because the defendant's motion should be denied regardless of the reasonableness of the police reliance on the search warrant. Under *United States v. Leon* (1984), a finding that a warrant was invalid because it was not supported by probable cause will not entitle a defendant to exclude the evidence obtained thereby if the police reasonably relied on a facially valid warrant. However, that determination does not need to be made with regard to the defendant because his constitutional rights were not violated by the defective warrant. (A) and (B) are incorrect because, as discussed above, the search was unlawful only with regard to the bookie's rights; the evidence may be used against the defendant because he had no expectation of privacy in the place searched.

Answer to Question 6

(B) The defendant can challenge his conviction because the prosecution's comment on the defendant's silence was improper. After arrest, a defendant has the right to an attorney and the right to remain silent. The exercise of those rights cannot be used against the defendant at trial. The Supreme Court has held that the prosecution cannot comment to the jury on the fact that an arrested defendant exercised the privilege against self-incrimination after being given *Miranda* warnings. Hence, when the prosecution, at trial, asked the defendant why he had not told the police about his self-defense claim right away, the prosecution was improperly using the defendant's exercise of a constitutional right against him. (A) is not entirely on point. Even if the defendant had not asked for an attorney, he could have invoked the privilege against self-incrimination and refused to talk while in custody. Thus, (A) is not as good an answer as (B), which speaks directly to the reason the conviction can be challenged. (C) is incorrect. Even though his silence might give rise to the inference that the story was fabricated, the arrested defendant has the right to remain silent and to consult with an attorney, and the exercise of those rights cannot be used against him. (D) is incorrect. By testifying, he waived his right to be silent at the trial; he did not waive his right to silence before the trial.

Answer to Question 7

(C) The objection should be overruled. This question illustrates the operation of the Sixth Amendment right to counsel approach, which you should use to evaluate the admissibility of any statements made ***after*** the defendant has been charged with the relevant crime. The Sixth Amendment provides defendants with a right to counsel at any post-indictment interrogation. Since the defendant was on trial for arson, any interrogation relating to those charges must take place, if at all, in the presence of the defendant's counsel unless the defendant has knowingly and voluntarily waived the right. Nothing indicates that the arsonist knowingly waived his right to counsel, making (B) a tempting choice. However, the Supreme Court has held that a statement obtained in violation of a defendant's Sixth Amendment right to counsel may be used to impeach the defendant's contrary trial testimony, which is what is happening here. Thus, the bailiff's testimony should be allowed. (A) is incorrect because the failure to give *Miranda* warnings, which may violate the Fifth Amendment privilege against self-incrimination, does not prevent use of otherwise voluntary statements for impeachment purposes, as in this case. (D) is incorrect because it is not relevant. The Sixth Amendment is violated by questioning a defendant after he has been charged, regardless of whether the defendant knows that the person questioning him is a police officer. Nor does this constitute a waiver of the right to counsel. When one is represented by counsel, a valid waiver of the right to counsel requires the presence of counsel unless the defendant initiates the contact. Here, the defendant's attorney evidently was not present when the bailiff talked to him, so there was no valid waiver here.

Answer to Question 8

(C) The documents will be admitted. The privilege against self-incrimination bars the government from procuring ***compelled testimony***. Here, the act of producing the documents does not involve testimonial self-incrimination. Documents are considered to be real or physical evidence, not testimonial evidence, and thus are outside the scope of the privilege. Thus, (A) is incorrect. (B) is irrelevant because the documents are beyond the scope of the privilege, regardless of who owns them. (D) is incorrect because it is irrelevant. Records required by statute that have a lawful administrative purpose are not protected by the Fifth Amendment.

Answer to Question 9

(B) The judge should not overrule the objection. There is no constitutional right to a jury of 12, but there must be at least six jurors to satisfy the right to a jury trial under the Sixth and Fourteenth Amendments. There is also no right to a unanimous verdict. However, the Supreme Court has held that six-member juries must be unanimous. Thus, the fact that a six-member jury was used would be constitutionally permissible, making (A) incorrect, but the requirement that only five of six jurors must concur for a guilty verdict would not be constitutionally permissible. (C) is incorrect because, while it is a true statement, it does not reach the correct result. It still is unconstitutional to have less than a unanimous verdict when there are only six jurors. (D) is incorrect because this is not a petty offense for purposes of the right to jury trial. A jury trial complying with the rules stated above is required for serious offenses, which are those authorizing imprisonment of more than six months. Here the offense permitted a sentence of up to one year's imprisonment, making it a serious offense for which the right to a jury trial applies.

Answer to Question 10

(B) The defendant can move to withdraw her plea. Ordinarily it is difficult to collaterally attack a guilty plea after sentencing when the plea is seen as an intelligent choice among the defendant's alternatives. Notwithstanding, a plea may be attacked after sentencing in certain circumstances; e.g., if there was ineffective assistance of counsel. Ineffective assistance of counsel undercuts the assumption of an intelligent choice among the defendant's alternatives on the advice of counsel. Therefore, a defendant may successfully attack a guilty plea on the ground that she received ineffective assistance of counsel if, but for the counsel's errors, the defendant probably would not have pleaded guilty and instead would have insisted upon going to trial. Here, the facts indicate that the defendant pleaded guilty because she believed that the government lawfully seized evidence that would implicate her in the crime. Had the defendant's counsel requested a copy of the search warrant, as most defense lawyers would have done, the defendant would have discovered that the evidence might be suppressed, and thus would not as readily have pleaded guilty. Hence, (B) is correct. (A) is incorrect because any admissions made during plea negotiations are inadmissible at trial. The fact that the defendant was not *Mirandized* before such statements would not be a basis for overturning the plea agreement. (C) is incorrect because a defendant's admissions during plea negotiations also would not save a plea agreement for the government. Admissions during plea agreements would not cure a defective plea agreement. (D) is incorrect as an overbroad statement. A plea agreement may be attacked after sentencing in certain circumstances.

Answer to Question 11

(B) The farmer may be fined under the statute but not imprisoned. The right to counsel under the Sixth Amendment gives the defendant the right to be represented by privately retained counsel or to have counsel appointed for her by the state if she is indigent. However, the right to counsel applies to misdemeanor trials only when a sentence of imprisonment is ***actually*** imposed (including a suspended sentence). Thus, even though the misdemeanor statute permits a potential jail term, its alternative penalty of a fine may constitutionally be imposed on the defendant despite the refusal to provide her with counsel. (A) and (C) are incorrect because the right to counsel would apply to any misdemeanor trial in which imprisonment is actually imposed. The failure to provide the farmer with counsel would preclude the imprisonment sentence. (D) is incorrect because, as discussed above, the misdemeanor's alternative penalty of a fine may be imposed without violating the constitutional right to counsel at trial.

Answer to Question 12

(D) The court will find that the conviction must be overturned because jeopardy had attached after the second trial ended in an acquittal. The Fifth Amendment right to be free of double jeopardy for the same offense has been incorporated into the Fourteenth Amendment. The general rule is that once jeopardy attaches, the defendant may not be retried for the same offense. In jury trials, jeopardy attaches when the jury is empanelled and sworn, but the state may retry a defendant even if jeopardy has attached when the first trial ends in a hung jury. Hence, (C) is incorrect. (A) is incorrect. Because the jury had not been empanelled and sworn when the magistrate had found insufficient grounds to prosecute, no jeopardy had attached yet. Likewise, the jury deciding the case would not have been empanelled or sworn when the case was presented to a grand jury. Thus, jeopardy had not attached when the case was presented to the grand jury. As a result, (B) is incorrect. (D) is correct because the jury would had to have been empanelled and sworn (and thus jeopardy had attached), and no exception exists for a case ending in an acquittal.

APPROACH TO EXAMS

CRIMINAL PROCEDURE

IN A NUTSHELL: The study of Criminal Procedure, for the most part, is the study of protections given by the Constitution (as interpreted by the Supreme Court) to persons accused of committing crimes. Since most constitutional restrictions on governmental power apply by their terms only to the federal government, constitutional criminal protections are applicable to the states only if the Supreme Court finds that they are part of the due process owed by states to citizens under the Fourteenth Amendment. In addition to the rights specified in the Constitution, the Supreme Court has made a few rules of its own to ensure the specified rights are protected. Two such judge-made rules are the focus of many law school classes—the exclusionary rule and the *Miranda* rule. The exclusionary rule generally prohibits the introduction at trial of evidence obtained in violation of the Fourth, Fifth, or Sixth Amendments. *Miranda* generally prohibits introduction at trial of statements obtained from people through interrogation while in police custody unless they are first informed of various rights and warned of consequences of waiving those rights.

I. WAS THE FOURTH AMENDMENT VIOLATED?

A. Was Seizure of a Person Proper?

1. Right to be free from unreasonable searches and seizures of person and property by government
2. What constitutes a seizure of the person?
    a. Under the totality of circumstances
    b. Reasonable person would not feel free to decline officer's requests and terminate the encounter
    c. Must be a physical application of force or submission to a show of force
    d. Arrest
        1) Must be based on probable cause
        2) Warrant not required for public arrest
        3) Warrant required to arrest person in own home
    e. Investigatory detentions (*Terry* stops)
        1) May be made on reasonable suspicion supported by articulable facts
        2) Reasonable suspicion determined by totality of circumstances
        3) Informer's tips must be accompanied by indicia of reliability
        4) Police must act in a diligent and reasonable manner in confirming or dispelling their suspicion (cannot take too long)
    f. Automobile stops
        1) Generally must have at least reasonable suspicion that a law has been violated
        2) Exception—special law enforcement needs can justify suspicionless roadblocks
            a) Cars must be stopped on basis of a neutral, articulable standard
            b) Must serve purpose closely related to a particular problem pertaining to automobiles and their mobility

g. Subpoena to appear before a grand jury is not within Fourth Amendment protection
h. Use of deadly force is a seizure, and deadly force may not be used unless reasonable under the circumstances

B. Was There an Improper Search or Seizure of Property?

1. Was there government conduct?
   a. Fourth Amendment proscribes only governmental conduct (*e.g.*, the police and their agents)
2. Does defendant have standing?
   a. May complain only about interference with own reasonable expectation of privacy or physical intrusion into own constitutionally protected area
   b. Determined under totality of circumstances
   c. Premises—person has a reasonable expectation of privacy in:
      1) Places owned by the person
      2) Person's home—whether or not person owns or has a right to possess
      3) Place in which person is at least an overnight guest
      4) No reasonable expectation of privacy in things held out to the public (sound of one's voice, smell of one's luggage, etc.)
      5) Reasonable expectation of privacy in home extends to curtilage
3. Searches pursuant to a warrant
   a. Warrant requirements
      1) Issued by neutral and detached magistrate
      2) Based on probable cause to believe that seizable evidence will be found in place to be searched
      3) Describes with particularity the place to be searched or items to be seized
      4) Invalid if based on a material false statement that was intentionally or recklessly included
      5) Must generally knock and announce authority
         a) No knock entry permissible if officer has reasonable suspicion that knocking and announcing would be dangerous or would inhibit investigation
         b) Evidence not excluded based on violation of above rule
   b. Exceptions to warrant requirement (generally, other warrantless searches unreasonable/unconstitutional under Fourth Amendment)
      1) Search incident to lawful arrest (contemporaneous requirement)
      2) Automobile exception
         a) Need probable cause to believe vehicle contains contraband or fruits, instrumentalities, or evidence of a crime
         b) May search anywhere in/on car where item that is subject of search may be found
         c) Contemporaneousness not required
      3) Plain view
         a) Legitimately on premises
         b) Discover contraband or fruits, instrumentalities, or evidence of a crime

c) In plain view

4) Consent (from one with apparent right to use or occupy property)
   a) If suspect present, may overrule consent
   b) Parent usually has authority to consent to search of child's room if parent has access
5) Stop and frisk
   a) During valid *Terry* stop (*see* above)
   b) Police have reasonable belief that detainee is armed and dangerous
   c) May patdown outer clothing for weapons
   d) May seize anything that by plain feel is weapon or contraband
6) Hot pursuit of a fleeing felon
7) Evanescent evidence (*i.e.*, evidence likely to disappear before warrant can be obtained, such as tissues from under a suspect's fingernails)
8) Emergency aid/community caretaker exception (*i.e.*, search justified by threats to health or safety)
9) Inventory searches incident to arrest
   a) Valid if pursuant to established police department procedure
10) Public school searches by school officials valid if reasonable:
   a) Offers moderate chance of finding evidence of wrongdoing
   b) Implemented through means reasonably related to objectives of the search
   c) Search not excessively intrusive
11) Mandatory drug testing—has been upheld when it serves a special need beyond the needs of law enforcement
   a) High school students in extracurriculars
   b) Government employees with access to drugs
12) Border searches—warrantless searches broadly upheld to protect sovereignty

II. WAS CONFESSION VALIDLY OBTAINED?

A. Was Due Process Violated—Involuntary Confession?

1. Judged by a totality of the circumstances
2. Government compulsion makes confession involuntary
3. Harmless error test applies if involuntary confession erroneously admitted into evidence

B. Was Sixth Amendment Right to Counsel Violated?

1. Applies at all critical stages of the prosecution
2. Attaches when adversary judicial proceedings are begun
3. Offense specific—pertains to only one charge and defendant must ask again if later charged with separate, unrelated crime
4. Waivable—must be knowing and voluntary
5. Remedy— if defendant was denied his right at trial, automatic reversal (harmless error rule applies as to nontrial proceedings)

6. Statement made in violation of Sixth Amendment may not be used to prove guilt but may still be used for impeachment

C. Was Fifth Amendment Privilege Against Compelled Self-Incrimination Violated?

1. *Miranda* warnings:
   a. Right to remain silent
   b. Anything that is said may be used in court
   c. Right to an attorney
   d. If cannot afford attorney, one will be appointed
2. Warnings must be given prior to custodial interrogation by police
   a. Defendant must know interrogation is by police; does not apply to informant or probation officer
   b. Custody—would reasonable person under the circumstances feel free to terminate interrogation and leave; if not, is environment coercive?
      1) Test is objective
      2) Traffic stop noncustodial (temporary and brief)
   c. Interrogation—any police words or conduct designed to elicit an incriminating response
3. Waiver
   a. Rights must be explicitly invoked
   b. Right to remain silent
      1) Waiver must be knowing and voluntary
      2) Judge under totality of the circumstances test
      3) If warnings given and defendant talked, valid waiver generally found
      4) If right claimed, request must be scrupulously honored (cannot ask more about the crime)
   b. Right to counsel
      1) All questioning must cease
      2) Defendant may voluntarily reinitiate questioning
      3) Request for counsel must be unambiguous
      4) Duration of prohibition against questioning—14 days after defendant returns to normal life
4. Effect of violation
   a. Evidence inadmissible at trial
   b. Statements may still be used to impeach defendant's testimony
   c. Defendant's silence after receiving warnings cannot be brought up
   d. Harmless error test applies
   e. Public safety exception—responses to questioning without *Miranda* warnings may be admissible if questioning was reasonably prompted by a concern for public safety

D. Pretrial Identifications

1. Sixth Amendment right to counsel applies at any post-charge lineup or showup
   a. Photo identifications—no Sixth Amendment right
2. Due process standard—unnecessarily suggestive identification procedures that give rise to a likelihood of misidentification violate due process
3. Improper identifications will be excluded from trial

4. If out-of-court identification excluded, in-court identifications allowed if from a source independent of the excluded identification

III. EXCLUSIONARY RULE

A. The Rule

Evidence obtained in violation of defendant's Fourth, Fifth, or Sixth Amendment rights generally will be excluded to deter government violation of constitutional rights

B. Fruit of the Poisonous Tree Doctrine

1. All evidence derived from excluded evidence will also be excluded
2. Balancing test—no exclusion if the deterrent effect on police misconduct is outweighed by the costs of excluding probative evidence
   a. Exceptions
      1) Independent source—evidence will be admitted if from a source independent of the unconstitutional conduct
      2) Intervening act of free will by defendant
      3) Inevitable discovery by police
      4) Live witness testimony
      5) In-court identification
      6) Violations of no-knock entry rule
      7) Good faith reliance on a defective search warrant
      8) Use of evidence to impeach
3. Outside scope of fruit of poisonous tree
   a. Grand juries
   b. Civil proceedings
   c. Violations of state law
   d. Violations of internal agency rules
   e. Proceedings to revoke parole
4. Harmless error test applies to violations

IV. PRETRIAL PROCEDURES

A. Preliminary (*Gerstein*) Hearing

1. Hearing to determine probable cause
2. Not required if probable cause already found (*e.g.*, by grand jury or under arrest warrant)
3. Hearing must be within reasonable time (48 hours)

B. Initial Appearance

1. Soon after arrest
2. Defendant told of charges, bail set, appointment of counsel if needed

C. Bail

1. Right under Due Process Clause as to federal prosecutions
2. Not required of states but many state constitutions or statutes require
3. Where right exists, excessive bail an Eighth Amendment violation
4. Where right exists, unfair procedures violate due process

D. Grand Juries

1. Not required of states (but some state constitutions require)
2. Upon finding probable cause, grand jury issues a "true bill"
3. Secret proceedings
4. Broad subpoena power
   a. Quashed only if opposing party can prove no reasonable possibility that material sought is relevant to the grand jury investigation
5. No right to:
   a. Counsel
   b. *Miranda* warnings
   c. Warnings that witness may be a "potential defendant"
   d. Exclude evidence that would be inadmissible at trial
   e. Challenge subpoena for lack of probable cause

E. Speedy Trial

1. Under totality of circumstances, court will consider: length of delay, reason for delay, whether defendant asserted his rights, and prejudice to defendant
2. Remedy—dismissal with prejudice
3. Right attaches on arrest or charging

F. Prosecutorial Disclosure Duties

1. Government must disclose exculpatory evidence
2. Failure = due process violation if reasonable probability trial result would have been different if undisclosed evidence had been presented at trial

G. Competency to Stand Trial

1. At time of trial, defendant not competent if:
   a. Defendant lacks rational and factual understanding of the charges and proceedings or
   b. Defendant lacks ability reasonably to consult with lawyer
2. Trial judge has a duty to raise if no one else does
3. Burden to prove incompetency may be placed on defendant
4. May be detained in mental facility for only short time unless commitment proceedings are brought

H. Pretrial Publicity

Excessive prejudicial publicity may necessitate change of venue

V. TRIAL

A. Right to Public Trial

1. Sixth and Fourteenth Amendments provide the right to public trial
2. Probable cause hearings presumably open to public
3. Suppression hearings open unless:
   a. Party seeking closure has overriding interest
   b. Closure is no broader than necessary
   c. Other reasonable alternatives were considered
   d. Court makes findings to support closure

B. Right to Jury

1. Sixth Amendment right to jury for serious offenses
   a. Serious offense—imprisonment for more than six months
   b. Civil contempt—no right
2. Number and unanimity
   a. At least six jurors
   b. 11-1, 10-2, and 9-3 convictions have been upheld
   c. Six-person juries must be unanimous
3. Representative cross-section
   a. Defendant need not be of excluded group to complain
   b. Petit jury need not be representative—just venire
   c. Peremptory challenges cannot be used in discriminatory manner
      1) If defendant shows facts or circumstances raising an inference of prejudice,
      2) Prosecutor must give race- or sex-neutral explanation, and
      3) Judge must then determine prosecutor's sincerity
      4) Defendants similarly limited
4. Right to impartial jury
   a. Right to question on racial prejudice if race inextricably bound up
   b. Opposition to death penalty
      1) May be excluded if view would prevent or substantially impair performance of duty

C. Right to Counsel

1. Denial of right at trial requires reversal
2. Denial of right at nontrial proceedings requires reversal unless harmless
3. Waiver valid if knowing and intelligent and defendant competent
   a. Voluntary and intelligent if defendant has a rational and factual understanding of the proceeding
4. Effective assistance of counsel
   a. Part of Sixth Amendment right
   b. Effective assistance is presumed
   c. Ineffective if:
      1) Deficient performance and
      2) But for deficiency, result of proceeding would have been different
   d. Not ineffective assistance—trial tactics
5. Conflicts of interest—representing multiple clients
   a. May be basis for reversal
   b. No right to joint representation

D. Right to Confront Witnesses

1. Right not absolute (*e.g.*, disruptive defendant)
2. Co-defendant's confession
   a. Confession implicating co-defendant prohibited unless:
      1) References can be excised or
      2) Confessing defendant takes stand and subjects himself to cross-examination

3. Prior testimonial statement of witness inadmissible unless:
   a. Witness unavailable and
   b. Defendant had an opportunity to cross-examine witness when statement was made
   c. "Testimonial"—at a minimum includes testimony from preliminary hearings, grand jury hearings, former trial, and police interrogation
      1) Police interrogation—nontestimonial if purpose of questioning was to respond to an ongoing emergency
      2) Results of forensic testing testimonial if offered to prove truth of testing
      3) May forfeit by wrongdoing intended to keep witness from testifying

E. Burden of Proof and Sufficiency of Evidence

1. Burden—proof beyond reasonable doubt
2. Mandatory presumption shifting burden to defendant violates Fourteenth Amendment due process

VI. GUILTY PLEAS & PLEA BARGAINING

A. Guilty Plea Waives Right to Jury

B. Taking the Plea

1. Judge must determine that plea is voluntary and intelligent
2. Judge must address defendant personally on record to ensure defendant knows:
   a. Nature of charge and crucial elements
   b. Maximum possible charge and mandatory minimum
   c. The right not to plead guilty
   d. By pleading guilty defendant waives right to trial

C. Remedy

Unfairly informed defendant not bound by plea

D. Bases for Collateral Attack on Guilty Plea

1. Plea involuntary—errors in plea-taking procedure
2. Court lacked jurisdiction to take plea
3. Ineffective assistance of counsel
4. Failure of prosecutor to keep plea bargain

E. Finality of Plea

1. Defendant not permitted to withdraw plea if intelligent choice among alternatives

VII. CONSTITUTIONAL RIGHTS REGARDING SENTENCE AND PUNISHMENT

A. Right to Counsel Available at Sentencing

B. No Right to Confrontation

1. Exception—magnified sentence based on new findings of fact
2. Exception—capital sentencing requires more confrontation right

C. Resentencing After Successful Appeal

1. If judge imposes greater punishment at trial (after defendant's successful appeal), record must show reasons for harsher sentence
2. Exception—reconviction upon trial de novo
3. Exception—jury trial

D. Substantive Rights Regarding Punishment

1. Eighth Amendment prohibits punishment that is both cruel and unusual; *i.e.*, punishment is grossly disproportionate to offense
2. Death penalty
   a. Statutory scheme must give fact finder reasonable discretion, full information, and guidance in making decision
   b. Statute may not be vague
   c. Application
      1) For murder—valid
         a) For accomplice to felony murder—valid if accomplice participated in a major way and acted with reckless disregard to the value of human life
      2) For rape—disproportionate and invalid
      3) If prisoner is insane—invalid
      4) If prisoner is mentally retarded—invalid
      5) If prisoner was younger than 18 when crime was committed—invalid
3. Unconstitutional to make a status a crime
4. Unconstitutional to sentence minor to life without possibility of parole
5. Unconstitutional to provide for harsher penalties for those demanding trial
6. Imprisonment of indigent for failure to pay fine violates equal protection

VIII. APPEAL

A. No Right to Appeal

B. If Right to Appeal Is Granted by State Law, Right to Counsel Applies at First Appeal

C. No Right of Self-Representation

D. Retroactivity of New Rule

New rules announced on direct appeal must be applied to all other cases on direct appeal

IX. COLLATERAL ATTACKS ON CONVICTIONS

A. Habeas Corpus

1. Civil action challenging lawfulness of detention
2. Petitioner has burden to show unlawful detention by preponderance of evidence
3. Defendant must be "in custody" (includes on bail, probation, or parole)

X. DOUBLE JEOPARDY

A. Fifth Amendment Right Applicable to States Through Fourteenth Amendment

1. Once jeopardy attaches, defendant cannot be retried for same offense

B. When Does Jeopardy Attach?

1. Jury trial—when jury empaneled and sworn
2. Bench trial—when first witness sworn
3. Juvenile proceedings—at commencement of proceeding

C. Exceptions Permitting Retrial

1. Hung jury
2. Mistrial for manifest necessity to abort original trial
3. Retrial after successful appeal
    a. Cannot be for more serious crime than crime convicted of in first trial

D. Same Offense

1. Two crimes are not the same offense if each crime requires proof of an element the other does not require (*Blockburger* test)
2. Only repetitive criminal prosecutions (not civil actions) prohibited
3. Charges by separate sovereigns (*e.g.*, state and federal governments) not prohibited

XI. PRIVILEGE AGAINST SELF-INCRIMINATION

A. Fifth Amendment Right Applicable to States Through Fourteenth Amendment

B. Right for Natural Persons Only (Not Corporations or Partnerships)

C. Applies Only to Testimony

1. Does not apply to physical evidence
2. Does not apply to documents

D. Defendant Can Refuse to Take Stand Altogether

1. Prosecutor cannot comment on defendant's silence after receiving *Miranda* warnings
    a. Exception—in response to a claim of no opportunity to explain
    b. Harmless error test applies—violation does not automatically require retrial

E. Witness Other than Defendant Must Take Stand and Invoke Privilege Question-by-Question

F. Elimination of the Privilege

1. Use and derivative use immunity sufficient to eliminate privilege
    a. Immunized testimony is involuntary and cannot be used for impeachment
    b. State immunized testimony cannot be used in federal prosecution
    c. Federal immunized testimony cannot be used in state prosecution
2. Privilege can be waived

ESSAY EXAM QUESTIONS

INTRODUCTORY NOTE

The essay questions that follow have been selected to provide you with an opportunity to experience how the substantive law you have been reviewing may be tested in the hypothetical essay examination question context. These sample essay questions are a valuable self-diagnostic tool designed to enable you to enhance your issue-spotting ability and practice your exam-writing skills.

It is suggested that you approach each question as though under actual examination conditions. The time allowed for each question is 30 minutes. You should spend 10 minutes spotting issues, underlining key facts and phrases, jotting notes in the margins, and outlining your answer. ***If*** you organize your thoughts well, 20 minutes will be more than adequate for writing them down. Should you prefer to forgo the actual writing involved on these questions, be sure to give yourself no more time for issue-spotting than you would on the actual examination.

The BARBRI technique for writing a well-organized essay answer is to (i) spot the issues in a question and then (ii) analyze and discuss each issue using the "CIRAC" method:

C — State your ***conclusion*** first. (In other words, you must think through your answer ***before*** you start writing.)
I — State the ***issue*** involved.
R — Give the ***rule(s)*** of law involved.
A — ***Apply*** the rule(s) of law to the facts.
C — Finally, restate your ***conclusion***.

After completing (or outlining) your own analysis of each question, compare it with the BARBRI model answer provided herein. A passing answer does ***not*** have to match the model one, but it should cover most of the issues presented and the law discussed and should ***apply the law to the facts*** of the question. Use of the CIRAC method results in the best answer you can write.

EXAM QUESTION NO. 1

On April 10, a convenience store was robbed by someone carrying a gun. The store's video camera caught the robbery on tape. The tape was shown on the evening news.

On April 11, an anonymous caller contacted the police saying, "I saw that tape of the robbery. The robber kind of looks like Student. He's an 18-year-old student at the high school."

On April 12, two police officers took the tape to the high school and showed it to the principal, who said, "It could be Student. It's hard to tell because the tape is not clear." The tape was also shown to Student's homeroom teacher, who said, "It might be him, but I couldn't say for sure."

Later that day, the police officers went to the store where Student works after school. They asked the manager if they could talk with Student, who was called to the manager's office. The police introduced themselves to Student and said, "We'd like to talk to you." They walked with Student into the manager's office and shut the door. One police officer sat behind the manager's desk; the other, in full uniform with his revolver visible, sat near the door. Student sat between them. The manager's office measures eight feet by 10 feet.

The police officers told Student they wanted to ask him some questions about the convenience store robbery on April 10. Student said he knew nothing about a robbery. He continued to deny that he had any knowledge of the robbery for about 20 minutes. Student did not ask to leave, and neither police officer told Student he was free to leave.

After about 20 minutes, the police officers told Student that they had a videotape of the robbery and that they had shown it to three people, all of whom positively identified Student as the robber.

Student said nothing for a few minutes. One of the police officers then said, "You know, if we can tell the prosecutor that you cooperated, she might go a lot easier on you. I'd hate to see you end up doing a long stretch in prison. Let's just say it's not a nice place." Student then blurted out, "I did the robbery. I used a little air gun."

Immediately after Student made that statement, the police officers informed Student that he was under arrest for the robbery of the convenience store. They read him his *Miranda* rights. Student stated he understood his *Miranda* rights and told the police officers that he was not going to say anything more to them. The police officers placed Student in handcuffs and took him to the police station where he was booked for armed robbery.

Student had had two earlier brushes with the law. When he was 16, he had been found delinquent in juvenile court for auto theft and had been placed on supervision for one year. When he was 17, he had received a ticket for underage drinking and had paid a fine of $150. He is a "C" student, but his teachers believe he is an "underachiever."

Student's defense attorney has filed a motion to suppress Student's statements on three grounds:

(1) Student's statements were obtained in violation of Student's Fourth Amendment rights.

(2) Student's statements were obtained in violation of his *Miranda* rights.

(3) Student's confession was not voluntary.

How should the trial court rule on each of the grounds in the motion to suppress? Explain.

EXAM QUESTION NO. 2

On Memorial Day, the county sheriff's department received an anonymous telephone call advising that Ryan Catwood was involved in the drowning death of Marissa Hooper, whose body had been found two weeks earlier floating in Pickwick Lake. The caller claimed that Ryan had drugged Marissa, carried her onto his bass boat, motored to a remote area of the lake, and dumped her into the water.

Deputies began looking for Ryan, and a radio dispatcher for the sheriff's department issued a BOLO (Be On the Lookout) for a green Explorer SUV registered to Ryan. Later that same day, Deputy Kenny Brisco spotted Ryan's SUV. Deputy Brisco stopped the vehicle and asked Ryan to follow him to the sheriff's department. Ryan did so. He was escorted to a small conference room and introduced to investigator Van Buren. Investigator Van Buren began by telling Ryan that he was not under arrest and could leave at any time.

When Van Buren broached the subject of Marissa's drowning, Ryan denied knowing her. Van Buren left the room and returned with a file. Without speaking, Van Buren began reading. After 10 minutes of silence, Van Buren commented aloud that, any minute, he was expecting to meet an eyewitness who had seen Ryan disposing of a body in Pickwick Lake. Ryan stood up, and Van Buren interjected, "Kid, this is your last chance to talk to me. I'm having the paperwork prepared to charge you with murder." Ryan started hyperventilating and pleading, "Please, don't do that. I'm sorry." Then addressing Van Buren, Ryan said, "I'm having a panic attack. I have got to get out of here!" Van Buren blocked Ryan's exit and told him, "Stay put; I'll call a doctor." Ryan sat down and began muttering that Marissa had threatened to leave him and that no other man was "good enough for her."

Van Buren left and returned with a corrections officer from the jail infirmary. Van Buren told Ryan that the corrections officer would escort him to the infirmary for a medical evaluation, but first, Van Buren advised Ryan of his *Miranda* rights. Ryan signed a rights acknowledgment and waiver form and asked to see a doctor. Without responding, Van Buren began questioning Ryan about when he last saw Marissa. Ryan asked, "Do I need a lawyer just so I can see a doctor?" He added, "Get me a cell phone." Van Buren asked why Ryan needed a cell phone, and Ryan looked at the corrections officer and said, "I'm through talking to that jerk. I want to see a doctor."

The corrections officer announced that he was leaving and would return promptly with a physician. Van Buren stared at Ryan and asked, "What can I do to get you to change your mind?" Ryan asked if Van Buren would "put in a good word" for him with the judge. When Van Buren responded that he would, Ryan broke down and gave a detailed confession of how he murdered Marissa.

Ryan was charged with premeditated, first degree murder, and you are the trial judge assigned to handle the case. Ryan's attorney has filed a motion to suppress any and all statements that Ryan made in Van Buren's presence.

Based upon the facts recited, answer the following questions:

(1) Should Ryan's statement "Please, don't do that. I'm sorry" and his remarks about Marissa threatening to leave him and no other man "being good enough for her" be suppressed? Why or why not? Explain your answer in detail.

(2) What effect, if any, do Ryan's question about needing a lawyer and demand for a cell phone have on the admissibility of his subsequent, detailed confession? Explain your answer in detail.

(3) What effect, if any, do Ryan's statements to the corrections officer that he was through talking with the jerk, Van Buren, and wanted to see a doctor have on the admissibility of his subsequent, detailed confession? Explain your answer in detail.

EXAM QUESTION NO. 3

At approximately 2:00 p.m. on July 2, Jean Hodes, a dispatcher with the Emergency 911 Communications Center in Erehwon, received a call from an unidentified male who sounded panic stricken. The caller reported that Nancy Sotwin was driving erratically on Milkweed Lane at a high rate of speed and had struck a young child riding a bicycle. The caller also related that Sotwin did not stop but drove to a house at the end of the lane, pulled into the attached garage, and closed the garage door.

Erehwon police officers responded to the call. They summoned medical assistance for the child, and several officers approached the residence at the end of the lane and knocked on the front door. When Nancy's adult brother, Andy, answered the door, the officers explained that a vehicular assault had occurred, and the officers asked Andy for permission to search the garage. Andy responded, "Whatever," stepped aside, and pointed to the door leading into the garage. Nancy walked out of the guest bathroom just as one of the officers reached the door, and she shouted to the officers to leave her house. The officer at the door ignored Nancy's protest; he opened the door and walked into the garage where he discovered a Saturn VUE with blood spattered over the right corner of the front bumper. Officers applied for a search warrant to seize the vehicle, and later forensic analysis identified the blood as that of the injured child.

The day following the hit and run, officers canvassed the neighborhood for witnesses. Officers interviewed Doug Wilson, who told them that he was having a late lunch the previous day at the Erehwon Grill and Bar, where he saw Nancy drink five martinis over a 30-minute period. Doug reported that when Nancy left the bar at approximately 1:45 p.m., she was very unsteady on her feet. Soon after the interview, Doug was called to active duty in Iraq for 48 months.

A grand jury indicted Nancy for vehicular assault by intoxication. Pretrial, the defense has moved to suppress the results of the blood analysis as the fruit of an illegal warrantless search of Nancy's garage. Also, anticipating that the prosecution would offer a tape recording of the 911 call and Doug's hearsay statements, the defense challenged admissibility as violating Nancy's constitutional confrontation rights. The state has responded that Nancy's brother, who lived at the residence, provided effective consent to a search of the garage and that the hearsay evidence is nontestimonial and, therefore, not subject to Confrontation Clause scrutiny.

Based on the foregoing, determine:

(1) Whether the warrantless search of the Sotwin garage violated the Fourth Amendment to the United States Constitution.

(2) Whether the federal Confrontation Clause bars admission of the 911 tape recording.

(3) Whether the federal Confrontation Clause bars admission of Doug's statements to the officers.

EXAM QUESTION NO. 4

James Kirk was hunting in a rural area in the state of Pennsyltuckey. He shot at what he thought was a deer. Unfortunately, it was a man in a deerskin coat, and the man died some days later from the wound Kirk caused. Kirk was prosecuted for negligent homicide and was convicted at trial. On appeal, the Pennsyltuckey Court of Appeals reversed, holding that, as a matter of law, the shooting was a "mere misadventure" and could not be the basis for a homicide prosecution.

The local prosecutor drove by the scene of the crime a few days after the court of appeals' decision was handed down. He noticed that Kirk had been hunting from a position only 50 feet from a farmhouse owned by someone other than the victim of the shooting. Accordingly, he has decided to prosecute Kirk for hunting within 400 feet of a dwelling house, a misdemeanor under Pennsyltuckey law. The maximum penalty for hunting within 400 feet of a dwelling house is 10 months' imprisonment and a $500 fine, and a person so convicted may not obtain a hunting license for the next five years. The case has been assigned to Judge Spock, the same judge who tried the first negligent homicide case. Kirk has demanded a jury trial, and he has asked for court-appointed counsel. Judge Spock has ruled that Kirk will have neither. He stated that he would impose no more than six months' imprisonment (in addition to a possible fine, and the five-year loss of hunting privileges). Kirk also asked the court to dismiss the case altogether on the claim that it is barred by the "federal double jeopardy provision."

Assume that Kirk is otherwise qualified to have court-appointed counsel. If Kirk is convicted and receives the stated sentence, what are his chances for a reversal in the court of appeals based on the following arguments: (1) that he should have been given court-appointed counsel; (2) that he should have been given a jury trial or (3) at least, that the same judge who had previously tried him should not have been allowed to try his second case; and (4) that the second prosecution for the same hunting incident is barred by double jeopardy? Explain your answer.

ANSWERS TO ESSAY EXAM QUESTIONS

ANSWER TO EXAM QUESTION NO. 1

(1) The trial court should deny the motion to suppress based on the Fourth Amendment. At issue is whether Student was unreasonably seized.

As a general rule, evidence obtained in violation of a person's Fourth Amendment rights must be suppressed. The Fourth Amendment, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, prohibits unreasonable searches and seizures. A person is seized if a reasonable person under the circumstances would not feel free to leave. Whether a seizure is reasonable under the Fourth Amendment depends on the scope of the seizure (*e.g.,* an arrest vs. an investigatory detention) and the strength of the suspicion prompting the seizure (*e.g.,* an arrest requires probable cause while an investigatory detention can be based on reasonable suspicion).

Here, a court probably would find that Student was seized. On the one hand, the officers ***asked*** Student to go into his manager's office to talk with them and he complied, which makes this seem more like a voluntary questioning situation. On the other hand, an officer stood near the door, in uniform, wearing a gun—a position that would probably send a message to the average person that leaving was out of the question, the questioning went on for 25 minutes, and the officers did not indicate that Student was free to leave. On balance, a court would probably find a seizure here.

Assuming that Student was seized, a court would probably find that the seizure was reasonable. It is unlikely that the court would find that the police had probable cause to make an arrest before Student confessed. Without a warrant, police may arrest a person for a felony, such as the robbery here, only if they have information sufficient to make a reasonable person believe that a felony was committed and the person before them committed it (*i.e.,* probable cause). Here, while the police had sufficient information to reasonably believe that a robbery was committed, the photo identifications of Student all were too uncertain to make a reasonable person believe that Student committed the robbery. However, the police had reasonable suspicion for an investigatory detention.

Under *Terry v. Ohio*, if the police have reasonable suspicion of criminal activity based on articulable facts, they may stop a person without a warrant to conduct a brief investigation. Here, three people said that the person seen committing the robbery on videotape could be Student. These identifications were sufficient to give rise to reasonable suspicion to investigate. Moreover, given that two of the witnesses were familiar with Student and their assertions that Student "could be" and "might be" the robber on the videotape, questioning Student for 25 minutes would probably be considered a reasonable investigation. Thus, the seizure was valid under the Fourth Amendment and Student's statements should not be suppressed on this ground.

(2) The motion to suppress based on *Miranda* presents a very close question, with no certain result. At issue is whether Student was in custody when he was being interrogated.

To offset the coercive effects of police interrogation, the Supreme Court requires police to give detainees *Miranda* warnings (*e.g.*, that they have a right to remain silent and to an attorney) before conducting any custodial interrogation. Here, the police did not give Student *Miranda* warnings before they began questioning him. That the questioning constituted an interrogation is not in doubt. Interrogation is any police conduct designed to elicit an incriminating response. Here, the officers asked Student questions about the robbery—clearly an interrogation.

The real question here is whether Student was in custody. Whether a person is in custody depends on whether a reasonable person under the circumstances would feel free to terminate the interrogation and leave. The more the situation resembles a formal arrest, the more likely a court will find the person to have been in custody. Here, the facts go both ways: On the one hand, the officers brought Student into a small office, and a uniformed officer with a gun was stationed between Student and the door.

Moreover, the officers did not tell Student that he was free to go at any time. On the other hand, the officers did not place Student under arrest; they merely told him that they wanted to talk to him. They did not restrain Student with handcuffs or take him to the police station. Thus, the result here remains very much an open question with there being no clear result.

(3) The motion to suppress Student's confession based on voluntariness should be denied. An involuntary confession will be suppressed as a violation of the Due Process Clause of the Fourteenth Amendment. Whether a confession is involuntary is determined under the totality of the circumstances. Here, two police officers questioned Student in a small room, and an armed officer was between Student and the door. Moreover, the officers lied to Student about the strength of their evidence (telling him that three people had positively identified him when in fact no one was sure if it was Student). They also told him that prison would not be good for him.

On the other hand, Student seems to have possessed at least average intelligence (he was a C student), he had experience with the criminal justice system (he was found delinquent for auto theft), he is an adult (18 years old), and the interview was relatively brief (about 25 minutes). Given the latter facts, a court would probably find the confession voluntary. Thus, the motion should be denied.

ANSWER TO EXAM QUESTION NO. 2

(1) Ryan's "I'm sorry" statement probably will be held admissible, but not his other two initial statements. At issue is whether Ryan was in custody when he made the statements.

Under *Miranda v. Arizona*, law enforcement officers must give specific warnings regarding a person's right to an attorney and right to remain silent prior to any ***custodial interrogation***. Failure to give the required warnings may result in suppression of statements obtained during the interrogation. Because no *Miranda* warnings were given prior to Ryan's statements at issue, if the court concludes that Ryan was in custody and interrogated, the statements will be suppressed. If not, the statements may be used against him.

In this case, therefore, we must determine whether Ryan was (i) interrogated, and (ii) in custody when he made the statement "Please don't do that, I'm sorry" and talked about Marissa leaving him. Although Ryan was not questioned in a traditional sense, an interrogation occurs when officers use words or actions that are likely to produce an incriminating response. Here, Van Buren's 10 minutes of silence followed by the comment that he was going to meet an eyewitness who saw Ryan dispose of the body likely meets the standard, and therefore constitutes an interrogation.

With regard to whether Ryan was in custody, the test is whether a reasonable person in Ryan's circumstances would have concluded that he was not free to terminate the interrogation and leave. Although Van Buren initially told Ryan that he was free to leave, the circumstances were remarkably similar to a custodial interrogation. Ryan traveled to the station, was taken to a small room, and was kept there for a period of time. It is, however, a close call with regard to the "I'm sorry" statement in light of Van Buren's remark that Ryan was not under arrest and could leave anytime. However, when Van Buren blocked Ryan's exit and said "stay put" during Ryan's panic attack, a finding of "custody" becomes more likely. As a result, Ryan's subsequent statements about Marissa leaving him and that "no other man was good enough for her" are more likely to be suppressed.

(2) Ryan's question about needing a lawyer and request for a cell phone probably will have no effect on the admissibility of his subsequent confession. At issue is whether Ryan properly invoked his right to counsel under *Miranda*.

After the initial statements discussed above, Van Buren advised Ryan of his *Miranda* rights and Ryan signed an acknowledgment and waiver form. A waiver, however, must be voluntary and knowing. Ryan had just suffered a panic attack and had been promised medical attention, but before receiving

it was read his *Miranda* rights and given a rights waiver form. Ryan could argue, therefore, that his waiver was not voluntary and knowing. However, courts applying a totality of the circumstances test rarely find a waiver to be involuntary. In this case, therefore, the argument is likely to fail.

Ryan could also argue that the statement "Do I need a lawyer just so I can see a doctor?" followed by a subsequent request for a cell phone constituted an assertion of his right to counsel. If Ryan did assert his right to counsel, all questioning had to cease and any statements taken in violation of the right would likely be suppressed. However, courts have consistently held that an assertion of a right to counsel must be unambiguous. It is very likely, therefore, that a court will hold that Ryan's ambiguous statement was not an effective assertion of his right to counsel and, therefore, the confession will not be suppressed on that basis.

(3) Ryan's pronouncement "I'm through talking to that jerk" probably also will not have any effect on the admissibility of his confession. At issue is whether it constitutes a valid invocation of the right to remain silent.

Under *Miranda*, if a defendant invokes the right to remain silent, questioning must stop and the request must be scrupulously honored. Such an assertion, however, must be clear and unambiguous. Arguably, it is not clear here. Ryan could argue, however, that at least Van Buren understood that Ryan had asserted his right against self-incrimination as demonstrated by Van Buren's question "what can I do to get you to change your mind?" If a court finds that Ryan had validly asserted his right, Van Buren violated that right by continuing the interrogation and trying to get Ryan to change his mind. In that case, the confession may be suppressed as taken in violation of Ryan's right against self-incrimination under the Fifth Amendment. However, it seems more likely that the court would find Ryan's statement ambiguous. In that event, there would be no *Miranda* violation and his subsequent confession would be admissible.

ANSWER TO EXAM QUESTION NO. 3

(1) The warrantless search of the Sotwin garage violated the Fourth Amendment to the United States Constitution. At issue is whether any exception to the warrant requirement is applicable.

Under the Fourth Amendment, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, searches must be reasonable. Generally, to be reasonable, a search must be pursuant to a warrant. However, the Supreme Court has carved out a number of exceptions to the warrant requirement, including an exception based on consent. A warrant is not needed to conduct a search if the police have valid consent to conduct the search. Consent generally can be granted by anyone with apparent access to the place searched. However, the United States Supreme Court has held that where two occupants are reasonably believed to share authority over the premises, one occupant's consent to search can be vetoed by the other occupant's express refusal. Here, Andy had apparent authority to consent to a search of the home because when the police knocked at the door, Andy, an adult, answered it, and he gave them permission to search. However, when Nancy walked out of the bathroom and shouted at the police to leave, she effectively revoked Andy's consent. Therefore, the search of the garage was unconstitutional and any evidence derived from the search must be suppressed under the exclusionary rule (all evidence obtained in an unconstitutional manner or that is the fruit of an unconstitutional search or seizure must be suppressed from evidence).

It should be noted that the above does not necessarily mean that the blood from the Saturn will be suppressed. If the state can show that the police would have discovered the evidence anyway or that it was obtained from an independent source, the evidence may be admitted. The state might be able to make such a showing here. The facts indicate that after seeing the blood on the Saturn, the police

applied for a search warrant and then tested the vehicle. The facts do not indicate what was included in the warrant. A search warrant will be issued if it shows probable cause to believe that seizable evidence will be found at the place to be searched. Whether probable cause is present is based on the totality of the circumstances. Here, the police probably could have met the probable cause standard even without seeing the blood on the Saturn, because an eyewitness told them that he saw Nancy driving erratically, strike the child, and pull into her garage. Thus, the inevitable discovery or independent source exceptions to the exclusionary rule may apply here.

(2) The federal Confrontation Clause would not bar admission of the 911 tape recording. At issue is whether the call would be considered testimonial under the Confrontation Clause.

The Confrontation Clause prohibits introduction of prior testimonial evidence unless the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant at the time the statement was admitted. Here, clearly Nancy did not have an opportunity to cross-examine the 911 caller, and we do not know if the caller was unavailable for trial. Nevertheless the 911 tape is admissible. The Supreme Court has held that generally, responses to police questioning are testimonial in nature. However, the Court has found that 911 tapes are nontestimonial—even if they include statements made in response to police questions—if the statements are made to enable the police to respond to an ongoing emergency. That was the case here. The call appears to have been made shortly after Nancy hit the young child. Thus, the Confrontation Clause would not bar admission of the tape recording of the call.

(3) The Confrontation Clause bars admission of Doug's statement to the police officers. The rules set out in (2), above, apply here. Doug is now unavailable, given that he has been deployed to Iraq. However, unlike the 911 call, Doug's statements were testimonial. They were made in response to police questioning and were not made to enable police to respond to an ongoing emergency. The police interviewed Doug the day after the hit and run took place. Thus, admission of Doug's testimony would violate the Confrontation Clause because Nancy did not have an opportunity to cross-examine Doug when his statements were made.

ANSWER TO EXAM QUESTION NO. 4

(1) ***Right to Court-Appointed Counsel:*** Kirk should be successful in having his conviction overturned for the court's failure to appoint counsel. At issue is whether Kirk's Sixth Amendment right to counsel has been violated.

The Sixth Amendment guarantees the right to be represented by counsel in all criminal cases. This right turns on whether the sentence that is ***actually*** imposed includes any imprisonment, however short. Thus, it does not matter that the judge said he would not impose a sentence of more than six months. Because Kirk received a sentence that included imprisonment, Kirk was entitled to a court-appointed attorney (the facts state that he was otherwise qualified; the courts have never clarified how inability to afford counsel is to be determined under the Sixth Amendment). Thus, the court should overturn Kirk's conviction on this ground.

(2) ***Right to Jury Trial:*** Kirk would also be successful in arguing that his conviction should be overturned for the judge's denial of Kirk's request for a jury. At issue is whether Kirk's Sixth Amendment right to a jury trial was violated. The Supreme Court has held the Sixth Amendment jury trial right applicable to the states via the Fourteenth Amendment, but the right applies only to serious, not petty, offenses. A serious offense is one for which more than six months' imprisonment is ***authorized***. Here, although only six months was given, and although this was stated in advance, the crime is serious enough to carry a 10-month possible sentence, so the right to a jury trial attaches. Also, the court may consider the total combination of penalties—the fine and the loss of hunting rights for five years—

in deciding whether the offense is serious. However, the additional penalties imposed here would not make much difference.

(3) ***The Same Judge in the Second Case:*** Kirk would not be successful in having his conviction overturned merely because the second prosecution is before the same judge who presided over the first prosecution. At issue is whether Kirk's right to Due Process was violated.

The Due Process Clause of the Fourteenth Amendment includes a guarantee of the fairness of criminal prosecutions. This includes a right to an unbiased decisionmaker. However, the fact that the judge already knows some of the facts in his case because of a prior case is not considered "prejudice" within the meaning of the due process requirement. Moreover, the facts do not show that Kirk preserved the issue for appeal at trial. Thus, Kirk would not be successful in arguing this ground for reversal.

(4) ***Double Jeopardy:*** Kirk would not be successful in arguing that his conviction should be overturned because of double jeopardy. At issue is whether the second prosecution would be considered the same offense as was prosecuted at the first trial.

The Double Jeopardy Clause of the Fifth Amendment provides that people shall not twice be prosecuted for the same offense. The clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment. Whether two offenses constitute the same offense for purposes of the Double Jeopardy Clause depends on whether each crime requires proof of an additional element that the other does not require, even though some of the same facts may be necessary to prove both crimes.

Here, the negligent homicide charge of the first proceeding requires proof of a killing, which is not required in the second prosecution for hunting within 400 feet of a dwelling. And the second prosecution requires proof of hunting within 400 feet of a dwelling, which is not an element of a negligent homicide case. Thus, Kirk would not be successful in arguing that his conviction should be overturned on double jeopardy grounds.