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CHAPTER 1. INTRODUCTION

Criminal procedures are designed to enforce the constitutional rights of criminal suspects and defendants throughout the entire criminal justice process.

The basic steps of the criminal process:

1. **Investigation** – The purpose of a criminal investigation is to gather evidence to identify a suspect and support an arrest. Investigations commonly involve search warrants and arrests, which are governed by the Fourth Amendment.

2. Prosecution chooses to bring criminal **charges** against the defendant.

3. **Grand jury indictment** – In the federal courts and in most states, the grand jury decides whether there is sufficient probable cause to charge a person with a crime.

4. **Initial appearance (arraignment)** – Defendant appears in court and enters a plea, the judge advises the defendant of his rights, appoints counsel if necessary, and sets bail.

5. **Discovery process** and **plea bargaining**

6. **Trial**

7. **Sentencing –** Possible sentences can include a fine, probation, and jail time.

8. **Appeal**

9. **Punishment/rehabilitation**

Throughout this entire process, at each step, criminal procedures function to protect defendants from any deprivation of their constitutional rights. There are several sources of the rules of criminal procedure, such as state constitutions, court decisions, and the federal rules of criminal procedure, to name a few. But the main source of criminal procedure is found within the United States Constitution, particularly the Fourth, Fifth, Sixth, and Eighth Amendments.

A. **Fourth Amendment** – Prohibits unreasonable searches and seizures, and sets requirements for warrants. Warrants allow the government to search or seize property and people. In order to be valid, warrants must be supported by probable cause and must particularly describe the place to be searched and the persons or things to be seized.

B. **Fifth Amendment** – Protects an individual against compulsory self-incrimination. This means that no defendant shall be compelled to be a witness against himself. In addition, the Fifth Amendment also contains the Double Jeopardy clause, which essentially prohibits anyone from being prosecuted twice for the same crime.

C. **Sixth Amendment** – Guarantees criminal defendants certain rights during criminal prosecution. These include the right to a speedy trial, the right to a trial by an impartial jury, the right to confront witnesses, and the right to assistance of counsel.

D. **Eighth Amendment** – Prohibits the government from imposing "cruel and unusual punishment" on criminal defendants.

Most of the protections within the first eight Amendments apply to the federal government **as well as** state governments. The Amendments bind the states through incorporation into the **Due Process** Clause of the Fourteenth Amendment. So the constitutional rights of criminal suspects and defendants are binding on the federal government and the state governments.

However, several constitutional rights have NOT been extended to the states. Most notably, the Fifth Amendment's right to a grand jury. So states are not required to use a grand jury as part of their criminal process.

► In this chapter, we discussed the basic steps of the criminal process and the main Constitutional provisions from which criminal procedures are derived. We learned that the Fourth Amendment protects against unreasonable searches and seizures and sets requirements for warrants. The Fifth Amendment contains the privilege against self-incrimination and the Double Jeopardy Clause. The Sixth Amendment guarantees criminal defendants the right to a speedy trial, the right to an impartial trial, the right to confront witnesses, and the right to assistance of counsel. And the Eighth Amendment prohibits cruel and unusual punishment.

CHAPTER 2. THE EXCLUSIONARY RULE

As we learned in the previous chapter, the Constitution protects criminal defendants in many aspects by providing them with many safeguards during the criminal process.

The Fourth Amendment prohibits the government from performing unreasonable searches and seizures. The Fifth Amendment protects against self-incriminatory statements. And the Sixth Amendment guarantees the right to counsel.

To prevent the government from violating these constitutional rights, Courts will generally suppress evidence from being admitted if the evidence has been obtained in violation of such rights.

A. **Exclusionary rule** – Any evidence that has been illegally obtained must be excluded from criminal trials.

1. The exclusionary rule most commonly applies to evidence gathered from an illegal search or seizure in violation of the Fourth Amendment. But it may also apply to improperly gathered self-incriminatory statements obtained in violation of the Fifth Amendment. And to evidence obtained after an individual has been denied their right to counsel under the Sixth Amendment.

Example – Assume that the police illegally search Pablo's car and find drugs. Since the search of Pablo's car was illegal, under the exclusionary rule, the drugs will be excluded as evidence in the government's case against Pablo.

2. The exclusionary rule is a **court-made rule**, first established in the case ***Weeks v. United States*** (1914)

Facts – A federal agent had conducted a warrantless search, looking for evidence of gambling at the home of the defendant. The evidence seized in the search was used at trial, and Weeks was convicted.

Holding –The Supreme Court reversed Week's conviction, holding that the Fourth Amendment bars the use of any evidence that is obtained through a warrantless search. The Court's purpose for applying the exclusionary rule was to deter law enforcement from conducting unreasonable searches and seizures, as well as to provide a remedy for defendants whose rights have been violated.

3. Exclusionary rule **applies to criminal trials only**. It does not exclude illegally obtained evidence from every legal proceeding. It just prevents such evidence from being admitted in criminal trials only.

a. The exclusionary rule does not apply to grand jury proceedings, bail hearings, preliminary hearings, sentencing hearings, parole revocation hearings, and *civil* court proceedings.

4. The exclusionary rule applies in both *federal and state courts*. After the *Weeks* case, the exclusionary rule was declared to apply only in federal court, however, the Supreme Court extended the rule to state courts in the case ***Mapp v. Ohio*** (1961)

Facts – Cleveland police officers had gone to the home of the defendant to ask her questions regarding a recent bombing. The officers demanded entrance into her home, but the defendant called her attorney and refused to allow the officers in without a warrant. The officers forced their way in, handcuffed the defendant, and searched her home, where they found obscene books and pictures.

The defendant was charged with violating obscenity laws in state court, and she was convicted. However, on appeal before the United States Supreme Court, the defendant's conviction was overturned.

Holding – The exclusionary rule applies not only in federal court, but also to state criminal proceedings, through the Due Process Clause of the Fourteenth Amendment. And since the officers searched the defendant's home without a warrant, any evidence found from the illegal search must be excluded.

► In this chapter, we discussed the exclusionary rule, which prohibits the introduction of unlawfully obtained evidence at a defendant's criminal trial.

CHAPTER 3. EXCEPTIONS TO THE EXCLUSIONARY RULE

Exceptions to the exclusionary rule:

1. When law enforcement acts in good faith
2. For impeachment purposes
3. For violations of the knock and announce rule

A. Law Enforcement Acts in Good Faith

1. Evidence that has been illegally obtained will nonetheless be admissible if law enforcement in **good faith** thinks that they are acting pursuant to a valid warrant.

a. If a police officer believes that a warrant is not required for a search, or conducts a search pursuant to a warrant which he believes is valid, the officer is acting in good faith, and any evidence obtained will be admissible in at trial, even if the warrant turns out to be invalid.

i. And on the other hand, if a police officer knows or should know of a defect in a warrant, the good faith exception will not apply.

2. The good faith exception to the exclusionary rules was established in the Supreme Court case ***United States v. Leon*** (1984)

Facts – The home of defendant Alberto Leon was under surveillance by the police, based on an anonymous informant's tip. The police prepared an affidavit to get a search warrant; however, unknown to the police, the information in the warrant application was no longer sufficiently up-to-date to establish probable cause. This was overlooked by the judge, who issued a defective search warrant. Pursuant to the invalid warrant, the police searched Leon's residence and recovered large quantities of illegal drugs. Leon was arrested, charged, and convicted.

Holding – The issue before the Supreme Court was whether the illegally obtained drugs should be excluded from Leon's trial. The Court held that they need not be excluded because of the good faith exception to the exclusionary rule.

The Court reasoned that, since the exclusionary rule was created primarily to deter police misconduct, excluding evidence obtained through an honest mistake would serve no such purpose. Therefore, the Court held that evidence seized on the basis of a defective search warrant may be introduced at trial as long as police officers act in good faith, and as a result, Leon's conviction was upheld.

3. Ten years after the *Leon* case, the Supreme Court again revisited the good faith exception to the exclusionary rule in the case ***Arizona v. Evans*** (1995)

Facts – A police employee had mistakenly listed the defendant Mr. Evans as having a misdemeanor arrest warrant. After a police officer stopped Evans for a routine traffic violation, the officer searched Evans pursuant to the faulty warrant information in the database, and found illegal drugs.

Holding – The Supreme Court found that the drugs were admissible, holding that evidence seized as a result of such a clerical error may be admitted, based on the good-faith exception to the exclusionary rule.

B. **For Impeachment Purposes**

1. The second exception to the exclusionary rule arises when a criminal defendant testifies in his own defense. When this happens, illegally obtained evidence may be admitted to **impeach** the defendant's testimony.

2. Note that it is ONLY the defendant's testimony that may be impeached with illegally obtained evidence. Testimony from any other witnesses may NOT be impeached with illegally obtained evidence.

Example – Billy the Kid is arrested for murder. While in custody, Billy confesses to the murder; however, the police never read him his Miranda rights.

→ In this case, Billy's admission has been illegally obtained in violation of his Fifth Amendment Miranda rights; and therefore, the admission can be excluded under the exclusionary rule.

However, during trial, Billy takes the stand and states that he did not commit the murder. At this point, Billy's initial voluntary confession, that was obtained in violation of his Miranda rights, may now be admitted by the prosecution in order to impeach his testimony.

C. **Violations of the Knock and Announce Rule**

1. The third exception to the exclusionary rule applies when law enforcement has violated the **knock and announce rule** when executing a search warrant.

2. The knock and announce rule is a *common law rule*, that has been confirmed by the Supreme Court as mandated by the Fourth Amendment.

3. The knock and announce rule requires police officers to knock on the door and announce their identity and purpose, and wait a reasonable amount of time for the occupants to let them into the residence, before attempting a forcible entry pursuant to a warrant.

a. However, the knock and announce rule does not apply if the police reasonably suspect that doing so may lead to evidence destruction, the escape of a suspect, or physical violence. In addition, the rule does not apply if the warrant itself permits forcible entry.

4. Regardless, for a typical warrant that does not permit forcible entry, if the police fail to follow the requirements of the knock and announce rule, evidence that is obtained as a result **will** not be excluded because it's an exception to the exclusionary rule.

► In this chapter, we discussed the three exceptions to the exclusionary rule. Under the good faith exception, illegally obtained evidence will be admitted if the police were acting in good faith. Under the impeachment exception, illegally obtained evidence may be introduced to impeach the defendant's testimony. And under the knock and announce exception, evidence that is obtained in violation of the knock and announce rule will still be admissible.

CHAPTER 4. FRUIT OF THE POISONOUS TREE DOCTRINE

As we have learned, the exclusionary rule prohibits illegally obtained evidence from being introduced at a defendant's trial. But what if an illegal search ends up leading to new evidence that is later gathered as an indirect result of the illegal search?

Generally, if illegally obtained evidence leads law enforcement to new evidence, that derivative evidence will also be excluded. Such derivative evidence is called **fruit of the poisonous tree**.

Example – Without a warrant, the police tap Joe's phones. While listening in on Joe, the police learn about the location of illegal weapons. Afterwards, the illegal weapons are seized

and Joe is charged with possession of illegal weapons. During Joe's trial, the prosecutor wants to admit the transcript from the wiretap AND wants to admit the illegal weapons.

→ In this case, both the wiretap transcript and the illegal weapons will be excluded from Joe's trial. The transcript will be excluded under the exclusionary rule because the police did not have a warrant to listen in on Joe, and therefore the transcript was obtained illegally. In addition, the illegal weapons will also be excluded as fruit of the poisonous tree, because the unlawful wiretap led police to the location of the weapons.

Exceptions to the fruit of the poisonous tree doctrine: (For each exception, the chain between the initial unlawful search and the later fruit of the poisonous tree evidence has been broken. As a result, the fruit of the poisonous tree evidence will be admissible.)

1. Independent source doctrine
2. Inevitable discovery doctrine
3. Intervening act by the defendant

A. **Independent source exception** – Fruit of the poisonous tree evidence will not be excluded when the government had an independent source for the evidence, which was wholly independent from the initial unlawful source.

Example – The police tap Joe's phones without a warrant. While listening in on Joe, the police learn about the location of illegal weapons Joe has stored at his girlfriend's apartment. Shortly after the illegal wiretap, the police get a tip from a reliable informant about the illegal weapons, and the police obtain a warrant to seize them.

→ In this case, even though the unlawful wiretap initially led police to the weapons, the weapons will nonetheless be admissible because the police obtained a valid warrant based on information totally unrelated to the unlawful wiretap. So although the weapons originally were fruit of the poisonous tree, the police had an independent source for their location based on the informant's tip. Therefore, the independent source exception applies and the weapons will be admissible at Joe's trial.

B. **Inevitable discovery doctrine** – Evidence that has been unlawfully seized may be admissible if the evidence would have been discovered anyway. (If the facts show that the police would inevitably have discovered the evidence in question without resorting to the initial unlawful source, the evidence will be admissible.)

Example – Screech is arrested for the murder of Zach, a fellow Bayside high school student. The police begin to interrogate him without giving him his Miranda warnings. He confesses and takes them to the Zach's body, which is located in a shallow grave on the grounds of Bayside High. As it happens, search teams have already been looking for the body in and around the school, and would have discovered the body within the next day had Screech not confessed. At Screech's murder trial, the prosecutor attempts to admit photos and other evidence of the victim's body. Screech objects, arguing that the police obtained the evidence as the direct fruit of Screech's non-Mirandized, and thus illegally obtained, statement.

→ In this case, even though the discovery of Zach's body was improperly obtained as fruit of the poisonous tree, the evidence will still be admissible. Since it was clear that the search teams would have eventually discovered the body, the evidence falls within the inevitable discovery exception, and will be admissible at Screech's trial.

C. **Intervening act by the defendant** (**Attenuation**) – This exception arises when there has been passage of time and an *intervening act of free will* made by the defendant.

Example – Sammy is arrested without probable cause. The next day he gets out on bail. A week later, Sammy voluntarily returns to the police station and confesses.

→ In this case, even though it can be said that Sammy's confession was gathered as an indirect result of his initial illegal arrest, his confession will nonetheless be admissible because it was made a result of Sammy's intervening act of free will.

D. **Harmless error test**

1. If illegally obtained evidence was improperly admitted at trial, and the defendant was convicted, the guilty verdict will stand if the prosecutor can prove, beyond a reasonable doubt, that the conviction would have resulted regardless of the improperly admitted evidence.

a. In other words, a conviction will not be overturned as long as there is overwhelming evidence of the defendant's guilt, other than the improperly admitted evidence.

2. This test comes into play when improperly obtained evidence was somehow admitted at trial, and the defendant was convicted of the crime.

a. When this occurs, it does not necessarily mean that the conviction will be overturned.

► In this chapter, we discussed the fruit of the poisonous tree doctrine, which states that, in addition to material uncovered during an illegal search, any evidence that is later gathered as a result of the illegal search, will also be excluded. We also learned about the three exceptions to the fruit of the poisonous tree doctrine: the independent source exception, the inevitable discovery exception, and attenuation.

CHAPTER 5. THE FOURTH AMENDMENT – GOVERNMENTAL CONDUCT REQUIREMENT

The Fourth Amendment to the U.S. Constitution reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In simpler terms, the **Fourth Amendment** *protects every person's right to be free from unreasonable searches and seizures.*

A. When faced with a fact pattern containing a search or seizure, there are four basic steps to follow to determine whether or not the search or seizure violates the Fourth Amendment:

1. Was there *governmental conduct*?

2. Was there a violation of an individual's *reasonable expectation of privacy*?

3. Did the police have a *valid search warrant*? And if not, was it saved by the police's good faith reliance?

4. If the warrant was invalid or there was no warrant, does the search fit with any of the eight *exceptions* to the warrant requirement?

Once you have gone through these steps, you will be able to conclude whether or not the search or seizure is constitutional. If you find that the search was constitutional, then the evidence gathered as a result will be fully admissible. On the other hand, if the search or seizure was unconstitutional, then you would apply the exclusionary rule to determine whether the unlawfully obtained evidence is admissible.

A. **Governmental conduct**

1. When faced with a Fourth Amendment issue, the first thing to determine is whether there was **governmental conduct**.

2. In order to determine whether there was governmental conduct, we simply look at whether the search or seizure was carried out by a government agent.

3. In general, the Fourth Amendment protects only against searches or seizures executed by a governmental agent. It does not protect against searches carried out by private persons.

4. Important categories of potential governmental agents:

a. Governmental agents include publicly **paid police officers**, whether they are on or off duty.

b. A private citizen will be considered a governmental agent if and only if they are **acting at the direction of the police**.

Example – If your roommate searches your room on his own, there is no Fourth Amendment violation. However, if police ask your roommate to search your room, this search would be challengeable under the Fourth Amendment because your roommate would now be acting as a governmental agent.

c. Privately paid police, like security guards and campus police, will be considered government agents if and only if they have been **deputized with the power to arrest**.

d. **Public school administrators**, like principals and vice-principals, will usually be considered governmental agents for Fourth Amendment purposes.

► In this chapter, we began our discussion on the Fourth Amendment, which protects against unreasonable searches and seizures. We learned that the first step in solving a search and seizure problem is to determine whether there was governmental conduct. If it the search or seizure was conducted by a government agent, then the next step is to determine whether an individual's reasonable expectation of privacy was violated, which we will discuss in the next chapter.

CHAPTER 6. REASONABLE EXPECTATION OF PRIVACY

The Fourth Amendment protects individuals against unreasonable searches and seizures. In order to determine whether a particular search or seizure satisfies the Fourth Amendment, there are several steps to go through.

First, we must determine whether there was governmental conduct. If it is found that there was governmental conduct, the next step is to determine whether or not there was a violation of an individual's **reasonable expectation of privacy** with respect to the item seized or the place searched.

Courts generally make this determination on a case by case basis based on the totality of the circumstances. However, there are several established places and items in which a person will ALWAYS have a reasonable expectation of privacy. And also, there are several categories of places and items in which a person will NEVER have a reasonable expectation of privacy. Let's discuss.

A. **Reasonable Expectation of Privacy**

1. Determined on a case by case basis based on the totality of the circumstances.

2. Things and places in which you will always have a reasonable expectation of privacy:

a. "**Persons, houses, papers, and effects**" (from the Fourth Amendment)

i. Includes clothing, homes, apartments, businesses, hotel rooms, personal correspondence, & personal belongings, such as backpacks, luggage, and cars.

ii. *Curtilage* – the areas and structures in close proximity to the home which are commonly used in connection with household matters; such as a front porch, and a backyard enclosed by a fence.

b. **A place you own**

i. Therefore, an individual who owns an area that has been searched by a government agent, has a reasonable expectation of privacy in that place, and therefore, will always have standing to object to it being searched.

c. **A place you have right to possess** (includes rented apartments as well as hotel rooms)

Example – Oliver, the owner of Greenacre, rents his property to Robby. The police illegally search Greenacre, and want to use evidence obtained from the illegal search against Oliver and Robby.

→ In this situation, both Oliver and Robby have standing to claim a Fourth Amendment violation because they both have a reasonable expectation of privacy in Greenacre. Oliver because he owns the place, and Robby because he has a right to possess it.

d. **A person's home** (whether or not they own it or have a right to possess it)

i. This applies to a holdover tenant. A holdover tenant will have a reasonable expectation of privacy in the premises, even though they are not legally entitled to its possession.

e. **A place where you are an overnight guest** (but only in regard to areas that an overnight guest would be expected to access)

i. An overnight guest at a home would normally have a reasonable expectation of privacy in the living room and bathroom, but not in the closet of the homeowner's bedroom.

ii. If an individual is at another's residence solely for *business purposes*, then the visitor will NOT have a reasonable expectation of privacy in the premises.

Example – a drug dealer who uses a friend's apartment only to bag cocaine would not have a reasonable expectation of privacy in the apartment.

3. **Standing**

a. Under this doctrine, only an individual whose personal privacy rights were violated may assert a Fourth Amendment violation.

i. What this means is that, if you have a reasonable expectation of privacy in a certain area, you will then have standing to challenge any search or seizure conducted in that area by a government agent in a court of law.

ii. And, on the other hand, if you do not have a reasonable expectation of privacy in an area searched, then you will not have standing to object to the search.

b. Standing usually becomes an issue when a defendant wants to challenge the lawfulness of a search or seizure that invaded a *third party's* reasonable expectation of privacy.

Example – Assume a man hides drugs in his girlfriend's purse. Afterwards, police illegally search the purse and seize the drugs. At the man's trial, he moves to suppress the admission of drugs into evidence, as they were the fruit of an illegal search. How should the court rule?

→ In this case, the court should deny the motion and admit the drugs. Even though the man owned the property seized, he did not have a reasonable expectation of privacy in his girlfriend's purse. Therefore, he does not have standing to challenge the illegal search of it; and, as a result, he cannot object to the admission of the drugs.

4. Places and things in which you do NOT have a reasonable expectation of privacy:

a. A person generally will not have a reasonable expectation of privacy in any item that is considered to be **held out to the public**, includes:

1. Sound of one's voice

2. The style of one's handwriting.

3. Records held by banks.

4. The location of a car on a public street or in a driveway.

5. Odors emanating from luggage or a car.

6. Garbage left outside for collection.

7. Anything visible from a public place or even public air space, even from a plane or helicopter.

8. Open fields – anything that can be seen in or across open fields.

9. Pen registers – devices that can be installed on phones or computers that record only the phone numbers or emails that have been dialed.

i. The court has reasoned that a person has no reasonable expectation of privacy with respect to the numbers dialed, because one should be aware that the telephone company used the numbers to originate the calls and assess charges. Also applies to identities of senders and recipients of emails. Not the contents of the communications.

► In this chapter, we learned that an individual must have a **reasonable expectation of privacy** with respect to the place searched or the item seized, in order to have standing to claim a Fourth Amendment violation. We discussed the places and items in which an individual will automatically have a reasonable expectation of privacy. We also discussed those places and items in which an individual does NOT have a reasonable expectation of privacy, which is anything held out to the public.

CHAPTER 7. FOURTH AMENDMENT – WARRANT REQUIREMENT

For any Fourth Amendment search and seizure question, the first step is to determine whether or not there was governmental conduct.

The next step is to determine whether there was a search or seizure of a place or thing in which an individual had a reasonable expectation of privacy.

And the third step, which we will discuss in this chapter, involves search warrants. In order for a search or seizure to be constitutional, the police must have a valid warrant that was executed properly, unless one of the eight exceptions to the warrant requirement applies.

A. For a warrant to be valid, there must be **probable cause** and **particularity**.

1. **PROBABLE CAUSE**

a. Probable cause exists when there is a *fair probability* that evidence can be found on the person or in the area searched at the time the warrant is executed.

b. Usually, an officer will submit to a magistrate an affidavit that states why a search is justified, and the magistrate will then presumably make a determination of probable cause that is independent of the officer's conclusions.

c. Note that, when police are trying to get a judge to sign off on a search warrant, the police may rely on information obtained from **informants**, even if the informants are anonymous.

i. When an affidavit is based on an informant's tip, the sufficiency of the affidavit will be determined by the **totality of the circumstances**. Relevant factors in a judge's decision on finding probable cause in this situation include the informant's reliability, credibility, and basis of knowledge.

Example – Assume the police receive an anonymous letter that implicates Rick is a drug dealer. The police find that some minor details in the letter are inaccurate; however, they confirm that most of the critical information in the letter is true. The police go ahead and use this information to obtain a search warrant of Rick's home.

→ In this case, even though some minor details from the letter are untrue, the warrant can be still issued in compliance with the Fourth Amendment, because the police have confirmed enough of the informant's info to allow a magistrate to find that probable cause exists based on a totality of the circumstances.

2. **PARTICULARITY**

a. A search warrant must specify the *place to be searched*, and the *items to be seized*.

i. If a warrant gives police leeway to search areas that are beyond the scope of where evidence could be, the warrant will be unconstitutional.

Example – The police have probable cause to believe that Ozzy murdered Sharon with a large samurai sword. The district attorney applies for a warrant to search Ozzy and Sharon's house for the sword. The magistrate issues a warrant authorizing the police to search their entire house, including *all closed containers*, for evidence linked to the murder.

→ In this case, the warrant does not satisfy the particularity requirement, because it gives the police the authority to search areas beyond the scope of where a large samurai sword could be; such as containers that are too small to hold a sword. Because this warrant essentially authorizes the police to conduct a fishing expedition into Ozzy and Sharon's house and their belongings, it does not meet the particularity requirement and is invalid.

B. **Good faith exception** to the probable cause and particularity requirements of a search warrant

1. If a warrant is defective because it lacks either probable cause or particularity, it can still be saved if the police officer acted in **good faith**.

a. What this means is that if police act in good faith reliance on a warrant that happens to defective, any evidence obtained as a result may still be used in court.

2. Four exceptions to this good faith doctrine: (under each exception, an officer's good faith reliance will NOT save an invalid warrant.)

a. When the affidavit underlying the warrant is *so lacking in probable cause* that no reasonable police officer would rely on it, the good faith exception will not apply.

b. When the affidavit underlying the warrant is *so lacking in particularity* that no reasonable police officer would have relied on it, the good faith exception will not apply.

c. *When the police or prosecutor lied to or misled* the magistrate when seeking the warrant, the good faith exception will not apply.

d. When the magistrate who issued the warrant is *biased* in favor of the prosecution, the good faith exception does not apply.

i. For a warrant to be valid, it must be issued by a neutral and detached magistrate.

C. **Execution of search warrants**

1. When executing a warrant, police are allowed to *search ONLY those areas and items authorized by the warrant*.

Example – If a warrant allows police to search for stolen cars, the police may not search inside any containers that would be too small to hold a car.

2. When police execute a search warrant, they may *detain* occupants found within or immediately outside the premises at the time of the search.

3. However, police are not allowed to freely *search* people found on the premises, UNLESS:

a. The warrant itself lists people who may be searched.

b. There is probable cause to arrest the person, and therefore police may make an arrest and conduct a search incident to the arrest.

c. Or police have reason to believe that a person is dangerous, in which case they may conduct a Terry frisk, not a full search.

4. *Knock and announce rule*

a. Under this rule, police must knock, announce their purpose, and wait a reasonable amount of time, unless there is reasonable suspicion that announcing would be dangerous or would inhibit the investigation.

b. Violations of the knock and announce rule are an exception to the exclusionary rule. So while violating the knock and announce rule will not necessarily result in the suppression of evidence, the Supreme Court has held that the knock-and-announce rule does form part of a judge's inquiry into the reasonableness of a search under the Fourth Amendment.

► In this chapter, we discussed the warrant requirements under the Fourth Amendment. We learned that in order for a search warrant to be constitutional, it must be based on probable cause and it must particularly describe the place to be searched and the items to be seized. We learned that even if a warrant lacks one of these two core requirements, it can still be saved by an officer's good faith reliance, subject to four exceptions.

CHAPTER 8. EXCEPTIONS TO WARRANT REQUIREMENT - SEARCH INCIDENT TO ARREST

So far, we have learned that a search or seizure falls within the protection of the Fourth Amendment when there has been governmental conduct that has violated an individual's reasonable expectation of privacy.

We learned that when a search or seizure is based on a warrant, the warrant must be valid and be executed properly. However, searches and seizures can be done without a warrant and still be constitutional.

There are eight exceptions to the warrant requirement:

1. Search is incident to a lawful arrest
2. The automobile exception
3. Consent
4. The plain view doctrine.
5. Exigent circumstances – evanescent evidence, hot pursuit, & emergency aid
6. Special needs
7. Inventory searches
8. Terry Stop and Frisk

A. **Search Incident to a Lawful Arrest**

1. After there has been an arrest, the police may conduct a warrantless search of the arrestee without violating the Fourth Amendment.

2. For this exception to apply, the arrest must be **lawful**.

a. If the arrest is unlawful, then the search will be unlawful.

2. The search must be **contemporaneous in time and place** with the arrest.

a. So, for instance, if the defendant is arrested in one city and the police later search him in another city, this will not be a valid search incident to arrest.

3. Police are permitted to search ONLY the areas in which the arrestee could **reach either to procure a weapon** or to **destroy evidence**.

a. Includes the body, clothing, and any containers within the arrestee's immediate control.

b. Note that police may not search digital data on the cell phone of an arrestee without a warrant. They could, however, examine a cell phone's physical characteristics to make sure that it cannot be used in any way as a weapon.

4. When the **driver of an automobile** is arrested

a. Once this occurs, the police may conduct a search of the passenger compartment of the vehicle, including any closed containers therein, ONLY IF the arrestee is unsecured and still may gain access to the interior of the vehicle, OR if the police have reason to believe the vehicle may contain evidence relating to the offense for which the person is arrested.

Example – Officer McClane pulls over Simon Gruber for speeding, finds out he has a suspended license, and arrests him for driving with a suspended license. McClane handcuffs Simon and puts him in the back his squad car. McClane then searches the passenger cabin of Simon's car, where he finds a gold bar under the seat, which McClane knows was recently stolen from the federal reserve bank. Are McClane's actions lawful?

→ In this case, Officer McClane's actions are not lawful, and the gold bar can be excluded from Simon's trial. The police may not conduct a search of an automobile's passenger cabin incident to an arrest unless the arrestee has access to the passenger compartment during the search, OR the police reasonably believe that the passenger compartment may contain evidence of the offense for which the arrest was made. In our example, neither condition is satisfied. Simon did not have access to the passenger cabin because he was secured in the back of the squad car. In addition, the arrest was for driving on a suspended license--McClane could have no reason to believe that there would be any evidence related to that crime in the car. Therefore, the warrantless search of Simon's car was in violation of his Fourth Amendment rights, and the gold bar will be excluded from his trial.

► In this chapter, we learned that warrantless searches are unconstitutional, unless they fit into one of the eight recognized exceptions to the warrant requirement. We discussed the first such exception to the warrant requirement, the search incident to arrest exception. We learned that, under this exception, when police have lawfully made an arrest, they may conduct a warrantless search of the arrestee. The search must be contemporaneous in time and place with the arrest. We also learned that when the driver of an automobile is arrested, the police may search the passenger cabin of the vehicle, including any closed containers therein, if the arrestee is unsecured and still may gain access to the interior of the vehicle, or if the police have reason to believe that the vehicle may contain evidence relating to the offense for which the person is arrested.

CHAPTER 9. AUTOMOBILE EXCEPTION

A. **The Automobile Exception**

1. Applies when there has *not* been an arrest, but the police want to search a vehicle.

2. In general, the police may search a vehicle as long as they have **probable cause** to believe that contraband or evidence of a crime will be found in the vehicle.

a. If probable cause exists, police can search the *entire vehicle*, which includes the passenger compartment and the trunk.

b. In addition, the police can search *any container* within the vehicle which could *reasonably contain the item* for which there was probable cause.

Example – A police officer has probable cause to believe that the defendant's van is being used to transport a stolen bicycle. The officer searches the van and comes across a purse. The officer goes through the purse and finds cocaine. Will the defendant be able to exclude the drugs at his trial?

→ In this case, yes, the drugs will be excluded because a purse is too small to reasonable contain a bicycle. Therefore, the search of the purse was unlawful, and any evidence collected from the purse is inadmissible.

Example – Bonnie and Clyde are driving in Clyde' car. Clyde is pulled over by Officer Thomas for speeding. When Thomas approaches, he sees a bag of crack hanging out of Clyde's pocket. Thomas arrests Clyde for possession. Thomas then orders Bonnie out of the car and searches the passenger cabin. He finds a purse which Bonnie says is hers. Thomas proceeds to search her purse, where he finds more crack. At Bonnie's trial, will the crack found in her purse be admissible?

→ Yes, it will be admissible. Police may search an entire vehicle when they have probable cause to believe that contraband or evidence of a crime will be found in the vehicle. In addition, the police can search any container within the vehicle which could reasonably contain the item for which there was probable cause. In our example, once Officer Thomas walked up to the driver's side of the car and spotted the crack in Clyde's pocket, that gave him probable cause to believe that there may be more contraband in the car. As a result, Thomas was allowed to search the entire car, which included any containers, regardless of who owned them, which could reasonably contain more crack. Therefore, the crack found in Bonnie's purse will be admissible against her.

► In this chapter, we discussed the automobile exception to the warrant requirement. We learned that police may search an entire vehicle, including the passenger cabin and trunk, if they have probable cause to believe that contraband or evidence of a crime will be found in the vehicle. In addition, the police can search any container within the vehicle which could reasonably contain the item for which there was probable cause.

CHAPTER 10. CONSENT

A. **Consent** – a warrantless search will be valid if the police have valid consent to conduct the search.

1. For consent to be valid, it must be made **voluntarily**.

    a. Police officers have no obligation to tell someone that they have the right to refuse a search. If police ask to conduct a search, and say nothing more, and the individual then gives permission, the consent will be considered voluntary.

2. Police must stay within the **scope** of the consent for it to be valid.

    a. This means that the police may search only those areas which a reasonable officer under the circumstances would believe they have permission to search.

3. Police must obtain the consent to search from someone who has **authority** to grant it.

    a. There is an exception – *apparent authority*.

i. If the officer reasonably believes that the consenting party has actual authority to consent to a search, but the consenting party does not in fact have such authority, then apparent authority exists, and the consent will be valid under the Fourth Amendment.

Example – Police officer arrives at a house and asks girlfriend if he can search it. Girlfriend tells the officer that the house belongs to her and her boyfriend, that she has a key, and that she keeps belongings there. Unknown to the officer, the house is not her house, but rather, her boyfriend's. Girlfriend consents to the search, and the officer finds illegal explosives belonging to boyfriend. At boyfriend's trial, the prosecution seeks to admit the explosives.

→ In this case, the explosives will be admissible. The officer was justified in reasonably believing that girlfriend had actual authority to consent to the search, even though she did not. Therefore, apparent authority exists, the consent will be valid, and the explosives are admissible against boyfriend at trial.

4. **Third party consent** to search **shared property**

a. When adults share a residence, ANY resident can consent to a search of the common areas within the residence.

b. However, if more than one co-tenant is present, and one consents to the search and the other does not, then the one who does not consent controls.

i. But note that, in this type of situation, if the objecting co-tenant is thereafter removed from the situation, for instance because of getting lawfully arrested, the police may THEN rely on any remaining co-tenants to obtain valid consent.

► In this chapter, we discussed the consent exception to the warrant requirement. We learned that a search that is done without a warrant will be valid if the police have valid consent to conduct the search. We learned that for consent to be valid, it must be made **voluntarily**, police must stay within the **scope** of the consent, and police must obtain consent from someone who has **authority** to grant it. Lastly, we learned that, in general, when adults share a residence, any co-tenant can consent to a search of the common areas within the residence, but if more than one co-tenant is present, and one consents and the other does not, then the one who does not consent controls.

CHAPTER 11. PLAIN VIEW EXCEPTION

A. **The plain view exception**

1. Police may make a warrantless seizure of an item in plain view as long as:

a. The officer is *lawfully present* at the location where he or she views the item.

b. The officer has a *lawful right of access to the item*.

c. It is *immediately apparent* that the item is contraband or evidence of a crime.

Example – A police officer chases a suspected felon into a residence. Once inside, the officer enters the bedroom and opens the closet to see if the suspect is hiding inside. The

suspect is not there, but the police officer notices a briefcase. The officer opens it up and finds a bag of pills labeled "ecstasy". The officer seizes the bag of pills.

→ In this case, the seizure of the pills will be invalid under the plain view exception to the warrant requirement because the second element has not been met. Although the first element was met, the officer was lawfully present in the bedroom and the closet, and the third element was met, it's clear that what was seized was contraband, the officer did NOT have a lawful right to search the briefcase, because the suspected felon could not be inside of it. Therefore, the seizure of the pills will be found to be unconstitutional.

Example – FBI agents have a valid warrant for the arrest of Benedict Arnold for treason and for the search of his residence. They go to his home, arrest him, and find and seize papers that contain evidence of treason. While there, the agents also seize a white statute of a ship that is displayed on a bookshelf. The statute looks suspicious for no particular reason, and they figure they'll take it to examine and see if there's anything criminal about it. At the FBI lab, it's discovered that the statute is make out of cocaine. When Arnold is charged with cocaine possession, he objects to the admission into evidence of the statute. Will Arnold's objection be sustained?

→ Yes, the objection will be sustained, and the statute will be inadmissible. Police may make a warrantless seizure of an item in plain view as long as the officer is lawfully present at the location where the item is seen, the officer has a lawful right of access to the item, and it is immediately apparent that the item is contraband or evidence of a crime. In our example, the third element is not satisfied. In order for it to be immediately apparent that an item is contraband or evidence of a crime, the police must have probable cause. Since the FBI agents acted on a hunch in regards to the statute of the ship, probable cause was lacking. Therefore, the plain view exception to the warrant does not apply.

► In this chapter, we discussed the plain view exception to the warrant requirement. We learned that police may make a warrantless seizure of an item in plain view as long as the officer is lawfully present at the location where he or she views the item, the officer has a lawful right of access to the item, and it is immediately apparent that the item is contraband or evidence of a crime.

CHAPTER 12. INVENTORY SEARCHES

A. **Inventory Searches**

1. Usually occur when someone has been *taken into custody* by police, and when a *vehicle* has been *impounded*.

2. In these situations, the police can make an inventory search of the arrestee's belongings or the vehicle without a warrant, without probable cause, and without reasonable suspicion, as long as it's done pursuant to established department procedures.

a. The rationale behind this rule is that inventory searches are justified to protect the arrestee's property, to protect the police from fraudulent claims of lost or stolen

property, and to protect the police from potentially dangerous contents that could be inside the item or vehicle.

Example – Fred gets pulled over and arrested for drunk driving. The police tow his car to the impound lot. The police have no reason to believe that there is any contraband or evidence of a crime in Fred's car, but nonetheless, they inventory its contents, and find illegal drugs in the trunk.

→ In this case, the drugs will be admissible against Fred, because, as we have learned, warrantless seizures made during routine inventory searches are valid under the Fourth Amendment, even when probable cause is lacking.

► In this chapter, we discussed the inventory search exception to the warrant requirement. We learned that police can make an inventory search of an arrestee's belongings or a vehicle, without a warrant and without probable cause.

CHAPTER 13. EXIGENT CIRCUMSTANCES

A. **Exigent Circumstances**

1. **Evanescent Evidence –** any evidence that may disappear quickly, before police would be able to get a warrant.

a. When police have probable cause to believe that a crime has been committed, that evidence of the crime can be found somewhere, and that an immediate search is necessary to prevent loss or destruction of the evidence, the police can conduct a warrantless search and seizure.

Example – The police can scrape under a suspect's fingernails without getting a warrant because the defendant could wash his hands within the time it would take to get a warrant.

2. **Hot Pursuit –** police are allowed to enter anyone's home to search for a fleeing felon. Any evidence they see in plain view while searching for the suspect will be admissible.

Example – Officer Johnny Utah sees Bodhi running from a bank with a bag of cash in one hand and a gun in the other. Utah chases after Bodhi and follows him into a house. Once inside, Bodhi is nowhere to be found. Utah goes upstairs and opens a closet door, where he finds marijuana plants. The owner of the house, Angelo, is subsequently charged with possession of marijuana, and the prosecutor seeks to admit the plants at trial.

→ In this case, the plants will be admissible based on the hot pursuit exception to the warrant requirement. When police are in active pursuit of a criminal suspect, the hot pursuit exception entitles them to make a warrantless entry into a home when there is probable cause to believe that the suspect is inside the home. Once inside, the police may search any location where the suspect or any accomplices may be hiding. And if any evidence of a crime is discovered in plain view as a result of the search, it will be admissible under the hot pursuit

exception to the warrant requirement. Therefore, even though the police did not have a warrant to search Angelo's house, the marijuana plants will be admissible against him under the hot pursuit exception.

3. **Emergency Aid** – police may enter a residence without a warrant when there is an objectively reasonable basis to believe that a person inside the residence needs emergency aid to treat or prevent injury.

Example – a warrant would not be required for the police to break down a door to enter a home with smoke coming out of a window or under a door, or to enter a home where there has been sounds of gunfire inside.

► In this chapter, we discussed the exigent circumstances exception to the warrant requirement. We learned that under the **evanescent evidence exception, police may conduct a warrantless search for** any evidence that may disappear quickly. Under the h**ot pursuit exception,** police are allowed to make a warrantless entry of anyone's home when searching for a fleeing felon. And under the **emergency aid** exception, police may enter a residence without a warrant when they reasonably believe that a person inside the residence needs emergency aid.

CHAPTER 14. SPECIAL NEEDS EXCEPTION TO WARRANT REQUIREMENT

A. The **special needs** doctrine – generally for purposes other than law enforcement, like administrative inspections or drug screenings. And it usually applies to searches by governmental employees and public-school officials.

1. **Drug testing** may be done without a warrant in several contexts.

a. The Supreme Court has found that public school children engaged in extracurricular activities can be randomly drug tested.

b. Railroad employees can be drug tested following an accident.

c. Government custom agents responsible for seizing drugs can be drug tested.

2. **Public school officials** may conduct warrantless searches of students and their effects, as long as the search is reasonable and is not excessively intrusive, in light of the age and sex of the student and the nature of the infraction.

3. **Government employees'** desks and file cabinets can be searched without a warrant, as long as the search is reasonable.

4. **Government agents** at the **border** may conduct warrantless routine searches of persons and effects.

a. Neither citizens nor non-citizens have any Fourth Amendment rights at the border with respect to routine searches.

5. **Parolees** may not have Fourth Amendment rights in regards to the government searching without a warrant, and without suspicion, a parolee and his home if it's a condition of the parole.

6. **Prison inmates** do not have a reasonable expectation of privacy in their jail cells. Prison guards may freely search prison cells without probable cause or a search warrant.

► In this chapter, we discussed the special needs exception to the warrant requirement. We learned that there are several departments of the government, other than law enforcement, that have special needs which justify warrantless searches.

CHAPTER 15. TERRY STOPS AND FRISKS

A. Terry Stops and Frisks

1. Originate from the case ***Terry v. Ohio*** (1968)

Facts – The defendant Terry and two other men were observed by a police officer in what the officer believed to be a robbery. The officer stopped and frisked the three men, and found weapons on two of them. Terry was convicted of carrying a concealed weapon and sentenced to three years in jail.

Holding – The search undertaken by the officer was reasonable under the Fourth Amendment and that the weapons seized could be introduced into evidence against Terry. The Court found that the Fourth Amendment prohibition on unreasonable searches and seizures is not violated when a police officer stops a suspect on the street and frisks him or her without probable cause, if the police officer has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime and has a reasonable belief that the person may be armed and dangerous. The Court emphasized that such a stop and frisk is justified by a concern for preventing crimes, and more importantly, for officer safety.

2. **Rule** – Police may stop and frisk someone, without probable cause, if they have a **reasonable suspicion** of **criminal activity** based on **specific and articulable facts**, which is enough for the *stop*; and have **reasonable belief that the person is armed and dangerous**, which is enough for the *frisk*.

3. **Terry Stop** - A brief detention of an individual for the purpose of investigating suspicious conduct.

a. A Terry stop can take place *anywhere* – on the street, at a train station, in a car, and on a bus.

b. A Terry stop arises when an individual has been *seized* – when a reasonable person would not feel free to leave or feel free to decline an officer's request to answer questions.

c. When an individual is being *pursued* by a police officer, that person will be deemed to have been *seized* only if the officer physically restrains him, or if the person submits to the officers' authority by stopping.

i. This means that if a suspect keeps on running, instead of obeying a command to stop by an officer, there is no seizure, and therefore no Fourth Amendment issue.

4. **Terry Frisk** – A pat down of the individual for weapons when the officer reasonably believes that the suspect is armed.

a. If *probable cause* arises during an investigatory stop and frisk, the seizure can become an **arrest**, in which case the officer could conduct a full search incident to arrest.

5. **Traffic Stops**

a. Terry standard has been extended to temporary detentions of persons in vehicles

b. In a traffic stop, *both the driver and passenger* are seized for Fourth Amendment purposes, and therefore either can challenge the legality of the stop.

c. An officer may order both the driver and passengers out of the vehicle.

d. The Court has found that **dog sniffs** at traffic stops are permissible so long as the sniff does not prolong the stop unreasonably.

e. When conducting a proper traffic stop, if an officer reasonably believes that a suspect is *armed and dangerous*, the officer may conduct a frisk of the suspected person AND may search the passenger cabin of the vehicle, limited to those areas in which a weapon may be placed.

► In this chapter, we discussed the last exception to the warrant requirement, Terry stops and frisks. We learned that for a stop and frisk to be valid, police must have reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot, AND reasonably believe that the suspect may be armed and dangerous.

CHAPTER 16. WIRETAPPING AND EAVESDROPPING

A. **Wiretapping** (and other forms of electronic surveillance) constitute a search under the Fourth Amendment.

1. All wiretapping and eavesdropping requires a *warrant*.

2. For a wiretap warrant to valid, four elements must be met:

a. There must be *probable cause* that a specific crime has been committed.

b. The *suspected persons* involved in the conversations that will be overheard *must be named*.

c. The warrant must describe with *particularity* the *conversations* that can be overheard.

d. The wiretap must be for a *limited time period*.

B. **Eavesdropping**

1. Usually becomes an issue when a defendant has spoken to someone using a wiretap or some other form of electronic monitoring.

2. There is no warrant requirement for gathering information from someone using a wire.

3. The "unreliable ear" doctrine – When a defendant speaks to someone who is wearing a wire, the defendant will have no Fourth Amendment claim because it is held that everyone assumes the risk that other parties will not keep your conversations private. This is commonly known as the "unreliable ear" doctrine.

► In this chapter, we discussed wiretapping and eavesdropping. We learned the four elements that are required for a wiretap warrant to be valid. Probable cause, the suspected persons must be named. The types of conversations to be overheard must be laid out. And the wiretap must be for a limited time period. We also briefly learned about eavesdropping and how no warrant is required for gathering information from someone wearing a wire.

CHAPTER 17. ARRESTS AND DETENTIONS

A Fourth Amendment "search and seizure" occurs, not only when police search a place or seize an item in which an individual has a reasonable expectation of privacy, but also when law enforcement **seizes a person**, by way of arrest or another type of detention. Therefore, in accordance with the Fourth Amendment, an arrest must be **reasonable** to be valid.

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

B. For a warrantless arrest to be *reasonable*, it must be based on **probable cause**.

1. Law enforcement must reasonably believe that the suspect has committed or is committing a crime.

C. Police may make an arrest for **any and all types of offenses** (even those punishable by merely a monetary fine with no jail time)

D. Warrants are not required to arrest a person in **public** when the police have probable cause to believe that the individual has committed a crime.

1. However, when a suspect is in their own **home**, police MUST have a warrant to enter and make an arrest.

E. **Terry Stops (investigatory detentions)**

1. To stop an individual for questioning while walking down the street, police need only *reasonable suspicion* that *criminal activity is afoot* that is *supported by articulable facts*.

a. Whether police have reasonable suspicion depends on the *totality of circumstances*. This means that police cannot detain a person merely because they have a *hunch* that the person is committing a crime. The suspicion must be reasonable, and it must be supported by articulable facts.

F. **Automobile Stops**

1. The police are permitted to stop a car if they have *reasonable suspicion* that a *law has been violated*.

a. Includes ANY minor traffic infraction, like driving with a broken tail light, or not wearing your seatbelt.

b. **Road blocks** are an exception. Police may set up roadblocks to stop cars without individualized suspicion that the driver violated a law.

2. When police pull over an automobile, that constitutes a seizure not only of the **driver**, but **all passengers** as well. Therefore, passengers have standing to raise a wrongful stop as a reason to exclude any evidence found during the stop.

3. After lawfully stopping a vehicle, police may *order the occupants out of the vehicle*, in the interest of police safety. And if the officer reasonably believes the detainees may be armed, he may frisk them and search the passenger cabin.

4. **Dog sniffs** - the Supreme Court has held that during routine traffic stops, a sniff by police dogs is *not a search* so long as the police do not extend the stop beyond the time needed to issue a ticket or conduct normal inquiries.

a. So police may do a dog sniff during a legal traffic stop without any reasonable suspicion that contraband is in the vehicle.

► In this chapter, we discussed the seizure of persons. We learned that for an arrest to be reasonable under the Fourth Amendment, the arrest must be based on probable cause. We learned that when police want to stop someone for investigative purposes, the police don't need probable cause, all they need is reasonable suspicion supported by articulable facts.

CHAPTER 18. POLICE INTERROGATION & CONFESSIONS

A. There are three federal constitutional challenges that can be brought to exclude a confession:

1. Fourteenth Amendment Due Process Clause
2. The Sixth Amendment right to counsel
3. The Fifth Amendment Miranda doctrine

B. **Excluding a confession based on the Due Process Clause**

1. A confession may be excluded under the Due Process Clause when the confession has been made **involuntarily** – the confession was a product of police *coercion* that overbears the defendant's will.

2. Examples of involuntary confessions:

a. When police officers held a gun to the head of a suspect to get a confession. When the suspect has held for 5 days with inadequate food and unable to communicate with anyone. And when the suspect is on medication and interrogated for more than 16 hours without food or sleep.

C. **Excluding confessions under the Sixth Amendment right to counsel**

1. Under the Sixth Amendment, a defendant has the right to be represented by counsel, or to have counsel appointed for him by the state if he is indigent, at all **critical stages** of a criminal prosecution **once formal charges have been filed**.

a. In other words, the Sixth Amendment right to counsel prohibits police from deliberately eliciting incriminating statements from the defendant outside the presence of counsel after being charged with a crime, unless the defendant has waived his right to counsel.

2. There can be no violation of the Sixth Amendment right to counsel UNLESS **formal proceedings have begun.**

1. Therefore, a defendant who has been *arrested but not formally charged* does not have a Sixth Amendment right to counsel. But does have a Fifth Amendment right to counsel

2. The Sixth Amendment right to counsel applies at all **critical stages** of criminal proceedings, once formal charges have been filed.

1. Include arraignments, preliminary hearings, bail hearings, plea hearings, post-indictment police interrogation, trial, plea bargaining and sentencing.

2. Examples of *non-critical stages* include the taking of blood, voice, and handwriting samples, photo identifications with a witness, lineups that take place before formal charges have been filed, preliminary probable cause hearings, and parole and probation proceedings.

3. The Sixth Amendment right to counsel is **offense specific**

1. It applies only to the crimes which the defendant is formally charged.

2. So once a defendant's Sixth Amendments have attached regarding the crime for which he is being held, he can still be questioned about *unrelated* and *uncharged* offenses by the police

► In this chapter, we discussed confessions during police interrogation. We learned that there are three constitutional challenges that can be brought to exclude a confession. The first is the Fourteenth Amendment Due Process Clause, which can be invoked if the defendant made the confession involuntarily, such that the confession was the product of police coercion that overbears the defendant's will. The second is the Sixth Amendments right to counsel, which prohibits police from deliberately eliciting an incriminating statement from a defendant, outside the presence of counsel, after the defendant has been charged with a crime, unless the right to counsel has been waived.

CHAPTER 19. FIFTH AMENDMENT MIRANDA DOCTRINE

A. While arresting a suspect, a police officer must read the arrestee his rights. The rights here come from the Fifth Amendment, and stem from the privilege against self-incrimination.

1. "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford one, one will be provided for you by the court."

B. ***Miranda v. Arizona*** (1966)

Facts –Mr. Miranda was arrested in his house and brought to the police station where he was questioned by police officers in connection with a crime. After two hours of interrogation, the police obtained a written confession from Miranda. The written confession was admitted into evidence at trial despite the fact that the police had not advised Miranda of his right to have an attorney present during the interrogation. Miranda was found guilty.

Holding – On appeal before the U.S. Supreme Court, it was held that, according to the Fifth Amendment, the prosecution may not use statements arising from a custodial interrogation of a suspect unless certain procedural safeguards were present. Such safeguards include proof that the suspect was aware of his right to be silent, that any statement he makes may be used against him, that he has the right to have an attorney present, that he has the right to have an attorney appointed to him, that he may waive these rights if he does so voluntarily, and that if at any points he requests an attorney there will be no further questioning until the attorney arrives.

C. **Miranda Doctrine**

1. The Fifth Amendment privilege against self-incrimination (applies to states & federal government) – A defendant's statement made while in **custody**, in response to **interrogation**, cannot be used against the defendant at trial, unless the defendant was advised of his Fifth Amendment privilege and voluntarily waived the privilege.

2. Four core Miranda warnings

a. You have the right to remain silent.
b. Anything you say can be used against you in court.
c. You have the right to an attorney.
d. If you cannot afford an attorney, one will be appointed for you.

3. Miranda warnings are necessary when there is **custodial interrogation**

a. **Custody**

i. A person in custody when they *reasonably feel that they are not free to end the questioning and leave*, and the environment presents inherently coercive pressures by law enforcement.

(i) For instance, an arrest constitutes custody, but routine traffic stops and probation interviews do not.

b. **Interrogation**

i. Any conduct the police knew or should have known that is likely to elicit an incriminating response.

ii. Miranda warnings are NOT required prior to incriminating statements that have been made **spontaneously** (because spontaneous statements are not the product of interrogation)

Example – Three police officers enter Stanley Ipkiss' apartment at 3 AM. They go to his bedroom, wake him up, and question him for several minutes about a bank burglary. During the questioning, Stanley confesses to the burglary. Is this in-home interrogation custodial?

→ The answer is yes. Even though the interrogation did not take place in an official setting, it was conducted by several police officers in the defendant's bedroom after they woke him at 3 in the morning. In this situation, a reasonable person would not feel free to leave, or for that matter, to tell the police officers to leave. Therefore, a custodial interrogation took place; and as a result, the officers were required to read Stanley his Miranda rights, and because they did not, the confession will be inadmissible.

c. The **public safety exception**

i. If a custodial interrogation is prompted by an immediate concern for public safety, Miranda warnings are unnecessary, and any incriminating statements will be admissible against the defendant.

Example – police are called to shooting at a mall where several people have been shot. Police catch who they have probable cause to believe is the shooter and arrest him, but he doesn't have a gun on him. Without reading him his Miranda warnings, they ask him where the gun is. He says it's in a plant near the entrance.

→ In this case, the suspect's statement will be admissible, because of the public safety exception to the Miranda rule. If the gun had not been found immediately, it posed a danger to public safety, for instance, a person or child could come upon it, or an accomplice could use it. Therefore, the police were not required to Mirandize the suspect, and his statement will be admissible.

4. **Miranda Waiver**

a. For a confession that has been made under custodial interrogation to be admissible, the police must not only have read to the suspect his or her Miranda rights, but also must have obtained a valid **waiver** from the suspect.

b. To *waive* Miranda rights, the waiver must be **knowing, intelligent and voluntary**

i. The defendant must *understand the nature of the rights*, and the waiver is cannot be the product of police *coercion*.

c. Waivers can be express or implied.

d. To admit into evidence a confession made through custodial interrogation, the prosecution bears the burden of proving a valid waiver by a preponderance of the evidence.

5. **Invoking Miranda rights**

a. In general, a suspect may terminate police interrogation at any time by invoking either the **right to remain silent** or the **right to counsel**.

b. To invoke the Fifth Amendment **right to remain silent** under Miranda, the suspect must explicitly and unambiguously tell police that he wishes to invoke their right to remain silent.

i. Vague statements, like "maybe I shouldn't say anything", or refusing to answer questions, do not count as an invocation of the right to remain silent.

ii. Once a suspect has properly invoked his right to remain silent, the police must scrupulously honor the suspects decision, meaning they must terminate the interrogation promptly.

(i) Police may reinitiate questioning ONLY if they **wait a significant amount of time,** and obtain a valid Miranda **waiver** from the defendant.

c. To invoke the the Fifth Amendment **right to counsel** under Miranda, the suspect must explicitly and unambiguously tell police of his desire to have counsel present.

i. Once a suspect has done so, the police can't conduct further interrogations unless an **attorney is provided** or unless the **suspect initiates the conversation**.

d. Note the *difference* between invoking the right to remain silent versus the right to counsel:

i. If the suspect indicates the desire to remain silent, the police may re-question him about a different crime after significant time has passed and new Miranda warnings are given and waived.

ii. If the defendant requests counsel, the police may not resume interrogation until counsel is provided or the defendant initiates conversation.

6. The Fifth Amendment right to counsel is NOT **offence specific**.

a. Once the suspect has requested counsel under Miranda, the police may not question the suspect about ANYTHING, including any other crimes, unless an attorney is present or the suspect initiates questioning on his own.

7. The admissibility of incriminating statements that have been obtained in violation of a suspect's Miranda rights.

a. Generally, any incriminating statements that have been obtained in violation of Miranda are inadmissible. However, such incriminating statements CAN be used to **impeach** the defendant's testimony on cross-examination.

b. If the police fail to give a suspect his Miranda rights, any **physical fruits** that were obtained as a result may still be admissible.

Example – Rick confesses to killing Morty, and tells the police where he hid the murder weapon, which is retrieved by the police. The entire interrogation is found to violate Miranda.

→ In this case, Rick will be able to suppress his statements; however, he will not be able to suppress the weapon.

8. The harmless error test

a. This test applies to physical evidence that was improperly admitted under the Fourth Amendment, AND to testimonial evidence in violation of Miranda.

b. Under the harmless error test, if evidence in violation of Miranda was improperly admitted at trial, and the defendant was convicted, the guilty verdict will stand if the prosecutor can prove, beyond a reasonable doubt, that the defendant would still have been convicted had the tainted evidence not been admitted.

► In this chapter, we discussed the Miranda doctrine, which stems largely from the Fifth Amendment privilege against self-incrimination. We learned that police are required to Mirandize a suspect when the suspect is in custody AND is being interrogated. Without a Miranda warning and a valid waiver, a confession will generally be inadmissible at trial under the exclusionary rule. We also discussed the invoking one's right to remain silent and right to counsel. If a suspect asserts the right to remain silent, the police may re-question him about a different crime after significant time has passed and new Miranda warnings are given and waived. And if a suspect requests counsel, the police may not resume interrogation until counsel is provided or the defendant initiates conversation.

CHAPTER 20. PRE-TRIAL IDENTIFICATION

A. There are three types of pretrial identifications:

1. **Line-ups** – Witnesses are asked to identify the suspect from a group of people

2. **Show-ups** – One-on-one confrontations between the witness and the suspect

3. **Photo identifications** – A series of photos that the witness is shown and asked to identify the suspect

B. Challenges to a pretrial identification:

1. **Denial of the right to counsel**

a. Stems from the Sixth Amendment.

b. Once the defendant has been *formally charged*, the Sixth Amendment right to counsel applies to line-ups and show-ups; however, there's NO right to counsel at photo identifications.

i. Recall that the Sixth Amendment right to counsel kicks in once the defendant has been formally charged. So for any line ups that take place BEFORE formal charges have been filed, there is no Sixth Amendment right to counsel.

2. **Violation of Due Process**

a. A pretrial identification procedure will violate Due Process when it is so unnecessarily suggestive that it creates a substantial likelihood of misidentification.

i. Due process is satisfied when police make sure that everyone in a line-up all *look roughly like the suspect*, and also don't make any *improper suggestions* to the witness that he or she may want to look closely at a particular suspect.

ii. Due Process will be violated when the perpetrator is known to be a member of a certain race, and the suspect is the only member of that race in the line up.

C. **Remedy** for constitutional violation of a pretrial identification

1. The remedy is to *exclude the witness from making an in-court identification*.

a. This means that the witness will not be allowed to identify the person in court.

b. There is an exception to this rule:

i. An in-court identification will be allowed if the prosecution can show that there is an *independent source* for the witness' identification of the defendant.

ii. If the prosecution can show that the in-court identification is based on observations of the defendant other than the unconstitutional pretrial identification, then the witness can make the in-court identification.

iii. To make this showing, the prosecution can point to the witness' **opportunity to observe the defendant**, the **specificity of the description** given to police, and **how certain** the witness was of their identification.

Example – Tom kidnaps Jerry. They drive to Tom's house, where they remain in close proximity for several hours before Tom locks Jerry in the basement. The next day, police storm in and arrest Tom. When they talk to Jerry, he gives them an accurate description of Tom. The next day, Jerry picks Tom out of the line up, stating that he is sure that he is the kidnapper. As it so happened, the lineup occured after formal charges and without Tom's counsel present; therefore, it was conducted in violation the Sixth Amendment. Will Jerry be able to make an in-court identification of Tom at his trial?

→ In this case, yes Jerry will be able to make the in-court identification. In general, if there has been a constitutional violation of a pretrial identification, the remedy is to exclude the witness from making an in-court identification. However, if the prosecution can show that there is an independent source for the witness' identification of the defendant, the in-court identification will be permitted. In our example, Jerry had ample opportunity to view Tom before the line-up, he specifically described Tom to the police, and he was extremely certain that Tom was the kidnapper. Therefore, even though the Sixth Amendment was violated during Tom's uncounseled line-up, Jerry will still be able to make an in-court identification of Tom at trial.

► In this chapter, we discussed pretrial identification. We learned about the three types of pretrial identification, line-ups, show-ups and photo identifications. We discussed the two challenges that can be made to pretrial identifications, that being the denial of the Sixth Amendment right to counsel, and violation of Due Process. And we also discussed the remedy for unconstitutional violations of pretrial identification, which is prohibiting the witness from making an in-court identification, unless there is an independent source for the witness' identification.

CHAPTER 21. GRAND JURY

After a criminal defendant has been arrested, the next step in the criminal process is for the prosecutor to present the case before the **grand jury**, with the goal of getting an **indictment**. The grand jury essentially acts as an investigative body, assessing whether there is adequate basis for bringing a criminal charge against a suspect.

A. **Grand Jury**

1. The right to an indictment by grand jury comes from the **Fifth Amendment**

   a. That this right has NOT been incorporated into the Fourteenth Amendment's Due Process Clause, so states are not required to use a grand jury.

   b. Although most states do require a grand jury to indict a criminal defendant, for those that do not, they charge a defendant by filing what's known as an **information**, which is a written accusation of the crime presented by the prosecutor.

2. The primary purpose of grand juries is to issue **indictments**.

   a. The standard for indicting a person is **probable cause**.

i. When prosecutors present a case to the grand jury, they attempt to establish probable cause to believe that a criminal offense has been committed. If there is no finding of probable cause, a defendant will not be forced to stand trial.

3. Grand jury proceedings are conducted in **secret**.

a. They are not public

b. The defendant has no right to participate

4. Grand juries may consider evidence, which is presented to them only by the prosecutor, that would **normally be excluded at trial**.

a. They may examine illegally obtained evidence and hearsay.

5. A grand jury may call the defendant as a witness, and if called, the defendant must appear.

a. In this situation, the defendant has no right to have counsel present.

6. A grand jury indictment may be **quashed**.

a. This occurs when an indictment was issued by a grand jury from which members of a minority group have been excluded. In this circumstance, a conviction resulting from such an indictment will be reversed.

► In this chapter, we discussed the important points about grand juries. We learned that the purpose of grand juries is to find probable cause to issue indictments. Their proceedings are completely private and they may hear any evidence that would otherwise be inadmissible at trial.

CHAPTER 22. PRE-TRIAL PROCEEDINGS

A. Preliminary Hearing (aka Arraignment or First Appearance)

1. Once the defendant has been indicted, there is a preliminary hearing where the defendant appears before the judge.

2. At this and other preliminary hearings, several things will happen:

a. The judge reads the indictment, advises the defendant of his rights, appoints counsel, if necessary, asks the defendant to plead, and sets bail.

B. Bail

1. The Eighth Amendment prohibits excessive bail.

a. The amount that a judge sets should be no greater than what is necessary to ensure the defendant appear at trial.

b. Defendants may be held without bail if the prosecution can show that the defendant is a danger to the community.

Example – Butch has been arrested for burglary several times. Each robbery he committed has resulted in no harm to any person and only minimal property damage. After each arrest, bail has been set and Butch appeared at trial. On Butch's fifth arrest for burglary, the judge denies bail.

→ In this case, if Butch challenges his denial of bail as violating due process and the Eighth Amendment, it will fail. While, in general, bail should be set to an amount no greater than what is necessary to ensure the defendant appears at trial, a judge may deny bail if the defendant is found to be a risk to public safety. In our example, since Butch has a long record of committing numerous burglaries, he is a danger to the community and denying him bail would be constitutional.

2. To set bail, or hold a defendant in jail before trial, there must be a finding of **probable cause**.

a. Probable cause will be presumed if the *grand jury has issued an indictment*, or if the arrest was made pursuant to an *arrest warrant*.

b. If neither of these two situations apply, a defendant who has been arrested will be entitled to a prompt judicial hearing to determine whether probable cause exists.

i. For instance, if a warrantless arrest takes place, the suspect will be entitled to a prompt probable cause hearing, usually within 48 hours. If the judge finds that the police acted without probable cause, the suspect must be released.

► In this chapter, we discussed arraignments, setting bail, and preliminary hearings to determine probable cause. We learned that bail should be set to an amount reasonably determined to ensure that the defendant will appear at trial. However, bail may be denied to ensure public safety. We also learned that, without an indictment, and without an arrest warrant, a defendant will be entitled to a preliminary probable cause hearing in order to justify pretrial detention or bail.

CHAPTER 23. PLEAS AND PLEA BARGAINING

A. At a preliminary hearing, the judge will ask the defendant to plead.

1. For a plea to be **valid**, the judge must establish that it is **voluntary** and **intelligent**.

a. This must be done by addressing the defendant in *open court*, *on the record*, and making sure the *defendant knows and understands the nature of the charges*, including the *elements of the crime charged*, and the *consequences of the plea*.

i. For instance, judge must inform the defendant that if he chooses to plead guilty, he will waive his right to trial.

B. A plea may be withdrawn in the following situations:

1. When the plea is found to be *involuntary* (based on the court's failure to meet the standards for taking a plea)

2. If the defendant prevails on a claim of *ineffective assistance of counsel*.

3. If the *prosecutor fails to keep their part of the bargain*.

Example – Defendant Tweety agrees to plead guilty in exchange for the prosecutor's promise to make no sentence recommendation. Tweety pleads guilty, and the judge accepts the plea. However, at the sentencing hearing, the prosecutor recommends to the judge the maximum sentence allowed.

→ In this case, because the prosecutor did not keep his end of the plea bargain, Tweety may withdraw his plea, start the whole trial process over, and make a new plea.

► In this chapter, we discussed pleas. We learned that, in order for a plea to be valid, it must be **voluntary** and **intelligent**. This means that the judge must address the defendant on the record, and ensure the defendant knows and understands the nature of the charges and the consequences of the plea. We also learned that, once a defendant who has plead guilty has been sentenced, that plea may be withdrawn only if it was found to be **involuntary**, the defendant prevails on a claim of ineffective assistance of counsel, or the prosecutor failed to keep their part of the bargain.

CHAPTER 24. TRIAL RIGHTS

A. **Right to a speedy trial**

1. As stated in the Sixth Amendment, all criminal defendants have the right to a speedy trial. This simply means that the *government may not delay the trial*.

2. In order to find that this right has been violated, courts evaluate the totality of the circumstances.

a. Factors considered include the length of the delay, the reason for the delay, and any prejudice suffered by the defendant.

3. The right to a speedy trial *attaches once the defendant has been arrested or charged*. Before this happens, there is no right to a speedy trial.

4. If there happens to have been a violation of the right to a speedy trial, the remedy will be dismissal with prejudice.

B. **Prosecutor's duty to disclose exculpatory evidence** (the Brady Rule)

1. Under this rule, the prosecutor must disclose to a criminal defendant all **material, exculpatory evidence**.

2. Failure to disclose such evidence will be a violation of Due Process, regardless of whether the failure to disclose was *intentional* or *inadvertent*.

3. If the prosecutor does, in fact, fail to disclose material evidence to the defendant, and the defendant gets convicted, the conviction will be reversed if it can be shown that:

a. The undisclosed evidence was *favorable* to the defendant, and

b. *Prejudice* has resulted (there's a reasonable probability that the outcome would have been different had the evidence been disclosed)

C. **Right to unbiased judge**

1. The judge has *no actual malice* against the defendant.

2. The judge has *no financial interest* in the outcome of the trial.

3. If the judge is shown to have either actual malice or a financial stake in the trial, then due process will have been violated.

D. **Right to a jury trial** (right to a fair and impartial jury)

1. A defendant has the right to a jury trial only for **serious offenses** – *offenses punishable by more than six months*.

2. The minimum number of jurors allowed in a criminal trial is **six**.

a. If only six jurors are used, the **verdict must be unanimous**.

b. If there are twelve members on the jury, the **verdict does not have to be unanimous**

i. May be reached by as low as a 9 to 3 majority.

5. The pool of individuals from which the jurors are chosen **must represent a cross-section of the community.**

a. If not, this violates the Sixth Amendment right to an impartial jury

b. If the jury itself happens to contain *all of one demographic*, this is okay, and complies with the Constitution. What's crucial is that the **pool from which it was drawn was appropriately diverse**.

6. **Peremptory challenges**

a. A peremptory challenge allows both prosecutor and defendant to exclude jurors from the jury; but they *cannot be used to exclude jurors based on their race or gender*.

b. If the prosecutor is found to use peremptory challenges to exclude members of a particular race or gender, this constitutes a violation of the Fourteenth Amendment Equal Protection Clause.

i. Defendant's own race/gender is irrelevant – there will still be an Equal Protection violation even when the defendant is a different race than those wrongfully excluded from the jury.

c. If a prosecutor has been found to use peremptory challenges to exclude members of a particular race or gender, *the defendant will be entitled to a new trial as a remedy*.

E. **Right to counsel**

1. A criminal defendant's right to counsel applies to all the **critical stages** of prosecution, obviously includes trial.

2. *Ineffective assistance of counsel*

a. In order to prove ineffective assistance of counsel, it must be shown that:

i. Counsel was *deficient* (counsel's performance fell below an objective standard of reasonableness)

ii. That there was *prejudice* (but for counsel's unprofessional errors, the result of the trial would have been different)

b. This two pronged test is extremely strict, as there is a strong presumption against finding counsel has been deficient. For this reason, an ineffective assistance of counsel claim should usually be denied.

c. If a defendant does succeed on such a claim, he will be entitled to a new trial as the remedy.

F. **Right to confront witnesses at trial**

1. This right is not absolute.

a. For instance, face-to-face confrontation will not be required when it serves an important public purpose.

i. As an example, courts can protect child witnesses from taking the stand, and instead, allow them to testify over a video feed.

b. Note also that if the defendant acts disruptively during trial, the judge can remove him from the courtroom.

► In this chapter, we discussed many of the constitutional rights relating to trial. We learned that criminal defendants have the right to a speedy trial, the right to have the prosecutor disclose all material, exculpatory evidence, the right to an unbiased judge, the right to a jury trial, the right to counsel, and the right to confront witnesses.

CHAPTER 25. EIGHTH AMENDMENT

A. The Eighth Amendment prohibits "**cruel and unusual punishment**"

1. Cruel and unusual punishment has been defined by the Supreme Court as punishment that is *grossly disproportionate* to the seriousness of the offense committed.

B. **Death penalty**

1. Constitutional so as long as it is not grossly disproportionate to the offence

2. A death penalty statute cannot **mandate** the death penalty for all persons convicted of a particular crime

a. Death penalty statutes must give the jury reasonable discretion whether to apply the death penalty.

Example – By statute in the state of Oz, the death penalty is mandatory whenever a defendant is convicted of first-degree murder.

→ In this case, this statute is unconstitutional. Because it create an **automatic category** for imposing the death penalty, to anyone convicted of first-degree murder, and contains no provision for the exercise of discretion, it violates the Eighth Amendment prohibition of cruel and unusual punishment, as well as the Fourteenth Amendment's due process clause.

3. Jurors must be allowed to consider all **mitigating evidence**.

a. Mitigating factors generally come from the defendant's *background and character* or from the *circumstances of the crime*; and may include such things as emotional disturbance, duress, and the defendant's youth.

b. Some statutes permit the jury to consider *aggravating factors* as well in imposing the death penalty; such as a killing done in an especially cruel manner, a killing done for monetary gain, and a defendant with an extensive felony record.

4. There are four established circumstances where the death penalty is ALWAYS prohibited:

a. A defendant who is **insane** at the time of execution cannot be given the death penalty, even if he was sane at the time the crime was committed.

b. The death penalty cannot be imposed on a defendant who is **mentally disabled**.

c. The death penalty cannot be imposed for a **crime that did not lead to a victim's death** (would be a disproportionate punishment)

i. Even if a defendant is convicted of crime as heinous as child rape, he cannot be given the death penalty if the victim did not die.

d. It is unconstitutional to give the death penalty to someone who was **under the age of eighteen** at the time the crime took place.

i. Courts have determined that the death penalty for offenders under 18 is disproportionate punishment.

ii. It is also unconstitutional to sentence juvenile offenders to mandatory life in prison without possibility of parole.

C. **Sentence enhancements**

1. Judges have *wide discretion* to consider many factors, including factors other than the evidence at trial, in imposing the sentence, as long as the sentence applied comes within the range of allowed by the legislature.

a. For instance, sentencing courts can rely on findings in probation reports of the defendant and the defendant's previous criminal record.

2. However, if the maximum sentence of a crime can be increased by a certain fact, it must be found by the **jury**, not the judge, and be found beyond a reasonable doubt.

a. In other words, it is the jury, not the judge, that must find any facts that are necessary to increase the maximum penalty for a crime.

i. When deciding to make sentences for multiple crimes run either *consecutively* or *concurrently*, that decision is made by a judge.

Example – Many states have hate crime statutes, which allow a sentence to be increased beyond the statutory maximum. In such cases, the fact that the crime was motivated by hate must be found by the jury, beyond a reasonable doubt, before the sentence can be increased beyond the statutory maximum.

► In this chapter, we discussed the Eighth Amendment's prohibition on cruel and unusual punishment. We learned that a punishment will be found to be cruel and unusual, and therefore unconstitutional, when it is grossly disproportionate to crime. We discussed the death penalty and learned that it cannot be imposed on the insane, those with mental retardation, defendants who were under 18 at the time the crime occurred, and when a victim did not die. We also discussed sentence enhancements, where we learned that, while judges generally have wide discretion in sentencing a convicted defendant, it is the jury, not the judge, who is responsible for the finding of a fact that would increase the penalty for a crime beyond the statutory maximum sentence.

CHAPTER 26. DOUBLE JEOPARDY

A. Double Jeopardy Clause in the Fifth Amendment: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb by the same sovereign."

1. **The double jeopardy clause means that a person may not be retried for the same offense, once jeopardy has attached**.

2. The prohibition against double jeopardy applies to the *federal* and *state* governments.

B. When Jeopardy **attaches**

1. Jeopardy attaches in a jury trial once the jury has been sworn in.

2. In a bench trial, once the first witness is sworn.

3. When there is no trial, like if the defendant pleads guilty, jeopardy attaches when the court accepts the plea unconditionally.

4. Before any of these situations occur, jeopardy has not attached, and a new prosecution against the defendant will be permissible.

C. The double jeopardy clause does not apply to **civil proceedings**

Example – A defendant can be criminally prosecuted for tax fraud, and afterwards, there can be a civil proceeding against the defendant to recover back taxes and penalties.

D. The "**same offense"** requirement

1. The general rule is that two crimes are not the same offense if each contains an element that the other does not.

a. What this means is that a defendant may only be tried for two crimes if each crime contains an element that the other does not.

2. If jeopardy has attached for a certain offense, the defendant cannot be retried for any *greater or lesser-included offenses*.

Example – if a defendant is convicted of aggravated robbery, the prosecution could not subsequently charge the defendant with simple robbery.

E. The "**same sovereign"** requirement

1. Double jeopardy prohibits retrying a defendant for the same offense by the same sovereign only.

2. State and federal government are not the same sovereign.

3. Separate states are not the same sovereign.

4. However, states and municipalities within them ARE the same sovereign.

a. Therefore, since municipalities are considered part of the state, both a state and its municipality cannot try a defendant for the same offense.

F. **Exceptions** to the double jeopardy rule (permit retrial):

1. A *hung jury* – a jury that cannot agree upon a verdict and is unable to reach the required unanimity or majority.

2. A *mistrial for manifest necessity* – examples of causes of mistrials for manifest necessity include a defective indictment, juror misconduct, and the unavailability of an essential witness, death or illness of judge,

3. When the defendant has successfully *appealed the conviction*. However, this exception will not apply when the reversal was based on the insufficiency of the evidence.

4. The defendant has *breached the plea agreement*.

► In this chapter, we discussed the double jeopardy clause of the Fifth Amendment. We learned that, under this clause, a person may not be retried for the same offense, once jeopardy has attached. We learned that Jeopardy attaches in a jury trial once the jury has been sworn in; and attaches in a bench trial once the first witness is sworn in. We learned about the "same offense" requirement, which means that a defendant cannot be tried for one crime and then later for another crime unless each crime contains an element that the other does not. We also discussed the "same sovereign" requirement, which bars retrial by the *same sovereign* only. And lastly, we learned that double jeopardy does not apply in these four situations: when there has been a hung jury, when there has been a mistrial for manifest necessity, when the defendant has appealed the conviction unless it was based on the insufficiency of the evidence, and when the defendant has breached the plea agreement.

CHAPTER 27. FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED TESTIMONY

A. The **Fifth Amendment** states that: "no person…shall be compelled in any criminal case to be a witness against himself."

1. This is known as the *Fifth Amendment privilege against compelled self-incrimination*, and invoking it commonly referred to as "taking the fifth."

2. Gives a person the right to refuse to make any statements or answer questions that may tend to incriminate the person.

3. Applies not only to the federal government, but also to the states through incorporation into the Fourteenth Amendment Due Process Clause.

B. The privilege against self-incrimination protects citizens from making **compelled testimony**.

1. The evidence must be **compelled**

a. Only *compelled* testimonial evidence is privileged.

i. For instance, if the defendant produces a writing by his own free will, the police may seize the writing, or the defendant may be compelled to produce it by subpoena, because he was not originally compelled to make the statement.

Example – Al Capone attends a mafia meeting. There, he jots down some notes in his journal which incriminate him in a tax evasion scheme. Police eventually get a warrant to seize the journal. The prosecution seeks to admit the journal into evidence, but Al moves to exclude the journal as a violation of his Fifth Amendment privilege against self-incrimination. How should the judge rule?

→ In this case, the judge should deny Al's motion, and admit the journal. In our example, Capone was not compelled to make those statements in his journal, but rather, he jotted down notes by his own free will. Therefore, the Fifth Amendment will not help Al, and the journal will be admissible.

2. Evidence must be **testimonial**

a. Only *testimonial* or *communicative* evidence will be protected.

i. The government may use physical evidence to incriminate a defendant.

Example – Keyser is compelled to partake in a line-up. Every person in the lineup is required to step forward, and, one at a time, say out loud, "Give me your necklace or I'll shoot you." After hearing each witness in the lineup, the witness identifies Keyser at the culprit. If Keyser objects to the line-up as violating his Fifth Amendment right against self-incrimination, how should the court rule"

→ In this case, Keyser's objection will be denied. Under the Fifth Amendment, only testimonial evidence will be protected. Thus, a defendant has no self-incrimination basis to object to a lineup or other identification procedure, even if asked to say certain words. In our example, the words "Give me your necklace or I'll shoot you" are used for identification purposes, and not as testimony. Therefore, Keyser cannot object to the line-up on self-incrimination grounds.

b. Other than participation in line-ups, other examples of non-testimonial evidence that the prosecution can compel a person to produce include: *blood samples*, *handwriting samples*, *voice samples*, *hair samples*, *fingerprints*, and *business records*.

i. For all these types of non-testimonial evidence, the privilege against compulsory self-incrimination does not apply.

C. Important points regarding the privilege against compelled self-incrimination:

1. Any *person* can take the Fifth.

a. It may be asserted by the defendant, witness, or a party in a civil proceeding. Corporations and partnerships, however, cannot assert the privilege.

2. The privilege *can be asserted in any proceeding where an individual is testifying under oath* (includes trials and other hearings).

a. A person must assert the privilege the first time a question is asked, or the person will waive his Fifth Amendment privilege for all subsequent criminal prosecutions.

b. The privilege applies to civil proceedings, as it does to criminal proceedings.

i. If a defendant fails to assert the privilege in a civil proceeding, the defendant cannot assert the privilege in a subsequent criminal proceeding. So if the defendant answers a question in a civil proceeding, he cannot exclude that evidence in a subsequent criminal proceeding under the Fifth Amendment.

3. In general, *prosecutors cannot comment on a defendant's decision not to testify at trial*. Also, prosecutors cannot comment on a defendant's decision to invoke his right to silence or right to counsel after receiving Miranda warnings.

D. There are three ways to eliminate the Fifth Amendment privilege against self-incrimination:

1. A witness may be compelled to answer questions if **granted immunity**. In this situation, the prosecution is barred from using the witness' testimony or anything derived from it to convict the witness.

2. If a defendant **takes the stand**, he waives the ability to take the Fifth as to anything within the scope of cross-examination.

3. The privilege against self-incrimination will be unavailable if the **statute of limitation has run** on the underlying crime, because the witness's testimony could not expose him to any criminal prosecution.

► In this chapter, we discussed the Fifth Amendment privilege against compelled self-incrimination. We learned that, under this privilege, only compelled testimonial evidence is protected. We learned that the privilege can be asserted by anyone in any type of case where the person is testifying under oath. We learned that the failure to assert the privilege in a civil proceeding undermines the ability to claim it in a later criminal proceeding. And we also learned that the privilege can be eliminated under grant of immunity, when the defendant takes the stand, and when the statute of limitations has run.