

**CRIMINAL LAW**  
**26 January 1998**

**I: INTRODUCTORY MATERIALS**

- There will be 20 Criminal Law Questions, 13 Criminal Procedure Questions on the MBE
- 2 Styles in which MBE tests Criminal Law
  1. Which is the **BEST** defense?
    - MBE means, which is the MOST Complete Defense
  2. Which is **MOST LIKELY**
    - MBE wants distinctions
- MBE wants to trick you by appealing to your emotion; DO NOT GET FOOLED by SYMPATHETIC PARTIES: Stick to the ELEMENTS of the Offense
- “*unconstitutional*” is Presumptively a Wrong Answer in Criminal law questions (though totally relevant to criminal procedure questions)

**A: JURISDICTION**

- The State Acquires JURISDICTION to Adjudicate if it is *situs* (conduct or result occurred THEREIN)
- Crimes of *omission*: Jurisdiction lies where the ACT Should have been performed

**B: MERGER**

- General Rule: There is NO Merger,
- But, for MBE: *Solicitation* + *Attempt* MERGE into the substantive Attempt
- Ergo, weirdly, a DEFENSE to Attempt is that you DID IT
- However, *Conspiracy* does NOT Merge into the Substantive Offense, Ergo, can be Convicted of CONSPIRACY & SUBSTANTIVE OFFENSE

**C: ESSENTIAL ELEMENTS OF A CRIME**

**1. Actus Reus**

- Act can be Any Bodily Movement
- Certain Bodily Movements, though, are not Acts for Criminal Liability purposes; these include:
  - Act which is NOT a product of Own VOLITION
  - REFLEXIVE or Convulsive Act
  - Act, Performed while UNCONSCIOUS or ASLEEP (does not include falling asleep at the wheel)
- *OMMISSION*: Generally, there is NO duty to RESCUE, but sometimes, there may be a Legal Duty to ACT (5)
  - a.) by *Statute* (file taxes)
  - b.) by *Contract* (life-guard)
  - c.) by *Relationship* (parent-child, spouses)
  - d.) by *Voluntarily Assuming a Duty of Care & Failing to Adequately Perform*
  - e.) Where OWN act of conduct CREATED the PERIL

## 2. Mens Rea

- Most Important Topic in Criminal Law (10 MBE questions)
- There are **4** Common Law Mental States:

### a.) *Specific Intent*

- Applies to the Following Crimes:
  - *Solicitation*
  - *Conspiracy*
  - *Attempt*
  - **1<sup>st</sup> Degree Murder** (created by Statute). Can use a Specific Intent Defense to reduce 1<sup>st</sup> Degree Murder to 2<sup>nd</sup> Degree Murder or Common Law Murder (malice Aforethought) (On MBE, murder alone means Common Law Murder which is 2<sup>nd</sup> Degree Murder, which is a Malice Crime, not a specific Intent Crime)
  - *Assault* (as an attempted battery)
  - *Larceny & Robbery*
  - *Burglary*
  - *Forgery*
  - *False Pretenses*
  - *Embezzlement*

### b.) *Malice*

- Applies to ONLY:
  - *Murder*
  - *Arson*

### c.) *General Intent*

- Includes All Crimes that are NOT Specific Intent Crimes, NOT Malice Crimes, and NOT Strict Liability Crimes (includes Assault as a Threat, but not as an attempted battery)
- Transferred Intent: A shoots B, intending to kill him. However, he misses and kills C. There are 2 Crimes here: The Attempted murder of B, and the Murder of C.
- Cannot MERGE 2 Crimes with Different Victims.

### d.) *Strict Liability*

- Formula: If the crime is in ADMINISTRATIVE, REGULATORY, or MORALITY area (i.e., the statute has adverbs like Knowingly, Voluntarily, Willfully, Intentionally; means crime of strict liability)
- Any Defense that NEGATES intention is NO DEFENSE to a Strict Liability Crime
  - See Q 30, 31; P 549, 550
  - MISTAKE of Fact is an INTENT Defense; not valid for a Strict Liability Crime (thus, Entrapment won't work)
  - Consent of the Victim is generally a bad answer
  - Intoxication is a poor defense to a strict liability crime because it relates to intent

### D: ACCOMPLICE LIABILITY

- Accomplices is **Liable** for the **CRIME ITSELF** and **ALL OTHER FORESEEABLE CRIMES**
- Requires the **active aid, abet, & counsel** in the commission of the crime
- Mere **presence** is **NOT** Enough (inactive consent, or silence or failure to call the police is not enough to establish accomplice criminal liability)

## II: INCHOATE OFFENSES

- There are **3** inchoate offenses

### 1. Solicitation

- Asking another to commit a crime
- The Crime of Solicitation occurs and attaches as soon as one party asks another to commit the crime
- If the person agrees, then it becomes a **CONSPIRACY**, and the solicitation charge disappears as it is merged into the conspiracy
- If the person does not agree, then it is still Solicitation

### 2. Conspiracy

- On MBE, Conspiracy Parties **MUST** be Pursuing an **UNLAWFUL** objective (B&E into own house to pawn goods, may be stupid, but it is Not unlawful)
- Elements:
  - a.) *Agreement between 2 or more Persons*
  - b.) *Intent to Agree*
  - c.) *Intent to Achieve an UNLAWFUL OBJECTIVE*
  - Conspiracy Does **NOT MERGE** into the Substantive Offense
- Liability
  - Each Conspirator is **Liable** for **ALL CRIMES** of Co-conspirators **IF** the crimes were committed in **furtherance** of the conspiracy **AND** those crimes were **foreseeable**
  - **MA:** Conspirators are liable **ONLY** for the Conspiracy and **NOT** the **CRIMINAL ACTS** of Others **unless** he was an accomplice to those crimes
- Agreement
  - Need **NOT** be Express
  - A Mere **tacit** understanding is sufficient
  - Various Parties can be Part of the Same Conspiracy even if they don't know the other co-conspirators and the agreement is not express
- Overt Act
  - Liability does not Attach until there is an **OVERT ACT** (according to the majority)
  - **MA & C.L. & Minority:** Ground liability for conspiracy with the **agreement itself** (do not require an Overt Act)
  - **Majority & MBE:** To be an overt act, any act will be an overt act in the furtherance of a conspiracy
- Impossibility
  - Impossibility is **NO Defense** to conspiracy

- Withdrawal
  - Even if Adequate, Withdrawal is NOT a DEFENSE to the Conspiracy, but withdrawal may be a defense to the liability for other co-conspirator crimes

### 3. Attempt

- Attempt = Specific Intent + Substantive Step (beyond mere preparation) in the Direction of the Commission of a Crime
- To be liable for an Attempt, perpetrator must take a **substantial step**
- Impossibility is NO DEFENSE to Attempt, Except if the Defendant thinks that a prescription is required for a drug, then forges a Doctor's note. Meanwhile, unknown to him is that the drug is available Over the Counter. He is charged with *Attempted Receipt of a Prescription Drug on a Forged Prescription*. In that case, Impossibility will be a Defense (the only time that Impossibility is a valid defense to Attempt)

## III: DEFENSES

### A: LACK OF CRIMINAL CAPACITY

- These are Defenses to **ALL** Crimes
- 1. Insanity
  - *McNaughton Test*: Defendant Lacks the ability at the time of his actions to **know the wrongfulness** of his acts OR **understand the nature and quality** of his acts
  - *Irresistible Impulse Test*: Defendant Lacks the Capacity for **self-control** OR **free choice**
  - *Durham Rule*: Defendant's Conduct was the **product of mental illness**
  - *MA, ALL, Model Penal Code*: Defendant lacks the Ability to **conform his conduct** to the **requirements of law**
- 2. Intoxication
  - Must Distinguish Voluntary Intoxication from Involuntary Intoxication
  - Addicts/Alcoholics are VOLUNTARY intoxication
  - To be INVOLUNTARY: must be against will
  - *Involuntary Intoxication* is a form of **insanity** & it is a defense to **ALL** crimes
  - *Voluntary Intoxication* is a Defense **ONLY** to **Specific Intent** crimes
- 3. Infancy
  - If < 7, NO Criminal Capacity
  - If between 7 – 14, there is a **rebuttable presumption** of NO Criminal Capacity, ergo no criminal liability (will almost always be wrong on MBE)

**B: SELF-DEFENSE**

- Deadly Force
  - A victim may use non-deadly force in self-defense **any** time the victim **reasonably believes** force is about to be used upon him
- Non-Deadly Force
  - **MBE**: Victim may use Deadly Force in self-defense **any** time the victim **reasonably believes** deadly force is about to be used upon him
  - **MA**: Prior to using Deadly Force, the Victim must **retreat as far as practicable**. Exceptions; there is **no duty to retreat** in the **home, rape/robbery victim, police**.
- Right of Aggressor to use Self-Defense
  - For the Aggressor to use Self-defense, the Original Aggressor must **withdraw** and **Stop** his Aggression. He must also **communicate** his withdrawal to the original victim. (almost never right on the MBE)
    - Q 54, P 555
    - If anybody uses force which **results in death**, then it is deadly force (i.e., using paper to repel an aggressor can be deadly force if it results in his death)

**C: DEFENSE OF ANOTHER/DWELLING**

- *Deadly Force* may **NEVER** be used **solely** to defend Property (but one may kill a burglar because he is protecting his family, i.e., another)

**D: DURESS & NECESSITY**

- Defenses to **All** crimes except for HOMICIDE
- *Duress*: a Human Threat
- *Necessity*: physical/natural forces

**E: MISTAKE OF FACT**

- The defense Varies Depending on the Mental State of the Crime Charged
- It only mitigates an Intention, i.e., it is NOT a defense to Strict Liability

***Mistake of Fact Defense Summary***

<u>Mental State of Crime Charged</u>	<u>Application of Defense</u>
1. <i>Specific Intent</i>	Any Mistake (reasonable or not)
2. <i>Malice or General Intent</i>	Reasonable Mistakes ONLY
3. <i>Strict Liability</i>	NEVER

**F: MISTAKE OF LAW**

- NO DEFENSE

**G: CONSENT**

- Almost NEVER the proper MBE answer unless Consent to INTERCOURSE
- Thus, consent is a defense to a forcible rape
- Adult Consent is a defense to Kidnapping
- Consent to batteries (for medical treatment)

**H: ENTRAPMENT**

- Very Narrow: Almost Never Available
- Pre-disposition, on the part of the Defendant to commit the crime Negates the defense of entrapment

## IV: COMMON LAW CRIMES (elements)

### A: CRIMES AGAINST THE PERSON

#### • BATTERY

- A Completed Assault: UNLAWFUL APPLICATION OF FORCE TO THE PERSON OF ANOTHER RESULTING IN EITHER BODILY INJURY OR AN OFFENSIVE TOUCHING
- A General Intent crime
- May have **aggravated battery** if use a DEADLY WEAPON, SERIOUS BODILY HARM, or Victim is a CHILD, WOMAN, or Police officer

#### • ASSAULT

- At Common Law, 2 Theories of Assault
  1. *Assault as an Attempted Battery*: Like all attempts, it is a **specific** intent crime
  2. *Assault as a Threat*: This is a **General** Intent Crime

#### • MAYHEM

- Require either DISMEMBERMENT or DISABLEMENT of a Bodily Part.
- Trend is to eliminate it as a separate offense and treat it as a Form of Aggravated Battery

#### • HOMICIDE

- Requires a DEAD, HUMAN Victim
- **Murder**: Common Law murder is what is now called *2<sup>nd</sup> Degree Murder*
  - It is a **Malice** crime, and not a Specific Intent Crime (no additional defenses which apply to specific defense crimes are available as a defense to common law murder: these include *Voluntary Intoxication & Mistake of Fact*)
- **1<sup>st</sup> Degree Murder**: is statutorily created, and it is a **specific intent** crime, therefore, may use the special defenses of Voluntary Intoxication & Mistake of Fact to reduce from 1<sup>st</sup> degree murder to common law murder, or 2<sup>nd</sup> degree murder
- **Common Law**: Homicide is **murder** if **1** of the **4 intents** is Present
  1. *Intent to KILL*
  2. *Intent to do SERIOUS BODILY HARM*
  3. *Abandoned & Malignant (DEPRAVED) Heart* (intentionally doing something that entails a **substantial** likelihood of death, i.e., playing Russian Roulette)
  4. *Felony-Murder* (cause death while committing a felony = murder)
- **Manslaughter**: there are **2** types: Voluntary & Involuntary. MBE wants to label homicides, and therefore, try to Never use voluntary manslaughter UNLESS find some passion in the facts of the question. Without PASSION there is no Voluntary Manslaughter

##### Voluntary Manslaughter

- There is some **provoking** event, which give rise to the heat of **passion**

##### Involuntary Manslaughter

- Killings from **criminal negligence** (i.e., sleeping behind the wheel)
- **Misdemeanor manslaughter**: killing somebody while committing a misdemeanor OR an un-enumerated felony (i.e., the felony committed giving rise to the homicide is Not within the felony-murder statute)

- **1<sup>st</sup> Degree Murder** (Statutory Creation, not part of the Common Law)
  - There is NO uniform definition of 1<sup>st</sup> Degree Murder, therefore, it is nearly impossible for the MBE to test on it
  - If it is on the MBE, the question will give a statute defining it 1<sup>st</sup> degree murder, or else the question will label it '1<sup>st</sup> degree murder'.
  - **MA:** 1<sup>st</sup> Degree Murder is:
    1. *Premeditated*
    2. *Particularly Vicious OR*
    3. *Committed in the Course of a Felony which is Punishable by Death or Life in Prison (All other murders are 2<sup>nd</sup> Degree Murders = common law murders)*
- **Defenses to Felony-Murder**
  - If the Defendant has a Defense to the Underlying Felony, he has a Defense to Felony-Murder
  - The Felony must be Independent of the Killing
  - The Deaths Must be foreseeable
  - Deaths caused while FLEEING from a felony are Felony-murder, **but** when reach a point of *Temporary Safety*, Deaths caused thereafter are NOT felony-murder
  - **MBE:** *Red-line View:* Defendant is NOT liable for Death of a co-felon **if** the death is the result of **resistance** by a Victim or the Police (he will still be liable for the deaths of non-felons)
  - **MA:** To be Felony-Murder, **1** of the Perpetrators of the felony must **do** the killing & some **non-perpetrator** must be the victim
    - Q 24-29 P 547-549
    - Process of Elimination is the Key to the whole exam: it is not a law exam, but a reading comprehension exam
- **FALSE IMPRISONMENT**
  - Consists of unlawful confinement of a person without his valid consent
  - Consent is invalid if it involved coercion, threats, deception, or incapacity
- **KIDNAPPING**
  - Unlawful Confinement involving either (1) **movement** of the victim or (2) **concealment** of the victim
  - Aggravation: if ransom, for the commission of other crimes, offensive purposes, child stealing

## **B: SEXUAL CRIMES**

- **RAPE**
  - The Slightest Penetration will complete the crime of rape
  - Rape is the UNLAWFUL Carnal Knowledge of a woman by a man, not her husband, without her effective consent.
  - Marriage: Under the Common Law, a husband could not rape his wife. This has changed.
  - Lack of Effective Consent:
    - *Intercourse by Actual Force*
    - *Intercourse by Threat of Great & Immediate bodily harm*
    - *Incapable of consent (intoxication, unconsciousness, mental condition)*
    - *Fraudulent belief that the act is not intercourse (but fraud involving a promise to marry can create a valid consent)*
- **STATUTORY RAPE**
  - Carnal knowledge of a female under the age of consent. It is strict liability, because even if there is consent, it is not effective. Mistake of age is NO defense.
- **CRIME AGAINST NATURE (Sodomy)**
  - Includes the following crimes
    - *Bestiality*: carnal copulation with an animal by a human being
    - *Buggery*: Anal intercourse by a man of either another man or a woman (Pederasty when committed by a man upon a young boy)
    - *Fellatio*: Oral Stimulation of the male sex organ
    - *Cunnilingus*; oral stimulation of the female sex organ
- **ADULTERY & FORNICATION**
  - *Adultery*: Any person who co-habitates or has sexual intercourse with another not his spouse if:
    - Behavior is open & notorious
    - Person is married and the other is not his spouse (or the other knows that the married is married)
  - *Fornication*: Open & Notorious sexual intercourse between or cohabitation by unmarried persons
- **INCEST**
  - Either marriage or a sexual act between persons closely related
- **SEDUCTION OR CARNAL KNOWLEDGE**
  - *Seduction*: when a male person induces a female of previously chaste character to engage in an act of intercourse on the promise of marriage (MPC requires only a false promise of marriage, not chastity or unmarried female)
  - Often, the subsequent marriage can be a defense.

## **C: CRIMES AGAINST PERSONAL PROPERTY**

### • **LARCENY**

- Requires a **wrongful taking** (stealing) and **carrying away** the **personal** property of another **without consent** (consent gained by fraud is void) with the **intent** to deprive the owner **permanently** of his interest in the property
- The intent to permanently deprive must exist **AT THE TIME** of the taking
- Taking the property of another with the belief that it is your own is **NOT** a common law larceny
- Larcenist has possession only, not title

### • **EMBEZZLEMENT**

- Embezzler **ALWAYS** has Lawful Possession (he is usually a trustee of a trust fund)
- It is the **ILLEGAL CONVERSION**
- No requirement of a carrying away, no need to have personal benefit
- Embezzler has possession only, not title

### • **FALSE PRETENSES**

- Defendant **persuades** the rightful **owner** of the property to **convey title** by a False Pretense
- The False Pretense must be as to a **present** or **past** Fact (a false promise to do something in the future is not a false pretense)

### • **ROBBERY**

- This is the Suit Case Crime
- A taking of the personal property of another from his person or presence by force or threats of force with the intent to permanently deprive him of that property
- **Larceny + Assault** (it is larceny with a threat)
- **Assaultive Element:** To be robbery, must Take Tangible Personal Property from **the person** or from **his presence** (presence is broadly interpreted: can include tying a guy up in the attic and taking his TV from the Den)
- **Must be Against his will:** either by **violence** or by placing the victim **in fear** (threat must be of imminent harm to the self or the other, not a threat of future harm)
- Threats of Future Harm are **extortion**

### • **EXTORTION**

- Blackmail
- The corrupt collection of an unlawful fee by an officer under color of Office (now, include obtaining or demanding personal property by means of threats to do harm or expose information)
- Distinction between Robbery & Extortion: To be Extortion, require
  1. *Defendant NEED NOT take anything from the Victim's person or in his presence*
  2. *The Threats are of FUTURE harm (≠ imminent harm in robbery)*

### • **RECEIVING STOLEN PROPERTY**

- Receiving possession & control of "stolen" property known to have been stolen by another with the intent to permanently deprive the owner of that property.

- **FORGERY**
  - Making or Altering a Writing with apparent legal significance so that it is false with the intent to defraud
- **MALICIOUS MISCHIEF**
  - The malicious destruction of or damage to the property of another.

#### **D: CRIMES AGAINST THE HABITAT**

- **BURGLARY**
  - Requires:
    1. Breaking (must be an ACTUAL breaking involving some force, however slight or a CONSTRUCTIVE breaking via threats or fraud. It is not breaking for someone to come in through a wide open door or window, however, if he pushes an interior door, that is a breaking)
    2. Entering (Whenever part of the Defendant's body crosses into the house)
    3. Dwelling house (Must be a dwelling house, under the common law, and not a commercial building)
    4. At Night
    5. With the Intent to Commit a Felony Therein (the Intent must exist AT THE TIME of the B&E, else it is not Common law Burglary)
  - MA; statute burglary in the Breaking & Entering into ANY structure at ANY time to commit a Crime therein
- **ARSON**
  - The **malicious** burning of the **dwelling house** of another
    1. Burnings (Not Explosions, not smoke damage, not water damage. Must be a **material wasting** of the **fiber** of the building by **fire**, i.e., the building must burn, not just the carpeting or various items)
    2. Dwelling (Must be a HOUSE)
    3. Another (If maliciously burn your own house, that is not common law arson.)
  - MA: Statute is more sensible.

## **E: CRIMES AGAINST JUDICIAL PROCEDURE**

- **PERJURY**
  - The **intentional** taking of a **false oath** (lying) in regard to a **material matter** (i.e., one that might affect the outcome of the proceeding) in a judicial proceeding
- **SUBORNATION OF PERJURY**
  - **Procuring** or **inducing** another to commit perjury
- **BRIBERY**
  - The **corrupt** payment or receipt of anything for value for official action. Now, extended to non-public officials, and either the offering of a bribe or the taking of a bribe may constitute the crime.
- **COMPOUNDING A CRIME**
  - Agreeing, for valuable consideration, not to prosecute another for a felony OR to conceal the commission of a felony or the whereabouts of a felon. Now, applies to any crime, not just felonies
- **MISPRISION OF A FELONY**
  - The failure to Disclose Knowledge of the Commission of a Felony or to prevent the commission of a felony. Now, misprision is no longer a crime, or if it remains a crime, it requires some affirmative action in the aid of a felon.

### **Hot Topics for the MBE**

1. **Mental State for a Crime**
2. **Transferred Intent**
3. **Accomplice Liability**
4. **Inchoate Offenses**
5. **Defenses**
6. **Crime Elements**

## **CRIMINAL PROCEDURE**

*26 January 1998*

### **I: INTRODUCTION**

- There will be 13 MBE questions, MA ≠ MBE for the Essay
- Constitution places restraints on criminal procedure; incorporate the bill of rights
- Only 2 Rights of the Federal Government are not in the States
  1. *5<sup>th</sup> Amendment Right to a Grand Jury Indictment*
    - Federal right to a grand jury indictment, not necessarily so in the states
  2. *8<sup>th</sup> Amendment Right to Bail*
    - Some state constitutions have a right to bail
- All other Rights of a Federal Defendant are required for State Defendants

### **II: EXCLUSIONARY RULE**

- Remedy of the US Constitutional Criminal Procedure where defendant can have the product of an illegal search excluded from the criminal proceeding
  - **Limitations on Exclusion**
    - 1.) *Does NOT Apply to the Conduct of **Grand Juries** (A Grand Jury Witness may be compelled to Testify based on Illegally Seized Evidence)*
    - 2.) *It is NOT an Available Remedy in a **Civil Proceeding***
    - 3.) *To **Qualify for the Exclusionary Rule**, the Search must Violate **EITHER the Federal Constitution OR a Federal Statute***
    - 4.) *There is a **GOOD FAITH Defense** to the Exclusionary Rule*
      - a.) *The Evidence will NOT be excluded if the police, in GOOD FAITH, relied on a **Judicial Opinion** which was later overruled by a superior Judicial Opinion*
      - b.) *The Evidence will NOT be excluded if the police RELIED, in GOOD FAITH, on a **Statute or Ordinance** which was later declared Unconstitutional*
      - c.) *The Evidence will NOT be Excluded if the police RELY in GOOD FAITH, on a **DEFECTIVE SEARCH WARRANT** (or a computer error where the record keeping error is NOT attributable to the police)*
  - **Exceptions to the GOOD FAITH Reliance on a Defective Search Warrant**
    1. *The Affidavit underlying the warrant is **SO LACKING in PROBABLE CAUSE** that **NO reasonable Police Officer** would have Relied on it (i.e., the Affidavit contained merely a bald assertion with no facts)*
    2. *The Warrant is Defective on its **FACE** (the warrant fails to state with particularity the **PLACE** to be searched or the **THINGS** to be seized)*
    3. *The Police or District Attorney Lied to or Mised the Magistrate*
    4. *The Magistrate has **WHOLLY** abandoned his Judicial Role*
- **Use of Excluded Evidence for Impeachment Purposes**
  - Some Inadmissible Evidence may be used to Impeach the DEFENDANT's Trial Testimony
  - US v Havens: All Illegally seized evidence which is inadmissible during the prosecution's case-in-chief May be used to impeach the Defendant's Trial Testimony (ONLY the Defendant's trial testimony may be impeached)

- **Fruit of the Poisonous Tree Doctrine**
  - Excludes not only the illegally seized evidence, but all evidence Illegally derived from that illegal search & Seizure
  - There are **3** ways to break the chain between Evidence and an Illegal Search
    1. *Government Shows an **Independent Source** for that Evidence*
    2. *The Evidence was the product of an **Inevitable Discovery***
    3. *There were **Intervening Acts of Free Will on the Part of the Defendant***

### **III: THE LAW OF ARRESTS**

- **Common Law Standard for a Warrantless Arrest:**
  - Remember, a Felony is a Crime Punishable by more than 1 year in Jail
  - Remember, a Misdemeanor is a Crime Punishable by less than or = 1 year in Jail
  - **Felony:** Any time there is a reasonable ground to believe a felony has been committed and that the suspect was a perpetrator, there may be a warrantless arrest
  - **Misdemeanor:** A warrantless arrest may be permissible for a misdemeanor ONLY if it was committed in the presence of the arresting officer
  - **Arrest Warrants:** are generally not required if the suspect is to be arrested in a Public place
  - **Non-emergency Arrest of a Person in his Home;** requires an arrest warrant
  - **Station House Detention;** the Police need Probable Cause to arrest or compel a person to come to the police station for either finger-printing or interrogation.

### **IV: LAW OF SEARCH & SEIZURE**

- *Model to Answer Search & Seizure Questions (See p. 5 of Conviser Mini-Review)*
  1. Does the Person (subject of search/seizure) have a **4<sup>th</sup> Amendment Right**?
    - Was there **Government Conduct**?
    - Was there a **Reasonable Expectation of Privacy**?
  2. If Yes, did the Police have a **Valid Search Warrant**?
  3. If No, was it a **Valid Warrantless Arrest**?
  4. Can the Search fit within the **Exception to the Warrant Requirement**?

A. 4<sup>th</sup> Amendment Rights

1.) Government Conduct

- The 4<sup>th</sup> Amendment protects only from Illegal GOVERNMENT searches & seizures
- Which Government Conduct fits in this Requirement?:
  - *Publicly Paid Police* (cops 24 hours per day)
  - *Private Individual Acting at the DIRECTION of the publicly paid police*
    - Private Police are NOT Government Conductors for 4<sup>th</sup> Amendment Purposes **unless** they are Deputized with the Power to Arrest

2.) Reasonable Expectation of Privacy

- Requires **STANDING**: One has NO Reasonable Expectation to Privacy if he has NO Standing to Object to the Illegality of a Search (i.e., to object to the validity of a search, one must have standing)
- Automatic Standing (3 Categories)
  1. *Owens the Premises Searched*
  2. *Lives on the Premises Searched (regardless of whether own it)*
  3. *Overnight Guests of the Premises have Standing to Object*  
**MA**: Persons Charged with a POSSESSORY offense have AUTOMATIC standing to object to the legality of the search
- Possible Standing (not Automatic, Judicial Discretion)
  1. *Owens the Seized Property (photos, tools)*
  2. *Legitimate Presence when Search Takes Place* (Factors Include: Passengers in a car who claim to own neither the car nor the items seized therein do NOT have standing to object just because they were present)
- No Standing: Things Held out to the Public
  1. *Sound of Voice*
  2. *Style of Handwriting*
  3. *Paint on the Outside of the Car*
  4. *Account Records held by a Bank*
  5. *Monitoring Location of a Car on Public Street or in Driveway*
  6. *Anything seen across OPEN FIELDS*
  7. *Anything seen by Flying Over in Public Airspace*
  8. *Odors Emanating from Luggage*
  9. *Garbage*

## **B. Valid Search Warrant**

### **1. Probable Cause**

- Hearsay MAY be the basis for the Issuance of a Valid Search Warrant (i.e., the police may use an informant)
- **MBE**: A valid Warrant may be based in part on the informer's tip, though the informer is anonymous
- **MA: Aquilar Spinelli Test**: To be a Valid Warrant based in part on an informer's tip, the Affidavit underlying that warrant must meet a **2 part test**
  1. *The Affidavit MUST State Sufficient Underlying Facts & Circumstances to allow the Magistrate to KNOW how the informer obtained his information*
  2. *The Affidavit MUST support Reliability & Credibility of that Informant (prior track record)*

### **2. Warrant Must be Precise on its Face**

- The Warrant must state with Particularity the place to be searched and the things to be seized

### **3. Warrant Must be Issued by a Neutral & Detached Judicial Officer**

- It must be issued by a Neutral law Officer
- That means NO Attorney Generals, NO Magistrates who take part in the search & seizure
- COURT CLERKS are neutral judicial officers and they may issue warrants for violations of City Ordinances

## **C. Exceptions to the Warrant Requirement & Valid Warrantless Arrests (6)**

1. *Search INCIDENT to a Lawful Arrest*
2. *Automobiles*
3. *Plain View*
4. *Consent*
5. *Stop & Frisk*
6. *HOT Pursuit & Evanescent Evidence* (which might get away if took the time to get a warrant, i.e., a blood sample in a DUI)

### **1. Search Incident to a Lawful Arrest**

- a.) *The Arrest must be LAWFUL* (if the arrest is unlawful, then the search will be unlawful)
- b.) *The Search must be CONTEMPORANEOUS in Time & Place with the Arrest*
- c.) *Geographical Scope Limitation*; Just the person & his WING Span (i.e., where he could reach for a weapon) **except** the **automobile**: when a person is Validly Arrested in his car, their WING span includes the entire contents of the PASSENGER CABIN, but not the TRUNK

## 2. Automobile

- Requires:
  - a.) *Probable Cause before the Search*
  - b.) *Probable Cause that the Car contains the FRUITS or INSTRUMENTALITIES of a Crime, or Contraband*
  - c.) *Possibility of the Car Escaping*
  - d.) *Limited Expectation of Privacy*
- Police may OPEN the Car, its Trunk, and any luggage or packages or other containers which could REASONABLY contain the items for which there is probable cause to look
- Probable Cause MAY arise AFTER the car is stopped, but it MUST arise BEFORE the Car is Searched
- Test: if the Magistrate had seen what the police officer saw, the magistrate would have issued a warrant

## 3. Plain View Doctrine

- The Police Officer must be **legitimately present** where he/she does the **viewing** (of the fruits/instrumentalities of the crime or contraband)

## 4. Consent

- The Consent must be **Voluntary & Intelligent**
- If the police claim that they have a warrant, when they do not, that Fraud will Negate the Consent
- However, the Police have No duty to warn the suspect of his Right not to consent
- Where 2 or More persons have an EQUAL right to use a piece of property, any 1 of them may consent to its warrantless search

## 5. Stop & Frisk

- The STANDARD for **stopping** = REASONABLE SUSPICION (< PC)
- The STANDARD for **frisking** = REASONABLE BELIEF that the suspect is Armed & Dangerous
- The Weapons obtained in a Stop & Frisk are ALWAYS ADMISSIBLE, so long as the STOP was lawful
- NON-WEAPONS may be admissible depending upon how much the non-weapon, when viewed from the outside, looks like a WEAPON or CONTRABAND

## 6. Hot Pursuit & Evanescent Evidence

- A Blood Sample, obtained without a warrant, is admissible for a drunk driver
- EVANESCENT includes scraping under the fingernails (since that evidence will be lost if it is not immediately obtained)
- Hot pursuit of a Fleeing Felon: If the police are NOT about **15** minutes behind the guy, that is not a good hot pursuit
- Once the police enter a house, any house include those which aren't the fleeing felon's, they're in and there are no other limitations as to what they can do. Anything they find will be admissible

#### **D. Wire-tapping or Eavesdropping**

- **ALL** Wire-tapping and Eavesdropping obtained evidence **REQUIRE** a Search Warrant
- **Except the UNRELIABLE EAR**; must assume the person to whom one is talking is Unreliable (assume he is a mole since talking to him won't require a warrant)
- All police cars are Wired, therefore, one should never say anything in a police car that you don't want them to hear
- **MA**: No Wires are Permitted in a Private Home (without a Warrant). It is OK to have a non-warrant wire in an Office.

#### **V: MIRANDA**

- A showing that the Miranda Warning was given is Required **BEFORE** the judge can allow entry of the evidence obtained from a Custodial Police Interrogation
- Miranda includes: "You have the Right to Remain Silent, anything you say can and will be used against you. You have the right to an attorney. If you cannot afford one, an attorney will be provided for you. (Also, you have the right to terminate the interrogation)
- **2 Keys to Miranda**: (1) Custody & (2) Interrogation
  1. Custody
    - A person is in **CUSTODY** at **the time of interrogation**, if the person is **NOT** free to leave (can either be in jail, the police station, or in home)
    - Probation Interviews & Routine Traffic Stops Are **NOT** custodial (i.e., Police need not Mirandize you before they obtain evidence therefrom, and it is still admissible)
  2. Interrogation
    - Miranda Warning is **NOT** required for Admission of **SPONTANEOUS STATEMENTS**
    - Interrogation: Any Conduct where the Police **KNOW** or **SHOULD KNOW** they might get a Damaging Statement (See Q 62, P 597)
    - "**BLURTS**" = Spontaneous Statement (not part of an interrogation, do not require a Miranda warning before admissible)
  3. Waiver
    - To Be Effective, the Waiver must be **Knowing, Intelligent & Voluntary**
    - **MBE**: Read the Warning. Can Silence be waiver? **NO**.
    - There is **NO** Waiver of Miranda Rights when attempted through **SILENCE** or Shoulder Shrug
  4. 5<sup>th</sup> Amendment Right to Counsel
    - As soon as a Defendant Asserts his right to terminate the interrogation & requests an Attorney, The Re-initiation of the interrogation by the police without the presence of his attorney Violates the 5<sup>th</sup> Amendment Right to counsel

## **VI: PRE-TRIAL IDENTIFICATION**

- The Purpose is to Check that the Victim/Witness Identification came from the Crime, not the proceedings
- There are **2** bases upon which to EXCLUDE a pre-trial identification
  1. *Denial of Right To Counsel*
    - After charged, a line-up is conducted. At the line-up, the defendant has a right to counsel. (however, there is no right to counsel when the witness is looking at photographs)
  2. *Denial of Due Process*
    - The Identification Technique is SO unnecessarily suggestive that there is a **substantial** likelihood of Misidentification
- Remedies: The in-court identification by the witness of the defendant will be struck if the pre-trial identifications denied a right to counsel or due process (Rarely granted)
- State, in response: may INTRODUCE an ADEQUATE & INDEPENDENT source for the Identification (if the witness had an ample opportunity to observe the defendant at the time of the crime)

## **VII: PRE-TRIAL PROCEDURES**

### **A. Bail**

1. *Immediately Appealable*
2. *Preventive Detention is Constitutional*

### **B. Preliminary Hearing** (to determine Probable Cause to Prosecute)

1. *Both sides may be Represented by Counsel*
2. *Both Sides may present evidence*

### **C. Grand Jury**

1. *5<sup>th</sup> Amendment Right to a Grand Jury Indictment is not required in State Criminal Cases (although state constitutions may require or permit). Required only if federal cases*
2. *Exclusionary Rule Does NOT apply in Grand Jury testimony (Grand jury witness may be compelled to testify based on illegally obtained evidence)*
3. *Grand Jury Proceedings are SECRET (there is no Defendant right to appear or send witnesses)*

## VIII: TRIAL

### A. Right to a Fair Trial

- Right to a FAIR & UNBIASED Judge: Bias = financial interest in outcome of the case, or some ACTUAL malice against the defendant

### B. Right to a Jury Trial

- Attaches whenever a Defendant is CHARGED with an offense, the MAXIMUM authorized punishment EXCEEDS **6 months** of incarceration in a penal facility (if the maximum authorized sentence is less than or equal to six months, there is no right to a jury trial)
  - Criminal Contempt: if the SUM of the sentences for Criminal Contempt exceed 6 months, then there is a right to a jury trial

### C. Number & Unanimity of Jurors

- Absolute Minimum of **6** (must be unanimous)
- There is no constitutional right to a 12 person unanimous verdict (Supreme Court has upheld 10-2, 9-3 verdicts)

### D. Cross-sectional Requirement

- Right to have the Jury POOL represent a fair cross section of the community (NOT the particularly impaneled jury).

### E. Peremptory Challenges

- It is Unconstitutional for the Prosecutor or Defense to exercise peremptory challenges to exclude from the jury prospective jurors on the basis of **race** or **gender**

### F. Right to Counsel

- Ineffective Assistance of Counsel is the most commonly raised and least likely to succeed appeal. It's virtually impossible to win at the federal level.
- Fed: to Succeed, the defendant must show:
  1. *Deficient Performance by Counsel*
  2. *BUT for the Deficiency, there certainly would have been a different outcome*
- MA; the most lenient state in the union regarding ineffective assistance of counsel. To succeed, the defendant must show:
  1. *Deficient Performance by Counsel*
  2. *Reasonable Probability of Prejudice*

## IX: GUILTY PLEAS & PLEA BARGAINING

- Guilty Pleas are equivalent to a Waiver of a Trial by Jury
- The Supreme Court WON'T disturb the guilty pleas after sentencing
- There is a Contract theory of Plea Bargaining: Plea bargains are treated like contract terms revealed on the record, before entering the plea and both sides are held to the bargain
- Taking the Plea:
  - When the Plea of guilty is Entered on the Record, the JUDGE must PERSONALLY ADDRESS on the record the Defendant about:
    1. *The Nature of the Charge*
    2. *The Maximum Authorized Sentence & the Mandatory Minimum Sentence*
    3. *Inform the Defendant that he has the right to Plead Not Guilty and Demand a Trial*
    4. *Inform the Defendant that by pleading guilty, he waives his right to a trial and proceeds directly to sentencing*
  - Remedy for a Deficiency in the Taking of the Plea is to Withdraw the Plea and Plea Anew
- 4 Bases for Withdrawing a Guilty Plea After Sentencing
  1. *Plea was NOT VOLUNTARY* (some mistake in plea taking ceremony, i.e., not informed about the maximum sentence)
  2. *Lack of Jurisdiction*
  3. *Ineffective Assistance of Counsel*
  4. *Failure of Prosecution to keep an agreed upon plea bargain* (breach of an agreed upon plea bargain with the prosecution is a sufficient bases to withdraw the plea, post-sentencing, and plea anew)

## X: SENTENCING

- Re-sentencing After a Successful Appeal & Re-conviction
  - Defendant may NOT be given a Harsher sentence upon a re-trial than he was given in the original trial which he appealed and was remanded
- Death Penalty
  - Any Death Penalty **statute** that does NOT give the Defendant an OPPORTUNITY to present Mitigating facts & circumstances is Unconstitutional
  - There can be NO Automatic Category for the Imposition of the Death Penalty
  - The State May NOT, by statute, LIMIT the mitigating factors; all relevant mitigating evidence must be ADMISSIBLE, else the statute is unconstitutional

## **XI: COLLATERAL ATTACKS UPON CONVICTIONS**

- This is the WRIT of HABEUS CORPUS
- Habeas Corpus is a **separate civil proceeding** which is NOT part of the criminal proceeding to which it refers
- Habeas challenges the **LAWFULNESS** of ANY Detention
- WHO? *Detainee v. Director of Dept. of Corrections*
- There is NO Right to Counsel to Petition for a Writ of a Habeas Corpus
- The Petitioner (detainee) Bears the **BURDEN** to demonstrate the Unlawfulness of his detention
- *Standard of Proof*: Preponderance of the Evidence (the Civil standard)
- State may Appeal the granting of a Writ or May Re-try the defendant for the same offense without violating Double Jeopardy
- Requirement of Custody: Detainee must be in Custody to have standing to bring a Habeas Corpus action (thus, people who have fully served their sentence may not have a habeas challenge, but those who are within the criminal justice system, such as on parole, since they are still in custody, may have standing for a habeas challenge)

## **XII: DOUBLE JEOPARDY**

- Double Jeopardy Attaches, in a jury trial, AS SOON AS The jury is sworn.
- Double Jeopardy Attaches, in a bench trial, when the 1<sup>st</sup> witness is sworn
- Double Jeopardy does NOT attach to civil proceedings
- Exceptions Permitting Re-trial (4) (same defendant, same charge)
  1. ***Jury is Unable to Agree Upon a Verdict (Hung Jury)***
    - No Constitutional Right to a Unanimous 12 person jury verdict, but many states require a unanimous 12 person verdict. In such a case, where a hung jury arises, there may be a re-trial of the same defendant on the same charge
  2. ***Mistrial for Manifest Necessity***
    - Midway through the trial, the Defendant has a heart attack. The judge may dismiss the jury, and declare a Mistrial for Manifest Necessity. In such a case, there may be a re-trial of the same defendant on the same charge.
  3. ***Retrial After Successful Appeal***
  4. ***Breach of an Agreed Upon Plea Bargain***
    - When the Defendant breaches an agreed upon plea bargain, the original plea and sentence may be vacated, and re-trial of the same defendant for the same charge is permissible
- Same Offense
  - 2 Charges are Generally NOT the same offense for Double Jeopardy purposes if Each charge requires proof of an **ADDITIONAL ELEMENT** that the other does not (i.e., Involuntary Manslaughter ≠ Hit & Run)
- Lesser Included Offense
  - Being placed in jeopardy for a greater offense BARS re-trial for a lesser included offense (& vice versa)
  - Exception: in jeopardy for battery (acquitted), victim then dies, may re-try for murder

- Separate Sovereign Rules in Double Jeopardy:
  - Double Jeopardy only bars Re-trial by the same sovereign.
  - May be tried for the same offense by State & Fed governments (since they are separate sovereigns).
  - Also State<sub>1</sub> and State<sub>2</sub> are separate sovereigns.
  - However, State & Locality are the SAME sovereign

### **XIII: 5<sup>TH</sup> AMENDMENT PRIVILEGE AGAINST COMPELLED TESTIMONY**

- **Assertible** by ANYBODY (witness, Defendant) in ANY TYPE OF CASE (civil, criminal, administrative action)
- If a person is asked something under oath in any case, the response to which might incriminate the person, he is entitled to assert the privilege
- The Privilege must be **claimed** in a CIVIL proceeding (though it may be asserted anywhere)
  - If Fail to assert the privilege, it is WAIVED for all subsequent criminal prosecutions
- **Scope:** 5<sup>th</sup> Amendment protects only from COMPELLED Testimony (therefore, it is inapplicable to Hair & Blood Samples, and things held out to the public). (Does not apply to Lie Detectors, Police interrogations, production of documents, etc.)
  - **Compelled testimony only**
  - It is Unconstitutional for a prosecutor to make a negative comment on the Defendant's failure to testify or his silence post-Miranda warning
- **Elimination of 5<sup>th</sup> Amendment Privilege (3 ways)**
  1. **Grant of Immunity**
    - 'Use & Derivative' Immunity = Government won't use the Defendant's immunized testimony to convict the defendant, but the government may prosecute the defendant based on evidence the government had before it immunized the defendant
  2. **No Possibility of Incrimination**
    - The Statute of Limitations has run on the crime in question
  3. **Waiver**
    - By taking the stand, the criminal DEFENDANT waives his 5<sup>th</sup> Amendment privilege as to ALL Legitimate Subjects on Cross

### **Hot Topics for Exam**

1. Exclusion (limitations & fruit of poisonous tree)
2. Search & Seizure
3. Miranda
4. Pre-trial identification
5. Right to a Jury Trial & Guilty Pleas
6. Double Jeopardy
7. 5<sup>th</sup> Amendment Privileges Against Compelled Testimony