

Criminal Procedure: Barbri – ESSAY emphasis (ALL essays so far!)

I Constitutional Requirements

A) Binding on States through Due Process Clause of 14<sup>th</sup> A:

- 1) 4<sup>th</sup> A: prohibition against unreasonable searches & seizures & exclusionary rule (prohibits introduction of E obtained in violation of D's 4<sup>th</sup>, 5<sup>th</sup>, & 6<sup>th</sup> A rights including E derived from violations of these rights. i.e., 'fruit of the poisonous tree.'
- 2) 5<sup>th</sup> A: privilege against compulsory self-incrimination
- 3) 6<sup>th</sup> A: right to a: speedy trial, public trial, trial by jury, right to confront Ws, & assistance of counsel in felony cases + misdemeanor cases where imprisonment imposed
- 4) 8<sup>th</sup> A: prohibition against cruel & unusual punishment

B) Q Rights Not Binding on States: Right to indictment by grand jury for capital & infamous crimes.

II 4<sup>th</sup> A:

A) General Approach: Is there a reasonable expectation of privacy?

- 1) Rule: protects the right of ppl to be free from unreasonable searches & seizures. Applies to states through 14<sup>th</sup> A due process cl (Show state action. i.e., govt agent). E.g., arrest.
  - (a) Private security guards who are deputized to make arrests qualify
  - (b) Grand Jury Appearance: seizure of person by subpoena not w/in 4<sup>th</sup> A.
- 2) Reqs for Standing: Search – Did search violate the D's reasonable expectation of privacy based on a totality of the circumstances? Seizure (e.g., arrest)– Would a reasonable person not have felt free to leave?
  - (a) Circumstances where ct has held a person has a reasonable expectation of privacy: 1) he owned/had a right to possession of place searched 2) the place searched was his home, whether or not he owned it (e.g., living at parents' home) 3) He was an overnight guest 4) Using sense-enhancing technology not in general public use to get information inside suspect's home that could not otherwise be obtained w/o physical intrusion (e.g, thermal imaging)
  - (b) Circumstances where there is no reasonable expectation to privacy: Objects held out to the public (E.g., paint on the outside of a car, sound of voice, handwriting, location of car on public roads/arrival at a private residence, garbage left for collection, areas outside home & "curtilage" – e.g., barn, land visible from a public place – even plane, smell of car/luggage ("sniff test"))

B) Where D has a reasonable expectation of privacy, the govt agent must generally obtain a valid warrant OR have a good faith reasonable reliance on a defective but facially valid warrant

- 1) Valid warrant: must be 1) issued by a neutral & detached magistrate (e.g., one who wholly abdicates judicial role not neutral) 2) Based on probable cause & 3) reasonably precise as to place to be searched & items to be seized. Minimize cops discretion
  - (a) PC: substantial probability that items to be searched are connected w/criminal activity & will be found in a particular location.
    - (i) Affidavit based on informer's tip may provide PC even if anonymous + hearsay. "Totality of circumstances." Consider relationship, basis of information etc
    - (ii) Warrant based on an affidavit held to be invalid if D establishes by preponderance of E ALL 3: Affiant applying for warrant intentionally/recklessly + included a false statement + material to the finding of PC. **Tip:** Heavily tested. D rarely successful.

- (b) EXCEPTIONS – where warrant is not required:
- (i) Arrests Made In public places: **Must** be passed on PC – trustworthy facts to lead a reasonable person to believe the suspect has committed/is committing a crime. Home arrests require warrant if non-emergency.
    - (1) Need PC to bring a suspect to station for questioning/fingerprinting
  - (ii) Stop & Frisk: merely requires reasonable suspicion supported by articulable facts (not mere hunch) of criminal activity. Detention must be limited in scope – no longer than necessary to conduct limited investigation to verify suspicion
    - (1) If RS detainee is armed & dangerous, police may frisk. May ask detained person to identify himself. May turn into arrest (e.g., PC to arrest for not identifying self).
    - (2) Brief property seizures valid under same rationale
  - (iii) Automobile Stops: Must have RS to stop a car. EXCEPTION: special law enforcement needs 1) stop cars on basis of neutral, articulable stand (e.g., every car) 2) designed to serve purposes closely related to particular problem relating to cars (e.g., drunk driving but not for illegal drugs).
    - (1) Pretextual stops permissible: If Police has RS driver violated traffic law may stop even if ulterior motive is to investigate if another law was violated (& cop has no PC for motive)
    - (2) Automobile passengers have standing under 4<sup>th</sup> A.
    - (3) After lawfully stopping car - Police officer may order occupants of vehicle to get out. May frisk if RS they're armed.
  - (iv) Detention to obtain a warrant: If PC to believe suspect has hidden drugs in home, may prevent him for going into home to destroy drugs for reasonable time needed to get warrant
- C) If police had a valid warrant, was the warrant executed in a proper manner?
- 1) Without unreasonable delay
  - 2) Knock & announce rule: police must knock, announce presence & wait for reasonable time. May seizure contraband they discover even if not specified in warrant. Violations of rule don't result in suppression. **Tip**: heavily tested.
    - (a) Exception: Officers or E would be endangered/ "evanescent"
    - (b) Person/place searched/seized was w/in scope of warrant
- D) Exceptions to the Search Warrant: Where a Warrantless Search Is Valid: ABCTIPSE
- 1) Automobile Exception: **Tip**: heavily tested
    - (a) If cop has PC to believe car contains E of crime, may search whole vehicle, including any container & trunk. May tow car to station & search it later.
    - (b) Containers that may be searched are limited to those that could reasonably contain the E sought (e.g., can't search for large rifle in glove compartment).
  - 2) Administrative Searches: Must be based on a warrant w/PC but warrant usually granted if pursuant to general & neutral enforcement plan + based on some legitimate authority (e.g, statute).
    - (a) Warrant not needed if: 1) business pervasively regulated 2) surprise inspection needed to further govt regulatory scheme 3) govt has substantial interest & 4) certainty/regularity of acts substitute for notice (e.g., public schools can require drug tests for activities)
  - 3) Border & Foreign Country Searches

- (a) Searches in foreign countries: 4<sup>th</sup> A doesn't apply to searches & seizures by US officials in foreign countries (E.g, may search alien's home in Mexico)
- (b) Border searches:
  - (i) No warrant for searches at border. Neither citizens/non-citizens have 4<sup>th</sup> A rights
  - (ii) Roving patrols inside US border: may stop if RS
  - (iii) Fixed checkpoints: May stop a vehicle & disassemble vehicle even w/o RS
  - (iv) May open intl mail if RC to suspect it has contraband
  - (v) Immigration may do factory surveys of workforce to determine citizenship. Even illegally obtained E admissible in civil deportation hearings
- 4) Consent: **Tip: Heavily Tested**
  - (a) Rule: A warrantless search is valid when the police have a voluntary + intelligent consent by a person w/+ actual/apparent authority to consent
    - (i) Knowledge of right to withhold consent not a prereq
    - (ii) Scope of search limited to scope of consent + all areas a reasonable person would believe consent extends to
    - (iii) If co-occupant is present & refuses consent, consent not valid
    - (iv) Homewoner parent may consent to search of kid's room unless facts indicate parent doesn't have a right (e.g., locked, D has key).
- 5) Terry Type Stop & Frisk
  - (a) Police offer may stop a person w/o PC so long as she has RS person criminal activity is afoot based on articulable suspicion (not mere hunch). **Tip:** Stop is not an arrest so only needs RS.
  - (b) May conduct a frisk limited to patdown of outer clothing if RS detainee has a weapon
  - (c) In course of patdown, officer may seize any item he reasonably believes to be a weapon or contraband based on plain feel. Items admissible.
  - (d) Terry stop w/cars: May order occupants out of stopped vehicle if RS + frisk them + search passenger compartments of the car (even if occupant in squad car). May not search trunk
- 6) Inventory Search: When cops engaged in community caretaking functions (e.g, impounding cars that are a safety threat), may search entire car to so long as good faith + standardized procedure. Decreased expectation of privacy w/in car.
- 7) Plain View: Police may make warrantless seizure when 1) legitimately on premises 2) discover E or contraband of a crime 3) see the E in plain view & 4) have PC based on an immediately apparent belief that the item is E, contraband or fruit/instrumentality of a crime. (E.g., open field, even if trespass, aerial view of MJ)
  - (a) Note: Plain view doctrine applies to other senses, "plain smell" etc
  - (b) Rationale: no reasonable expectation of privacy for objects held out in plain view.
  - (c) Curtilage: afforded Q protection home gets. Consider if observable from public place, proximity to home, whether connected w/intimate activities assoc w/sancity of home, if enclosed.
  - (d) Drugs: Portable chemical tests ok
- 8) Search Incident to Lawful Arrest: **Tip: Heavily Tested**
  - (a) Incident to lawful arrest + may search person & areas in which person may reach to obtain weapons or destroy E ("wingspan").
  - (b) Search must be contemporaneous in time & place w/lawful arrest

- (i) Cars: May search entire interior compartment of car. Contemporaneous req satisfied even if search interior of car *after* putting occupant in squad car, e.g.
- (c) Search Incident to Incarceration: inventory search of arrestee's belongings/impounded car ok
- (d) Protective sweeps of all/part of premises permissible if reasonably believe accomplices are present. (No need for RS to search closets/spaces immediately adjoining place of arrest bc wingspan)
- E) Exigency/Hot Pursuit/Evanescent E:
  - 1) Police in hot pursuit of a felon may make warrantless search & seizure & may pursue suspect into private dwelling.
  - 2) May seize w/o warrant E likely to disappear before warrant obtained
  - 3) Also justified if emergency: persons injured/threatened w/injury, burning fires justify warrantless searches & seizures (E.g., arson - not going to make cops get warrant).
- F) E.g., of Exceptions Permitting Warrantless Searches: Administrative searches to seize contaminated food/highly regulated business, searches of parolees & homes – even w/o RS, searches of govt EEs' desks if work related + RS, drug tests of employees in accident
- G) Wiretapping/Eavesdropping **Tip**: Heavily tested
  - 1) Wiretapping & other forms of E surveillance violates reasonable expectation of privacy & is a search so requires valid warrant 1) based on PC 2) naming suspected persons involved in conversation to be overheard 3) describing particularity of conversations that can be overheard 3) limited to a short duration necessary to get desired information 5) returned to ct, showing what conversations were intercepted
    - (a) Exception: **Tip- Heavily tested**
      - (i) Speaker assumes the risk that the person he is talking to is a wired informer (no 4<sup>th</sup> A right for private conversations)
      - (ii) Pen registers not controlled by 4<sup>th</sup> A (many statutes though)

### III 5th A: Applies to states via 14<sup>th</sup> A due process clause

- A) Privilege Against Compelled Self Incrimination: Compelled T Evidence
  - 1) A Person may refuse to answer a question whenever his response might furnish E needed to prosecute him.
    - (a) Privilege applies only to partnerships/corporations.
    - (b) Civil v criminal case:
      - (i) Civil case – the privilege must be claimed + does not permit a person to avoid being sworn in. Must object to questions specifically.
      - (ii) Criminal case: D has right not to take stand/be asked to.
        - (1) Burdens on assertions of privilege against self-incrimination impermissible: D.A. can't comment on D's silence after being arrested & getting Miranda warnings/D's failure to T. D on timely motion may get jury instruction not to draw adverse inference/judge sua sponte may instruct judge.
        - (2) EXCEPTION: D.A. may comment on D's failure to take stand only in response to counsel's assertion D didn't have a chance to explain his story.
        - (3) Harmless error test applies if D.A. impermissibly comments

- 2) Privilege limited in scope to compelled T E, not to real/physical E.
  - (a) Examples: person served w/subpoena requiring production of documents can't invoke privilege bc act of production doesn't involve T self-incrimination, 5<sup>th</sup> A doesn't prohibit cops from searching/seizing docs tending to incriminate, not a basis to object to a lineup/ID – even if asked to speak bc words used for ID & not T purposes, & only compelled T E (D's voluntary writings admissible)
- 3) Privilege Does not Apply when:
  - (a) Waiver: Criminal D waives when taking the stand.
  - (b) Grant of immunity: W may be compelled to Answer.
    - (i) "Use & derivate" use immunity sufficient (i.e., W's T & E located by means of T not be used against W. W may be prosecuted if D.A. can show E used against W is from independent source)
    - (ii) Use of T obtained as a result of immunity can't be used by another sovereign.
    - (iii) T obtained by promise of immunity involuntary & inadmissible even to impeach (e.g., specific promises)
  - (c) No possibility of incrimination (e.g., SOL run).
- B) 5<sup>th</sup> A (applied to states via 14<sup>th</sup> A) requirements for admissions/confessions. *Miranda*
  - 1) admission/confession to be voluntary (unrestrained choice free of duress or coercion) in order to be admissible
    - (a) Determined through "totality of circumstances." Specific promises of benefits, & threats, deprivation detract from reliability & trustworthiness. Trickery permissible (unlike w/Miranda)
    - (b) Involuntary statements not admissible to impeach.
    - (c) If involuntary confession admitted into E: harmless error test applies
  - 2) Miranda Warnings
    - (a) For confession to be admissible under 5<sup>th</sup> A privilege against self-incrimination, Person in custody (objectively not free to leave, not routine traffic stops) + prior to interrogation (words/conduct by police likely to elicit a response) + no public safety exception must be given *Miranda* warnings. (**Tip:** Doesn't violate 6<sup>th</sup> A)
      - (i) Miranda rights: right to remain silent, right to an attorney/have a L appt
      - (ii) Miranda not required for spontaneous statements, routine booking questions or W testifying before grand jury – even if compelled by subpoena.
      - (iii) Public safety exception: no Miranda warnings where reasonably prompted by concern for public safety (e.g., locate a hidden gun) + immediate need to protect public/cop & no time to give warnings
    - (b) Waiver of Miranda rights: permissible so long as knowing, voluntary & intelligent: no confusion, trickery, but no need to know charges, may be implied if silence + conduct, signing an automatic waiver not sufficient.
    - (c) W's Right to Terminate Interrogation: at any time/prior to interrogation.
      - (i) Right to remain silent: If W indicates he wishes to remain silent – cops must "scrupulously honor" request. At minimum, cops must wait sufficient time before questioning.

- (ii) Right to counsel: If W unambiguously requests counsel, all questioning must stop unless accused later waives right to counsel (e.g., by initiating questioning). At all later questioning, counsel must be present. Cops can not reapproach even about a different crime.
- 3) Effect of *Miranda* warning violation:
- (a) Use of Confession: Admissible to impeach D's T but not as E of guilt
  - (b) Warnings After Questioning & Confession: If cops obtain confession from D w/o giving him *Miranda* AND THEN give him *Miranda* & obtain a subsequent confession: subsequent confession also inadmissible if original unwarned question appears intentional v inadvertent
  - (c) NonT fruits of unwarned confession: Cops fail to give *Miranda* warnings + suspect confesses & provides cops w/information leading to non-T E. Unclear whether non-T E should be suppressed
- C) Double Jeopardy: **Tip:** heavily tested
- 1) General Rule: Under the 5<sup>th</sup> A, a person may not be retried for the same offense once jeopardy has attached. Prohibits reprosecution for a crime after there has been a final j'ment. Dismissal of a charge is not final j'ment.
- (a) When jeopardy attaches:
    - (i) Jury trial: jeopardy attaches at empaneling/swearing in of jury
    - (ii) Bench trial: jeopardy attaches at empaneling of 1<sup>st</sup> W
  - (b) Juvenile proceedings bar subsequent criminal trials for same offense. Other civil proceedings don't bar subsequent criminal trials/other criminal trials don't bar subsequent criminal proceedings
- 2) Exceptions Permitting Retrial for the Same Offense:
- (a) State may retry D whose first trial ends in hung jury (not unanimous)
  - (b) Trial may be discontinued + D reprosecuted if: manifest necessity to abort original trial OR where termination occurs at behest of D + isn't on the merits
  - (c) State may retry D who successfully appealed a conviction UNLESS grounds for reversal was lack of sufficient E but
    - (i) May not be tried for a greater offense than D was convicted of +
    - (ii) If a harsher sentence imposed: judge must state on record reasons why. Rationale: ensure not vindictiveness for D exercising right of appeal
      - (1) EXCEPTION: No need for judge to give reasons if sentence imposed on de novo trial OR jury (unless told of 1<sup>st</sup> jury's sentence)
    - (iii) Death penalty can't be imposed in 2<sup>nd</sup> trial if jury did not impose it in first trial
    - (iv) Charges may be reinstated after D breaches plea bargain **Tip:** Heavily tested
- 3) What Constitutes the Same Offense
- (a) General Rule for when 2 crimes don't constitute the same offense: 2 crimes are the same offense unless each crime requires proof of an additional element the other crime doesn't require
  - (b) Multiple cumulative punishments for offenses constituting the same crime permissible if legislative intent to permit for multiple punishments for same offense (E.g, D can be sentenced both for robbery & using a Weapon if legislative intent)
  - (c) Lesser Included Offenses:

- (i) Attachment of jeopardy for a greater offense (e.g., aggravated battery) bars retrial for a lesser offense (e.g., battery).
- (ii) Attachment of jeopardy for a lesser offense bars retrial for a greater offense (2<sup>nd</sup> degree murder bars for 1<sup>st</sup> degree murder) UNLESS: retrial for murder if V dies after jeopardy attaches in a battery case.
- (iii) EXCEPTION – New E:
  - (1) If unlawful conduct that is later used to prove the grater offense 1) hadn't occurred at the time of prosecution for lesser offense OR 2) hadn't been discovered despite due diligence
- (d) Sentence Enhancer: Person may be indicted for a crime the conduct of which was used to enhance D's sentence for another crime (E.g. D indicted for larceny & larceny was a sentence enhancer)
- 4) Double Jeopardy Clause doesn't bar trials by separate sovereigns but a state & a municipality in the state aren't separate sovereigns. E.g., in conspiracy case where conspiracy entered into in NY & intended objective completed in CA, double jeopardy doesn't bar prosecution in both NY & CA but does bar prosecution in both Claremont & CA).
- 5) Appeals by Prosecution:
  - (a) Prosecution may appeal any dismissal on D's motion if it would not require a new trial, even after jeopardy has attached
  - (b) GOvt may appeal a sentence if a statute permits review
  - (c) But if jury has failed to impose death penalty on first trial, prosecution can't seek death penalty on retrial after successful appeal
- 6) Collateral Estoppel: "Issues." D can not be tried/convicted of a crime if a prior prosecution by that sovereignty resulted in a factual determination inconsistent w/one required for conviction. E.g., Trial in CA for larceny shows that V had the item in her possession the whole time. D can't be tried for larceny.

#### IV 6<sup>th</sup> A – **Tip: VERY HEAVILY TESTED**

##### A) Right to Counsel:

- 1) General Rule: 6<sup>th</sup> A guarantees right to effective assistance of counsel in all critical stages of criminal proceedings whether felony or misdemeanor, after formal charges are filed. D who has waived right to counsel no longer has a right to counsel
  - (a) **Tip:** No violation of 6<sup>th</sup> A right to counsel until formal charges are filed but may be a 5<sup>th</sup> A right to counsel under *Miranda*. Lack of *Miranda* violates 5<sup>th</sup> A
- 2) Right to counsel as "offense specific" – even if 6<sup>th</sup> A rights have attached, D may be questioned regarding unrelated, uncharged offenses (although consider 5<sup>th</sup> A violation under *Miranda*. Offenses considered "different" if each requires proof of additional element other does not). **Tip:** tested
- 3) Critical Phases Where 6<sup>th</sup> A right to counsel attaches after charges filed: 1) custodial police interrogation 2) post-indictment interrogation 3) Preliminary hearing to determine PC to prosecute 4) arraignment, 5) postcharge lineups/showups, 6) entry of guilty plea & sentencing 7) felony trials 7) misdemeanor trials when imprisonment/suspended jail sentences actually imposed 8) overnight recesses during trial 9) appeals as of right & 10) appeals of guilty pleas/pleas of nolo contendere

- 4) Stages At which 6<sup>th</sup> A right to counsel is NOT applicable: 1) blood sampling 2) taking of handwriting or voice exemplars 3) precharge/investigative lineups 4) photo Ids 5) preliminary hearings to determine PC to detain 6) brief recesses during D's T 7) discoveretionary appeals (except pleas of nolo contendere) 8) parole & probation revocation proceedings & 9) post-conviction proceedings
- B) Waiver of Right to Counsel/Right to Defend oneself:
  - 1) Judge must determine D's waiver must be knowing & intelligent.
  - 2) No right to self-represent on appeal.
  - 3) Indigents who are later convicted may be required to reimburse govt if later able to pay
- C) Ineffective Assistance of Council violates 6<sup>th</sup> A **Tip**: usually fails
  - 1) Effective assistance of council generally presumed. Claimant must show 1) deficient performance – fail to be a meaningful adversary of govt - by counsel below the minimal level of competency & 2) but for deficiency result of proceeding would have been different (E.g., shorter sentence/not guilty).
  - 2) Trial tactics not a basis for claim
  - 3) Joint representation doesn't per se constitute IAC but if L brings conflict of interest to judge's attn & ct refuses to appt separate counsel, D entitled to automatic reversal
- D) Right to Support Services: If D makes a preliminary showing he is likely to be able to use insanity defense + statemust provide a psychiatrist for preparation of defense
- E) Seizure of Funds where D was going to use money/property from drug laundering to pay for L Q
- F) 6<sup>th</sup> A Right of Criminal D to Confront Adverse Ws (**Tip: Heavily tested**)
  - 1) General Rule: 6<sup>th</sup> A gives to D in criminal prosecution right to confront adverse Ws. Right not absolute: If confrontation would serve public purpose (e.g., protecting molested kids), D voluntarily leaves or D disruptive after being warned
  - 2) Introduction of Co-D's confession against D (**Tip: Very heavily tested**) If 2+ persons tried together & one has given a confession implicating the other, 6<sup>th</sup> A confrontation clause prohibits use of statement unless:
    - (a) All portions referring to other D can be eliminated
    - (b) The confessing D takes the stand + subjects himself to cross exam w/r/t truth/falsity
    - (c) The confession of the non-testifying co-D is being used to rebut the D's claim that his confession was obtained coercively
  - 3) Burden of Proof: state must prove beyond a reasonable doubt bc presumption of innocence. Mandatory presumption that shifts burden of proof to D violates 14<sup>th</sup> A (due process cl).
- G) Trial Rights: Right to A Speedy Trial, Jury Trial & Fair Trial
  - 1) Right to a Speedy Trial:
    - (a) Attaches when D has been arrested/charged. Whether D's right violated is considered under a 'totality of the circumstances' (consider length of delay, reason, whether D asserted right, prejudice). NO requirement D know of charges for right to attach but D.A. indefinitely suspending charges violates
    - (b) Remedy: dismissal w/prejudice
  - 2) Right to a Fair Trial: 6<sup>th</sup> A & 14<sup>th</sup> A
    - (a) Right to a public trial:
      - (i) Pretrial Proceedings & pretrial suppression hearings presumptively open to public
      - (ii) Trial: press & public's 1<sup>st</sup> A right to attend trial

- (iii) Excessive pretrial publicity: if prejudicial to D, may require change of venue/retrial
- (b) Right to an unbiased judge: due process violated if judge shown to have actual malice against D or financial interest. No req in minor misdemeanor cases that judge be a L!
- (c) Other “due process” rights: 1) trial conducted in manner making it unlikely jury gave E reasonable consideration 2) state compels D to stand trial in prison garb/visible shackled unless needed for security/escape 4) jury exposed to influence favorable to D.A

3) Right to trial by jury

- (a) Q right only for “serious offenses” (serious if imprisonment more than 6 mo). No right to trial for petty offenses, juvenile delinquency, or civil contempt proceedings
  - (i) Probation: Judge may place a contemnor on probation for up to 5 yrs so long as revocation of probation would not result in imprisonment for more than 6 mo.
- (b) No Q right to jury of 12 but must be at least 6 jurors. Unanimous convictions upheld but if only 6 jurors, must have unanimous conviction

4) Right to venire selected from representative cross-section of the community:

- (a) Use of peremptory challenged for racial/gender based discrimination violates EPQ. EPQ on peremptory strikes requires D to show 1) facts/circumstances raising an inference exclusion based on race/gender & 2) D.A> must come forward w/race/gender neutr l explanation. 3) Judge determines if D.A. explanation was pretext & if so, invalidates strike

5) Right to impartial jury:

- (a) D entitled to questioning on voir dire specifically directed to racial prejudice if: 1) race bound up in case or 2) accused on interracial capital crime
- (b) Death Penalty Cases:
  - (i) State may not automatically exclude for cause all those expressing doubts @ death penalty. Must be determined that jurors’ views would prevent or substantially impair performance of duties.
  - (ii) If juror improperly excluded, death sentence subject to automatic reversal
  - (iii) D must be allowed to ask potential jurors is they would automatically give death penalty. If Y → exclude for cause.

6) Sentence enhancement: If substantive law allows sentence beyond statutory maximum + if additional facts (other than prior conviction proven) + proof of facts must be submitted to jury + proved Beyond reasonable doubt

√ 8<sup>th</sup> A: Prohibition Against Cruel & Unusual Punishment or punishment grossly disproportionate to seriousness of offense

A) Death Penalty

- 1) Not inherently violate of 8<sup>th</sup> A
- 2) Where Death Penalty is Prohibited: 1) Rape of adult woman 2) prisoner who is insane at time of execution, even if sane at time offense committed 3) Person who is mentally retarded 4) status crimes 5) cannot be based on aggravating factor of ‘s prior conviction 6) Execution of minors under 18 when committed offense (including murder) 7) felony murder UNLESS D’s participation was Major + acted w/reckless indifference to human life

- 3) No automatic imposition of death penalty: Jury must be allowed to consider all mitigating circumstances + impact on V's family (goes to D's culpability)
- B) Considering D's Perjury Q when Judge determines sentence

## VI 14<sup>th</sup> A: Due Process

- A) Burden of Proof on prosecution (supra): mandatory presumptions impermissible
- B) Obtaining E in a manner that shocks the conscience (E.g., surgery to remove a bullet) requires great need.
- C) Unnecessarily suggestive identifications + substantial likelihood of misidentification
  - 1) Remedy: exclusion of the in ct identification but rarely granted bc:
    - (a) W may make in ct ID despite unQ pretrial ID if: 1) ct ID based on independent source (E.g., opportunity to observe at the time of the crime) OR 2) counsel was present OR 3) accused waived counsel
    - (b) Exclusion of the jury for determining admissibility of ID E not Q required.
- D) D's competency to stand trial:
  - 1) Competency v insanity: Competency is based on D's mental condition at the time of trial. Not a defense to crime but bar to trial. D retried when regain competency.
  - 2) D incompetent to stand trial if 1) lacks a rational + factual understanding of charges & proceedings OR 2) lacks sufficient ability to consult w/counsel w/reasonable degree of understanding.
  - 3) State may not require D to show incompetency by "clear & convincing E"
- E) Excessive Pretrial Publicity: if prejudicial, may require change of venue/retrial

## VII Exclusionary Rule

- A) General Rule: prohibits introduction of E obtained in violation of D's 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> A rights & E that is obtained from exploitation of illegally obtained E ("fruit of the poisonous tree").
- B) Exceptions:
  - 1) Fruits derived from statements obtained in violation of Miranda
  - 2) E obtained from a source independent of original illegality (why difficult to get ID that's illegal excluded)
  - 3) An intervening act of free will by the D (e.g., D illegally arrested but then released & later returns & confesses). **Tip: heavily tested**
  - 4) Inevitable discovery: if D.A. can show that police would have discovered the E whether or not the police acted unQ
  - 5) Violations of the knock & announce rule
- C) Limitations of the Exclusionary Rule:
  - 1) Inapplicable to grand jury (unless violation of federal wiretapping statute), civil proceedings, internal agency rules & parole revocation proceedings.
  - 2) Good faith reliance on defective search warrant – based on case law, facially valid statute, or computer report containing clerical error not made by police UNLESS (4) warrant was so lacking in PC that it could not reasonably be relied on, warrant was defective on face, affiant lied to/misled magistrate or magistrate wholly abandoned judicial role. **Tip: heavily tested**
  - 3) E obtained from illegal search may be used to impeach D's statements – but not others. Also, voluntary confession in violation of *Miranda* may be used to impeach.

- 4) Test if illegal E improperly admitted: harmless error test.
- 5) Enforcing: Govt bears burden of establishing admissibility by a preponderance of the E outside the hearing of the jury. D has right to T at a suppression hearing w/o T being admitted against him at trial on issue of guilt.

## VIII Pretrial Procedures

- A) Preliminary Hearing to Determine PC to detain: D's liberty may be restricted only on PC
  - 1) Not required if PC already determined by arrest based on warrant or grand jury indictment
  - 2) Must be held w/in reasonable time (e.g., 48 hr).
- B) Pretrial Detention – Bail
  - 1) State Q create right to bail unless capital charge. Generally can be set no higher than necessary to assure D's appearance.
  - 2) Refusal to grant bail/setting excessive bail may be appealed immediately
  - 3) May deny bail if pose a danger/would fail to appear
  - 4) **Tip:** 8<sup>th</sup> A not a good argument against denial of bail bc not incorporated against states. Use due process argument for arbitrary bail setting
- C) Grand Jury Proceedings
  - 1) No 5<sup>th</sup> A right to indictment by grand jury incorporated in 14<sup>th</sup> A
  - 2) Secrecy & D's lack of access: D has no right of notice that grand jury considering an indictment, no right to be present/confront W/introduce E.
  - 3) W subpoenaed to T before grand jury has no right to counsel + Miranda warnings. W must appear but may refuse to answer specific questions if incriminate.
  - 4) Jury may base indictment on E that would be inadmissible at trial
  - 5) **Tip:** exclusion of minorities only defect sufficient to quash grand jury indictment. Indictment reversed w/o regard to harmless error
- D) Prosecutorial Duty to Disclose Exculpatory Information & Notice of Defenses
  - 1) D.A. must disclose material, exculpatory E to D. Failure to do so is grounds for reversal if 1) E is favorable bc it impeaches/exculpatory & 2) prejudice has resulted (i.e., reasonable probability outcome would have been different)
  - 2) Notice of Alibi & Intent to Present Insanity Defense:
    - (a) D must notify D.A. if going to present alibi/insanity. If alibi, D must give D.A. list of Ws & D.A. must give D list of Ws it will use to rebut case.
    - (b) D.A. may not comment of D's failure to produce named W/failure to present alibi

## IX Guilty Pleas & Plea Bargaining

- A) Judge Must Determine D's Plea if Voluntary & Intelligent
  - 1) General Rule: Judge must determine D's plea is voluntary & intelligent + by personally addressing D + in open ct & on the record. (Voluntariness: Counsel's presence is key; Intelligent – does D understand he's waiving priv against self-incrim, right to confront accusers & jury trial?)
  - 2) Judge must ensure D understands 1) the nature of the charge 2) the maximum possible penalty & any mandatory minimum & 3) right he has not to plead guilty & that if he pleads guilty, he waives right to trial.
  - 3) No req Judge personally explain elements of each charge to D.

- 4) Remedy for failing to meet standards: withdrawal of guilty plea.
- B) Collateral Attack on Guilty Pleas: guilty pleas may be set aside if involuntary, lack of jx, IAC or D.A.'s failure to keep a plea bargain (**tip**: heavily tested)
- C) Collateral effects of guilty pleas: guilty pleas may be used as a conviction in other proceedings if relevant e.g., sentence enhancement

## X Appeal

- A) Q Issues
  - 1) No fed Q right to appeal
  - 2) Indigents must be provided w/counsel for first appeal as a matter of right, appeals of guilty pleas & pleas of nolo contendere
- B) Collateral attacks on convictions
  - 1) After appeal no longer available, Ds may attack convictions collaterally through habeas corpus proceedings if in custody. Petitioner's burden of proof is preponderance of E of unlawful detention. State may appeal the grant of a writ of habeas corpus.

## XI Rights during punishment (**Tip**: rarely tested)

- A) Generally no right to counsel at parole/probation revocation hearings unless involves imposition of a new sentence
- B) Prisoner's regulations that impose "atypical & significant hardship" in relation to ordinary incidents of prison life give rise to due process claim
- C) No 4<sup>th</sup> A protection in cells
- D) Prisoners must be given reasonable access to cts & right to adequate medical care under 8<sup>th</sup> A
- E) 1<sup>st</sup> A rights of freedom of speech, association & religion may be burdened by regulations reasonably related to penological interests
  - 1) Incoming mail broadly regulated but no outgoing mail
  - 2) No interference w/religious practices absent compelling interest

## XII Juvenile Proceedings

- A) Rights: 1) written notice of charges 2) Assistance of counsel 3) opportunity to confront adverse Ws by cross examine 4) right not to testify 5) guilt beyond a reasonable doubt
- B) Jeopardy attaches

## XIII Forefeiture

- A) Right to pre-seizure notice & hearing
  - 1) Owner of personal property not Q entitle dto notice & hearing before property seized
  - 2) Hearing required for final forfeiture of property
  - 3) If real property: notice 7 opportunity to be heard required before seizure unless exigent circumstances
  - 4) May be subject to 8<sup>th</sup> A: civil in rem & monetary fines aren't
  - 5) No protection for innocent owner if she voluntarily entrusted (E.g., wife loses car bc husband used it to pick up hooker).