**Criminal Law Outline**

1. Forms of Intent
   1. Specific Intent: solicitation, conspiracy, attempt, 1st degree murder, assault (depending on which theory), larceny, embezzlement, false pretenses, robbery, burglary, forgery.
   2. General Intent: all other crimes, including assault and battery.
2. **Inchoate Crimes**
   1. **Attempt**: commits an act of perpetration (not mere preparation) with the intent to commit the intended target crime.
      1. Act of Perpetration: Must take a “substantial step” toward commission or “come dangerously close” to committing the crime.
      2. Defenses
         1. Merger: attempt merges into target crime.
         2. Impossibility: legal impossibility if a valid defense, factual impossibility is not.
   2. **Conspiracy**: defendant enters into an agreement with another party for an unlawful objective and some overt act is performed in furtherance.
      1. **Agreement**: written, oral, express, implied by conduct. Co-conspirators need not meet or even know they exist, so long as they are working toward common goal, thus evidencing agreement by conduct.
      2. **Another Party**:
         1. Majority: Two Guilty Minds: agreement with undercover police officer is not an agreement, but remaining conspirators may have agreement.
         2. Minority: one guilty mind is enough if he believes the other party is agreeing to commit to the unlawful purpose.
         3. Wharton’s Rule: if the target crime requires two parties, then no conspiracy unless there is a third person.
      3. **For an Unlawful Objective**: crime or fraud (need not be illegal).
      4. **Overt Act**: at least one co-conspirator must commit overt act.
      5. **Vicarious Liability**: each conspirator is liability for crimes committed by co-conspirator if crime was *foreseeable* and *in furtherance* of conspiracy, even if defendant did not participate in crime.
      6. **Defenses:**
         1. **Withdrawal**: defense to target crime, *but not to conspiracy*, where defendant timely communicates to co-conspirators that he is no longer part. Walking away is not enough.
         2. **Impossibility**: factual invalid, legal valid defense.
         3. **No Merger** with Target Crime. However, merger with solicitation.
   3. Solicitation: defendant asks or requests another to commit a crime with the intent the person solicited commit the crime. Vicarious liability attaches.
3. **Accomplice Liability**: accomplices—those who, intending the crime be committed, aid, counsel, or encourage the principal—are liable for the crime itself and all other foreseeable crimes, but they must have aided or abetted the crime. Mere presence or silent approval is not enough.
   1. **Withdrawal**: must neutralize assistance if it has been provided, and withdraw before commission of the crime.
   2. Accessory After the Fact: majority view—not liable for principal’s crimes
4. **Crimes Against the Person**
   1. **Homicide Crimes**
      1. **Murder**
         1. **Definition**: Homicide committed with malice caused by defendant.
         2. **Causation**
            1. **Foreseeability**: death must be foreseeable result of act or omission. Intervening negligence *is* foreseeable.
            2. **Act of a Third Party**: defendant liable if third party’s act was *foreseeable* and:

Solicitation

Co-Conspirator

Accomplice

Felony Murder Rule

* + - * 1. Omission to Act: must have a duty to act.
      1. **Malice**: four alternative methods to establish:
         1. Intent to Kill: gleaned from statements or use of a deadly weapon in a deadly manner.
         2. Felony Murder Rule
         3. Intent to Inflict Grave Bodily Harm
         4. Depraved Heart: reckless indifference to a known high risk of death or serious bodily injury.
      2. **Degrees**: at common law, no degrees. Today, by majority rule, two degrees bases on Malice.
         1. First:

Premeditated & Deliberate: requires time, but need not be much, and calm and cool frame of mind.

Felony Murder Rule & Specified Felony

* + - * 1. Second: Intent to Inflict Grave Bodily Harm or Depraved Heart.
    1. **Felony Murder**: defendant is liable for a homicide perpetrated during the commission of an inherently dangerous, independent felony.
       1. “During”: starts at attempt, ends at time felon enters place of temporary safety.
       2. “Inherently dangerous felony”:
          1. Majority: Burglary, Arson, Rape, Robbery, Kidnapping.
          2. Minority: also, non-dangerous felonies committed in a dangerous manner.
       3. “Independent”: Felony must be independent from act that caused death, i.e., no assault or battery.
       4. **Proximate Cause**: felony must be a proximate cause of the homicide—i.e., homicide must be foreseeable result of felony. No liability if getaway car strikes child while driving carefully.
       5. **Vicarious Liability** **Rules**
          1. Co-Felon Causes Death: all felons are liable for deaths caused by a co-felon.
          2. Non-Felon Causes Death:

Of Felon: no liability if co-felon is killed.

Of Non-Felon: in some states, no liability, in others, liability.

* + - 1. Underlying Defense: if you have a defense to the independent felony, you have a defense to the Felony Murder.
    1. **Manslaughter**
       1. **Involuntary**: typically if you cannot meet the malice for murder.
          1. **Definition**: Homicide committed without malice under one of three
          2. **Intent**: any of

Intent To Inflict Slight Bodily Injury

Criminal Negligence

Misdemeanor Manslaughter: defendant kills while committing a non-inherently-dangerous felony or a malum in se (inherently wrongful) misdemeanor.

* + - 1. **Voluntary**: homicide where either
         1. **Adequate Provocation**: caused both subjective and objective passion, and there was no cooling-off period.
         2. **Good Faith Mistake**: mistake of fact was unreasonable but honest, as to self-defense, defense of others, or crime prevention.
  1. **Assault**: attempted (but unsuccessful) battery or threatened battery
     1. Attempted Battery: attempts, but unsuccessful, at causing physical harm to victim. Must specifically intend to cause battery.
     2. Threatened Battery: e.g., “I will hit you.” General intent.
  2. **Battery**: an offensive touching. General intent.
  3. **Kidnapping**: confining by moving or concealing victim.

1. **Crimes Against Property** 
   1. **Larceny**: non-consensual taking away of property possessed by another with intent, at time of taking, to permanently deprive. Late consent is not retroactive. Must have moved property, even if slightly. In Larceny by Trick, defendant obtains consent by trick. If defendant believes it is his property or he has a right to it, no larceny.
   2. **Robbery**: a larceny committed from the victim’s person or presence by force or threat of force of *immediate* bodily harm. Distinguish extortion: obtaining property by means of threats to do *future* harm**.**
   3. **Embezzlement**: fraudulent conversion of another’s property while defendant rightfully possesses property.
   4. **False Pretenses**: defendant’s acquisition of *title* (rather then possession) of another’s property by a false representation made with intent to defraud. E.g., fraudulent sale.
   5. **Burglary**: breaking and entering another’s structure with intent to commit a felony. At common law, it had to be at night and a person’s dwelling.
      1. **Breaking**: must involve some physical movement of a part of the house. In some states, there is constructive breaking, which is obtaining entry by fraud.
      2. **Entering**: some portion of defendant’s body (including object) must enter the structure.
   6. **Arson**: burning of a protected structure in another’s possession with malice.
      1. Structure: at common law, had to be dwelling of another, but most states protect all structures.
      2. Malice: intent to burn structure or with knowledge of high risk.
2. **Defenses**
   1. **Justification**
      1. **Self-Defense**: may use *reasonable and necessary* deadly force to protect against an imminent deadly attack.
         1. Retreat:
            1. Majority Rule: no duty to retreat in face of attack unless defendant is the initial aggressor.
            2. Minority: must retreat is can be safely done, but if home, or a police officer, or a victim of a violent felony in this exchange, no need to retreat.
         2. Defendant is Aggressor: may assert self-defense if withdraws or initially used non-deadly force and other responds with deadly force, but must retreat if can do so safely.
      2. **Defense of Others**: may use deadly force if reasonable and necessary to protect other from imminent deadly attack.
         1. **If Other is Not Entitled to Use Self Defense**: i.e., if other is the initial aggressor, majority allows defendant to claim Defense of Other if victim reasonably appears to have a right to use deadly force, but minority says no mistakes, even if reasonable.
      3. **Mistake of Fact**:
         1. Specific Intent: honest, need not be reasonable.
         2. General Intent: must be reasonable.
      4. **Defense of Property**: generally, may not use deadly force, but can use regular force. However, majority permits deadly force in home to prevent against violent intruder or intruder intending to commit felony inside.
   2. **Excuse**
      1. **Insanity**: excuse for all crimes
         1. **M’Naghten**: because of mental disease or defect at time of conduct, D lacked ability to know of wrongfulness of actions or to understand the nature & quality of actions.
         2. **Irresistible Impulse**: D lacked capacity for self-control & free choice.
         3. **MPC**: defendant lacked substantial capacity to conform conduct to requirements of law (Irresistible Impulse) or to appreciate wrongfulness of conduct (M’Naghten).
         4. **Durham**: D’s conduct would not have occurred but for the presence of mental illness
      2. **Intoxication**: if defendant is intoxicated at time of crime, intoxication *may* excuse
         1. **Voluntary**: when defendant voluntarily and knowingly becomes intoxicated, no defense to general intent crime or malice (including recklessness), but may negate specific intent only if so intoxicated he cannot form specific intent for crime.
         2. **Involuntary**: when defendant is forced to or unknowingly becomes intoxicated, and is defense to all crimes. **Also**, *treat it as insanity* and discuss additionally the insanity tests.
      3. **Duress**: defense to everything *but* intentional homicide
      4. Diminished Capacity: some states: as result of mental disease defect short of insanity, defendant did not have required mental state. Typically limited to specific intent crime.
      5. Entrapment: defendant must have no predisposition to commit the crime and criminal plan originated with government.
      6. Youth/Infancy

**Essay Tips**:

1. If you don’t know which is majority and which is minority view, just say “some states” and “some states.”

2. There is often a crossover with tort, so whenever you see either tort or crime, question if the other is also present.

3. Always discuss act, mental state, and causation.

4. Vicarious liability: in any question about this, look to Accomplice Liability, Solicitation, or Co-Conspirator liability. Before discussing Co-Conspirator liability, establish that there was a conspiracy. Do not assume it on exam.

5. Always discuss potential defenses to any crime.

**Criminal Law Checklist Outline & Hard Sheet**

1. **Accomplice Liability**: intend crime be committed + aid, counsel, or abet. Withdrawal is defense if neutralizes assistance and occurs before commission.
2. Inchoate Crimes
   1. **Attempt**: intend to commit + act of perpetration
   2. **Conspiracy**: agreement for unlawful objective + overt act
      1. Another Party
         1. Majority: Bilateral: two guilty minds necessary
         2. Minority: Unilateral: one guilty mind necessary
      2. Overt Act: only one co-conspirator need commit
      3. Vicarious Liability: foreseeable + in furtherance
      4. Withdrawal: defense to target crime only, requires communication, walking away not enough.
   3. **Solicitation**
3. Crimes Against The Person
   1. **Murder**: homicide + malice
      1. Malice
         1. Intent to Kill
         2. Felony Murder: homicide + inherently dangerous, independent felony (BARRK).
            1. “During”: starts at attempt, ends when felon enters place of temporary safety.
            2. Where Non-Felon Causes Death: liability in some states
         3. Intent to Inflict Grave Bodily Harm
         4. Depraved Heart: Reckless Disregard to High Risk
      2. Foreseeability: death must be foreseeable result of act or omission, and intervening negligence *is* forseeable.
   2. **Involuntary Manslaughter**: homicide + intent less than malice
      1. Intent to Inflict Slight Bodily Injury
      2. Criminal Negligence
      3. Misdemeanor Manslaughter: non-inherently-dangerous felony or inherently wrongful misdemeanor.
   3. **Voluntary Manslaughter**
      1. Adequate Provocation
      2. Good-Faith, Unreasonable Mistake
   4. **Assault**: attempted or threatened battery
   5. **Battery**: offensive touching
   6. **Kidnapping**: confining by moving or concealing victim
4. Crimes Against Property
   1. **Larceny**: non-consensual taking (at least slight movement) with intent to permanently deprive.
      1. Larceny by Trick = consent obtained by trick
   2. **Robbery**: larceny from victim’s person or presence by force or threat of *immediate* bodily harm.
   3. **Burglary**: breaking and entering another’s structure + intent to commit felony therein. At common law, home + night.
      1. Breaking: must involve some physical movement of part of structure
      2. Entering: some portion of defendant’s body (including object)
   4. **Embezzlement**: fraudulent conversion while in rightful possession
   5. **False Pretenses**: acquisition of *title* by intentionally false representation
   6. **Arson**: burning of protected structure with malice. At common law, had to be home.
5. **Defenses & Excuses**
   1. **Self-Defense**: reasonable & necessary force against immediate deadly attack
      1. Retreat
         1. Majority: not unless initial aggressor
         2. Minority: if safe, unless in home or a police officer
      2. Defendant as Aggressor: OK if withdraws or initially used non-deadly force, but must retreat if safe.
   2. **Defense of Others**: reasonable & necessary force against immediate deadly attack.
      1. If Other Not Entitled To Use Self-Defense: majority allows defense if victim reasonably appears to have right, minority says no.
   3. **Defense of Property**: only regular force, but majority permits deadly if in home against violent intruder intending to commit felony.
   4. **Mistake of Fact**
      1. General Intent: negates if reasonable
      2. Specific Intent: negates if honest
   5. **Insanity**: excuse for all crimes
      1. M’Naghten: mental disease or defect causing lack of ability to know wrongfulness or understand nature and quality
      2. Irresistible Impulse: lacked capacity for self-control and free choice
      3. MPC: either M’Naghten or Irresistible Impulse
      4. Durham: conduct would not have occurred but for mental illness
   6. **Intoxication**
      1. Voluntary: no defense to general intent crimes, may negate specific intent.
      2. Involuntary: defense to all crimes. *Also, treat as insanity* and apply insanity tests as well.
   7. **Duress**: excuse to all but intentional homicide
   8. Diminished Capacity: some states: mental disease defect short of insanity negates mental state for specific intent crime.
   9. **Youth/Infancy**

**Criminal Procedure Outline**

1. **The Exclusionary Rule**
   1. **Defined**: excludes from subsequent prosecution evidence obtained by illegal search or coerced confession.
      1. **Fruit of the Poisonous Tree**: excludes both illegally seized evidence as well as all evidence derived from police illegality.
         1. **Exception**: doctrine inapplicable to *Miranda* violations unless the police act in bad faith. Absent bad faith, statements themselves are inadmissible, but the fruits of those statements are admissible.
         2. **Three Ways to Break the Poisonous Chain**
            1. Independent Source
            2. Inevitable Discovery: police would have inevitably discovered the evidence.
            3. Defendant’s Intervening Acts of Free Will
   2. **Limitations on the Exclusionary Rule**
      1. **Inapplicable to Impeachment of Defendant**: however, may only be used to impeach the credibility of defendant’s trial testimony. Cannot be used to impeach any other defense witness.
      2. Inapplicable to Grand Jury Proceedings
      3. Inapplicable in Civil Proceedings
      4. Inapplicable to Parole Revocation Proceedings
      5. Inapplicable to Violations of the “Knock & Announce Rule”
      6. Illegality of Search: to trigger exclusion, search must violate federal constitution or a federal statute.
   3. **On Appeal**: defendant’s conviction, even if based on evidence that should have been excluded, will not be overturned on appeal if the error was harmless (“harmless error”)—i.e., conviction would have resulted despite the improper evidence.
2. **The Fourth Amendment**: protects against *unreasonable* searches and seizures.
   1. **Arrests & Detention**
      1. **Probable Cause** required to arrest.
      2. **Arrest Warrants**: unnecessary in public places, necessary for a non-emergency arrest in someone’s home.
      3. **Investigatory Detentions** (*Terry* Stops): requires reasonable suspicion of a violation of law, supported by articulable facts. No hunches allowed. Reasonable suspicion depends on the totality of circumstances. Same standard applies to automobile stops, except that no reasonable suspicion is required for checkpoints that are “neutrally applied.”
      4. Police Dogs: during routine traffic stops, a “sniff” is not a search so long as stop is no longer than ordinarily required to issue ticket.
   2. **Search & Seizure**
      1. Checklist: (1) Government Conduct; (2) Reasonable Expectation of Privacy; (3) Valid Search Warrant or Exception.
      2. **Governmental conduct?** Conduct must be of public police (on or off duty), private individual acting at police direction, private deputized police).
      3. **Reasonable Expectation of Privacy (Standing to Object)?**
         1. **Automatic Standing**
            1. Own the premises searched.
            2. Live on the premises searched.
            3. Overnight Guests.
         2. **Sometimes Have Standing**:own the property seized, but only if there is a reasonable expectation of privacy in the item or area searched.
         3. **No Standing**
            1. Passengers in cars who don’t own car or property in car, drug dealer briefly on premises of someone else solely to prepare drugs
            2. Anything you hold out to the public: sound of voice; style of handwriting; paint on your car; account records held by a bank; the location of your car (but search warrant needed to affix tracking device); anything seen across the open fields; anything seen from flying over public airspace; odors emanating from luggage or car; garbage on the curb for collection.
      4. **Valid Search Warrant?**
         1. **Yes**: test its validity: requires Probable Cause & Particularity
            1. **Probable Cause**: a fair probability that contraband or evidence of a crime will be found in the area searched.
            2. **Particularity**: warrant must state with particularity the place to be searched and the things to be seized.
            3. **Informants**: if the officer’s affidavit is based on informant information, sufficiency is determined by the totality of circumstances. An informant’s reliability/credibility and basis of knowledge are relevant factors.

**Anonymous Informants**: valid warrant can be based in part on an informant’s tip even if that informant is anonymous, but it cannot be solely based on an anonymous informant.

* + - * 1. “No Knock” and Exigent Circumstances: a “No-Knock” entry is permitted in executing a search warrant if exigent circumstances exist—it would be dangerous, futile, or inhibit the investigation.
      1. **No Warrant or Invalid Warrant**: evidence is excluded, unless
         1. **Good Faith Defense**: an officer’s good-faith reliance on a search warrant overcomes defects in probably cause and particularity, unless

Affidavit is so lacking in probable cause that no reasonable officer would have relied on it.

Affidavit is so lacking in particularity.

Police or prosecutor lies to or misled the magistrate.

Magistrate is biased.

* + - * 1. **Search Incident to Lawful Arrest**: no warrant required where search is incident to a lawful arrest, is contemporaneous in time and place, and the search does not exceed the person and the areas he can reach to procure a weapon or destroy evidence.

**Automobile**: police may search the interior of an automobile incident to a lawful arrest only if (1) the arrestee is unsecured and still may get access to the interior, *or* (2) the police reasonably believe evidence of the offense for which the person was arrested may be found in the vehicle.

* + - * 1. **Community Caretaker Exception**: many states recognize exception to warrant requirement where officer faces emergency that threatens health or safety of a member of the public. Many states are applying it to automobiles.
        2. **Automobile Exception**: only applies if officer *has probable cause*, in which case may search entire car (including trunk), and open any package inside that can *reasonably contain* what they are looking for. The probable cause can arise after the car is stopped, but must be before anything is searched.
        3. **Plain View**: police officer must be *legitimately present* at the location and it must be *immediately apparent* that item is contraband or fruit of the crime.
        4. **Consent**: must be *voluntary* and *intelligent*. If police say they have a warrant, it negates consent.

**Third-Party Consent**: where two or more people have an equal right to property, either can consent to its warrantless search, however, if both are present and one consents though the other doesn’t, the one who does not consent controls.

* + - * 1. **Stop & Frisk:** brief detention for the purpose of investigating suspicious conduct.

Stop: requires reasonable suspicion.

Frisk: requires reasonable suspicion of danger through weapon. Stop must have been reasonable. If the officer reasonably believes by *plain feel* that something is a weapon *or* contraband, it will be admissible.

* + - * 1. **Evanescent Evidence**: no warrant required to recover evidence that might disappear quickly (e.g., taking a blood sample, scraping fingernails).
        2. **Hot Pursuit of a Fleeing Felon**: no warrant required, and if police enter any structure in hot pursuit, they can search the whole house unrestrained by time or place.
        3. **Inventory Searches**: before incarceration of an arrestee, police can search his personal belongings and entire vehicle, including containers, without a warrant.
        4. **Public School Searches**: public schoolchildren engaged in extracurricular activities can be randomly drug-tested without warrant. Warrantless searches of a schoolchild’s personal effects can be done to investigate violations of school rules. A school search is reasonable if (1) offers a moderate chance of finding evidence of wrongdoing, (2) the measures adopted for carrying out the search are reasonably related to the search, and (3) the search is not excessively intrusive.
  1. **Wiretapping & Eavesdropping**: requires a warrant, unless:
     1. **Unreliable Ear**: everybody assumes the risk that the person he is speaking to is wired. So, if the person you are speaking to consents to wiring, no warrant required.
     2. No warrant required where speaker makes no attempt to keep the conversation private.

1. **The Fifth Amendment: *Miranda***
   1. **Rule**: custodial interrogation requires that *Miranda* rights be given. Warnings need not be verbatim. Only substance must be conveyed.
   2. **Trigger: Custodial Interrogation**
      1. Custody: one is in custody if he is not free to leave, measured objectively. Probation interviews and routine traffic stops are not custodial.
      2. Interrogation: defined as any conduct where police knew or should have known they might *elicit an incriminating response* from the suspect. A defendant’s spontaneous statements don’t count as interrogation. Defendant must know he is being interviewed by government agent (no snitch).
   3. **Waiver**: *Miranda* rights can be waived where knowing, voluntary and intelligent, measured by the totality of circumstances.
   4. **Invocation**: invocation of *Miranda* rights must be unambiguous; silence is insufficient. Police may re-initiate questioning if they wait a sufficient amount of time, defendant is re-Mirandized, and the questions do not relate to the subject of the earlier question.
      1. **5th Amendment Right to Lawyer**: invocation of right to counsel must be unambiguous. Once so invoked, interrogation must cease until the accused is given an attorney or waives by initiating further questioning. This is not offense-specific: applies to entire process of custodial police interrogation—defendant cannot be questioned on anything. Distinguish from 6th Amendment right to counsel, which is offense-specific.
2. **Pre-Trial Identification**: two bases to attack
   1. **Denial of Counsel**: post-charge line-ups and show-ups give rise to a right to counsel. But there is no right to counsel for: (1) victim is merely shown photos, (2) pre-charge line-ups, (3) the taking blood samples, handwriting samples, or fingerprints; (4) parole and probation revocation proceedings; and (5) during brief recesses during defendant’s trial testimony.
   2. **Denial of Due Process**: certain pre-trial identification techniques are so unnecessarily suggestive and substantially likely to produce misidentification that they deny due process of law.
   3. **Remedy** for unconstitutional pre-trial identification is to exclude the identification, unless state can show it had an *adequate, independent source* for the identification, such as where the witness had time to look closely at the person at the time of the crime (thus, where P sees D during crime, and IDs him in faulty lineup, a new in-court ID need not be excluded).
3. **Pre-Trial Procedures**
   1. Bail: issues are immediately appealable.
   2. Preventative Detention is constitutional.
   3. Grand Juries
      1. Exclusion remedy does not apply to grand jury proceedings.
      2. Proceedings are secret; defendant has no right to appear or send witnesses.
4. **Prosecutorial Duty to Disclose Information**: failure to disclose information, whether willful or inadvertent, violates due process and may be grounds for reversal of the conviction. Failure to disclose information will result in reversal of the conviction where the information is favorable to the defendant and prejudice has resulted (a reasonable probability the result would have been different had the information been disclosed).
5. **Trial**
   1. Right to an Unbiased Judge: judge may not have financial interest in outcome of the case or some actual malice against defendant.
   2. **Right to Jury Trial**
      1. Trigger: right attaches any time tried for offense in which maximum authorized sentence exceeds 6 months.
      2. Number of Jurors & Unanimity: must be at least 6 juror. If only 6, verdict must be unanimous. Note that there is no constitutional right to a unanimous, 12-person verdict, and courts have as low as 9-3.
      3. Cross-Section: jury pool must reflect a fair cross-section of the community, but empaneled jury need not.
      4. Use of Peremptory Challenge: unconstitutional for P or D to exercise peremptory challenges to exclude race or gender.
6. **The Sixth Amendment Right to Counsel**
   1. **Rule**: defendant has a right to counsel for all critical stages of a prosecution, including trial, for all felony trials and for misdemeanor trials where imprisonment or a suspended sentence is actually imposed. Usually attaches upon charging.
   2. **Offense Specific**: if you request a lawyer for a certain matter, police can still question you on other offenses.
   3. **Ineffective Assistance**: to overturn conviction, must be deficient performance, and but for such deficiency, the result would have been different. This is a high bar. Requires specification of particular errors of counsel.
   4. **Right to Self-Representation**: defendant has a right to represent himself so long as his waiver is knowing and intelligent, and he is competent to proceed. Defendant can be found mentally competent to stand trial yet incompetent to represent himself, as determined by the trial judge’s discretion.
   5. **Informant**: right is violated where *paid* informant is placed in defendant’s cell and *deliberately elicits* statements regarding charged crime.
7. **Confrontation Clause**: defendant has a right to confront witnesses against him, however, right of confrontation is not absolute:
   1. The absence of face-to-face confrontation does not violate the Sixth Amendment provided preventing such confrontation serves an important public service and the reliability of the witness’s testimony is otherwise assured.
   2. Disruptive defendant may be removed from the courtroom.
8. **Guilty Pleas & Plea Bargaining**
   1. **General Rule**: Supreme Court will not disturb pleas after sentencing.
   2. **Colloquy**: if defendant pleads guilty, judge must specifically address defendant, *on the record*, about (1) the nature of the charge, (2) the maximum authorized penalty and any mandatory minimum penalty, and (3) the right to plead not guilty and go to trial.
   3. **Exceptions**: four bases for withdrawing a guilty plea after sentence
      1. Plea Involuntary. However, not involuntary merely because it is entered in response to prosecution’s threat to charge the defendants with a more serious crime.
      2. Lack of Jurisdiction
      3. Ineffective Assistance of Counsel
      4. Prosecutor Breaches Agreement
9. **Death Penalty**
   1. Defendant must have ability to present mitigating facts and circumstances.
   2. There can be no automatic category for imposition of the death penalty.
   3. State may not by statute limit the mitigating factors; all relevant mitigating evidence must be admissible or statute is unconstitutional.
   4. Only a jury, and not a judge, may determine the aggravating factors justifying imposition of the death penalty.
10. **Double Jeopardy**: bars retrial for same offense
    1. **When Attaches**: Jeopardy attaches in a jury trial when the jury is sworn. In a bench trial, when the first witness is sworn.
    2. **Exceptions**: retrial is permitted where:
       1. Jury Unable to Reach Verdict
       2. Mistrial for Manifest Necessity: e.g., medical emergencies.
       3. Retrial After Successful Appeal. But, upon retrial, defendant *cannot* be retried for a more serious offense than he was convicted for at trial.
       4. Breach of Agreed Upon Plea Bargain by Defendant. If so, defendant can be charged with original charges, even if higher than what he pled to. Also, agreement to testify against another means a promise to testify at first and any subsequent retrial.
    3. **Same Offense**: Two crimes do not constitute same offense if each crime requires proof of an additional element that the other does not. Thus, both must have their own unique element. Trial for greater offense prohibits retrial for lesser included offense, and trial for lesser included offense prevents retrial for greater included offense, unless greater included offenses are allowed where they could not have been brought originally (battery later murder upon death).
    4. Jeopardy does not generally attach when the proceedings are civil.
    5. Separate Sovereigns: a separate sovereign (e.g., state vs. federal) can retry for the same offense. However, subdivisions within states are not distinct sovereigns from the state they are in.
11. **Fifth Amendment Right Against Compelled Testimonial Self Incrimination**
    1. **Generally**: available to anybody in any kind of case asked a question that might tend to incriminate him. Privilege must be claimed when *the first time* the question is asked, or it is waived. Thus, if you respond once, you can never reclaim the privilege again on it.
    2. **Scope**: only protects against *testimony* which is *compelled when given*. Does not protect use of one’s body to incriminate himself, such as DNA testing. Does not cover forcing D to hand over previously made incriminating notes, as the notes were not compelled when written.
    3. It is unconstitutional for prosecutor to make a negative comment about D’s invocation or right to remain silent/not testify. If prosecutor does so, harmless error standard applies. However, prosecutor can comment on defendant’s failure to take the stand if in response to defense counsel’s assertion that defendant was not allowed to explain his side of the story.
    4. **Privileged Can Be Eliminated by**
       1. Grant of Immunity – use and derivative immunity (this still allows prosecution based on evidence that was had prior to grant of immunity)
       2. No possibility of incrimination (e.g. SOL has run)
       3. Waiver: if defendant takes the stand, he waives his privileges on all subjects of cross-examination.

**Essay Tips**:

1. If an essay asks whether a particular piece of evidence “will be admissible at defendant’s criminal trial,” consider not just whether there was a violation of federal law, but whether the remedy is exclusion and, if so, exclusion for what purpose.

2. Always raise good-faith exception if police actually used a search warrant.

**Criminal Procedure Checklist Outline & Hard Sheet**

1. **Exclusionary Rule**: excludes if obtained by illegal search or coerced confession
   1. **Fruit of Poisonous Tree**
      1. Inapplicable to *Miranda* Violation: unless police act in bad faith. If not, statement is excluded but not fruits of that statement.
      2. Ways to Break Poisonous Chain
         1. Independent Source
         2. Inevitable Discovery
         3. Defendant’s Intervening Act of Free Will
   2. **Limitations on Exclusionary Rule**: inapplicable to
      1. Impeachment of Defendant’s Trial Testimony
      2. Grand Jury Proceedings
      3. Civil Proceedings
      4. Parole Revocation Proceedings
      5. Violations of “Knock & Announce”
   3. On Appeal: conviction stands if harmless error
2. **4th Amendment**
   1. **Arrests & Detention**
      1. Arrest Requires Probable Cause
      2. When Arrest Warrant Required: private places
      3. *Terry* Stop: requires reasonable suspicion of violation of law supported by articulable facts.
   2. **Search & Seizure**
      1. **Governmental Conduct?**
      2. **Reasonable Expectation of Privacy?**
         1. **Always**: own or live on premises searched; overnight guests
         2. **Sometimes**: own property seized, only if reasonable expectation of privacy in item or area searched
         3. **Never**: anything held out to public; passengers in car who don’t own property in car; drug dealers briefly in home
      3. **Search Warrant?**
         1. **Yes—Test Validity**: requires probable cause + particularity
            1. Informants: totality of circumstances, but anonymous informant cannot be sole basis
         2. **No Warrant or Invalid Warrant**: evidence excluded unless
            1. **Good Faith Reliance on Invalid Warrant**
            2. **Search Incident to Lawful Arrest**: must be contemporaneous in time and place and cannot exceed person and areas he can reach to get weapon or destroy evidence. Protective sweep of area permissible if reason to believe there are accomplices.

**Automobile**: may search interior only if (1) arrestee unsecured and can still access or (2) reasonably believe they will find evidence of *offense of arrest*.

* + - * 1. **Community Caretaker Exception**: officer faces emergency that threatens health or safety
        2. **Automobile Exception**: requires probable cause, and permits search of entire vehicle and any container therein which might reasonably contain item they seek
        3. **Plain View**: legitimate presence + immediately apparent
        4. **Consent**: voluntary + intelligent

Third-Party Consent: where 2+ have equal right to property, either may consent, but if both present and one doesn’t consent, no consent.

* + - * 1. **Stop & Frisk**

Stop: requires reasonable suspicion

Frisk: requires reasonable suspicion of danger through weapon, and permits contraband if reasonable believed on *plain feel*.

* + - * 1. **Evanescent Evidence**
        2. **Hot Pursuit of Fleeing Felon**: may enter any structure and search its entirety unrestrained by time or place
        3. **Inventory Search**: before incarceration of arrestee, may search person, effects, vehicle, and containers.
        4. **Public School Searches**: reasonable if (1) offers moderate chance of finding evidence of wrongdoing; (2) measures adopted to carry out search are reasonable related to search; and (3) not excessively intrusive.
  1. **Wiretapping & Eavesdropping**: requires warrant unless a conversant consents or speaker makes no attempt to keep private.

1. **5th Amendment:** ***Miranda***
   1. Rule: custodial interrogation triggers *Miranda* requirement
   2. Custody: not free to leave, measured objectively
   3. **Interrogation**: anything that police knew or should have known might elicit incriminating response. Defendant must believe he is talking to police.
   4. **Invocation**: must be unambiguous, silence insufficient.
      1. **Reinitiating Questioning**: permitted if police wait sufficient amount of time, re-Mirandize, and question on different subject.
   5. **5th Amendment Right to Lawyer**: once invoked, interrogation must cease until accused is given attorney or waives by initiating further questioning.
      1. **Not Offense Specific**: once invoked, no questioning on anything. Distinguish from 6th Amendment right to counsel, which is offense specific.
2. **Pre-Trial Identification**
   1. **6th Amendment Right to Counsel**: required for post-charge line-ups and show-ups, but not for pre-charge line-ups or taking of other identifying evidence.
   2. **Due Process**: no ID techniques that are unnecessarily suggestiveand substantially likely to produce misidentification.
   3. **Remedy**: exclude ID unless *adequate, independent source* for ID
3. **Prosecutorial Duty to Disclose Information**: failure to disclose exculpatory evidence, even if inadvertent, violates due process and results in reversal where evidence is favorable and prejudice—reasonable probability of different outcome.
4. **Jury Tria**l
   1. Trigger: maximum sentence exceeds 6 months
   2. Number & Unanimity: at least 6, and verdict must be unanimous; more than six need not be, and courts have allowed as low as 9-3
   3. Cross-Section: jury pool must reflect cross-section, empaneled jury need not
   4. Peremptory challenge: neither P or D can use for race or gender
5. **6th Amendment Right to Counsel**: counsel required once charged
   1. **Offense Specific**: police can still question you on other matters
   2. **Ineffective Assistance**: but for deficient performance, result would have been different. Requires specification of particular errors of counsel
   3. Right to Self-Representation: requires competence, which is different than mental competence to stand trial.
   4. Informant: violation to place in cell *paid* informant who deliberately elicits
6. **Guilty Pleas & Plea Bargaining**
   1. Colloquy: judge must address *on record* nature of charge, maximum penalty and mandatory minimum, and right to plead not guilty and go to trial
   2. Exceptions Permitting Withdrawal: plea involuntary, lack of jurisdiction, ineffective assistance, prosecutorial breach of plea agreement
7. **Death Penalty**
   1. Mitigators: must have ability to present all relevant mitigators
   2. No Automatic Category for imposition of death penalty
   3. Jury Required: to determine aggravating factors
8. **Double Jeopardy**
   1. Attaches: in jury trial, when jury is sworn; in bench trial, when first witness is sworn.
   2. Same Offense: not same offense if each crime requires proof of additional element the other does not. Greater-included offense prohibits lesser-included offense, and lesser prohibits greater unless greater unavailable.
9. **5th Amendment Right Against Compelled Testimonial Self-Incrimination**
   1. Applicability: civil and criminal
   2. Scope: protects against *testimony* which is *compelled when given*
   3. When Claimed: must be when first asked, or can never assert
   4. Right Eliminated By
      1. Grant of Immunity
      2. Incrimination Impossible (e.g., SOL)
      3. Waiver: Defendant Takes Stand: waives privilege on all subjects of cross-examination.