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Criminal Law



Criminal Law

Index

Part 1	<u>Definitions, Defenses, Mental States, etc.</u>
Topic 1	Jurisdiction
Topic 2	Crimes that merge
Topic 3	Requirements for an act/omission of crime <i>Acts that DO NOT qualify for criminal liability</i> <i>Omissions</i> <i>Mental state</i>
Topic 4	Accomplice liability <i>Withdrawal</i> New York distinction
Topic 5	Inchoate offenses and defenses <i>Solicitation</i> <i>Conspiracy</i> Definition Withdrawal New York distinction <i>Attempt</i>
Topic 6	Defenses to Crimes <i>Insanity</i> <i>Intoxication</i> <i>Infancy</i> <i>Self-defense</i> Use of deadly force Use of non-deadly force New York distinction <i>Duress and necessity</i> New York distinction <i>Mistaken fact</i> <i>Entrapment</i> <i>Consent</i>

Part 2 Common Law Crimes

- 1 Battery**
New York distinction
- 2 Assault**
- 3 Homicide**
Common law homicide
Common law second degree murder
Defenses
Common law manslaughter
Involuntary manslaughter
New York homicide law
 - First degree murder
 - Second degree murder
 - Intentional killing
 - Highly reckless murder
 - Felony murder
 - Manslaughter in the first degree
 - Manslaughter in the second degree
 - Negligent homicide
- 4 Rape**
- 5 Larceny**
Common Law larceny
New York distinction
- 6 Embezzlement**
- 7 False pretences**
- 8 Robbery**
New York degrees of robbery
- 9 Burglary**
New York distinction
- 10 Kidnapping**
New York distinction
- 11 Arson**
New York distinction

Part 3 Criminal Procedure Law

- Topic 1 Exclusionary procedure**
New York distinction
Fruit of Poisonous Tree doctrine
- Topic 2 Law of arrest**
Scale of police intrusion
- Topic 3 Searching and seizure**
Government search
Expectation of privacy/Standing
Valid search warrant
New York distinction
Exceptions where search warrant is not required
- Topic 4 Confessions**
MIRANDA
Fifth Amendment right to counsel
New York distinction
- Topic 5 Pretrial Identification**
- Topic 6 Grand Jury**
- Topic 7 Miscellaneous topics**
Bail
Grand juries in New York
Prosecutorial duty to disclose evidence (New York)
Notice of alibi and intent to present insanity defense
Right to a jury trial
Cross sectional requirement
Ineffective assistance of counsel
Guilty pleas
Withdrawing guilty pleas
Sentencing
Death penalty
Double jeopardy
Fifth Amendment right against compelled testimony

Criminal Law/Procedure Tips

Criminal Law/Procedure is one of six MBE topics that are tested (multiple choice question format) on every MBE exam. In addition, Criminal Law/Procedure is one of the most frequently tested topics on the NY essay exam. As such, it is one of the most important topics for you to know well. Fortunately, Criminal Law/Procedure is not particularly complex, and the vast majority of Bar Exam Candidates, will have studied Criminal Law/Procedure in Law School.

Within Criminal Law/Procedure, SmarterReview recommends that you pay particular emphasis to the topics highlighted in color in the index. In particular, you should make sure you know Homicide and Search & Seizure laws to the best of your ability.

PART 1

Definitions, defenses, mental states, etc.

There are twenty questions on criminal law on the MBE/Multistate multiple choice exam.

The law cited below is the federal law, i.e., the law that will be tested on the MBE /Multistate multiple choice exam. Where the New York law differs from the federal law, the distinction is pointed out.

Topic 1 Jurisdiction

The criminal conduct or the result of the criminal conduct must occur in a state for that state to have jurisdiction over the conduct. For a crime of omission, the state in which the act should have happened is the state that has jurisdiction.

Topic 2 Crimes that merge

Solicitation and attempt both merge into the substantive offence. This means that if Adam commits the act of attempted larceny and then commits the actual larceny, Adam can only be charged with larceny and cannot be charged with attempted larceny as well. This is because the crime of attempted larceny has disappeared or has merged into the crime of larceny. Similarly, the act of soliciting a crime merges into the actual performance of the crime. **However, conspiring to commit a crime does not merge** into the actual crime. Thus one can be charged with conspiracy and the crime itself.

Topic 3 Requirements for an Act/Omission of a Crime

A crime consists of an act or omission plus the required mental state.

A **ACTS that DO NOT qualify for criminal liability:**

- i) Acts that are not of your own volition (for example, someone pushed you)
- ii) A reflexive act (for example, epilepsy)
- iii) Acts performed while asleep or unconscious

B **OMISSIONS**

There are five circumstances where a failure to act, or an omission, is a crime:

- i) Legal duty arising by **statute**. For example, failure to file a tax return is a crime.
- ii) Legal duty arising by **contract**. For example, a lifeguard may be guilty of criminal omission if he/she stands by and does not attempt to rescue a drowning person.

- iii) Legal duty arising out of certain **relationships**. For example, a parent has a duty to feed a child.
- iv) Legal duty arising out of a **voluntary assumption** of a duty of care.
- v) Legal duty where your **conduct created the situation of peril**.

C MENTAL STATE

There are four distinctions as to states of mind. Different crimes require different states of mind for criminal liability to arise.

i) Specific intent crimes

Examples of specific intent crimes are first degree murder, obtaining by false pretenses, assault, larceny, embezzlement, robbery, burglary and forgery.

Because specific intent crimes require such strong intent, they have two defenses that other “lesser intent” crimes do not have. These are the defenses of “mistaken fact” or “voluntary intoxication.” (These defenses will be discussed in more detail below.)

ii) Malice crimes

The only examples of malice crimes are second degree murder and arson. Malice does not mean with deliberate vicious intent but, rather, that the defendant recklessly disregarded an obvious or high risk that an event would occur.

iii) Strict Liability

Also known as the “no-intent” crimes. The formula for a strict liability crime is that if a crime is in an administrative, regulatory or morality area of law AND the statute does not use an adverb such as knowingly, willfully or intentionally, then it is a strict liability crime. A strict liability crime is a crime where the state of intent of the defendant is irrelevant.

NOTE: Insanity and involuntary intoxication are defenses to ALL crimes including strict liability crimes.

iv) General intent crimes

Rape, battery, and any other crime not in one of the above three categories, is a general intent crime.

There is also a state called “transferred intent,” which is where one aims to assault a person but misses and assaults someone else instead.

Topic 4 Accomplice Liability

Accomplices to a crime are liable for the crime itself plus all other foreseeable crimes that occur. To be an accomplice one has to:

1. Aid or encourage or abet or counsel
2. With intent to aid in the committing of the crime.

Thus if Adam aids Ben, thinking that Ben will use a stick to hit Charlie, but, in fact, Ben kills Charlie with the stick, Adam is not liable for the murder unless it was completely obvious that Ben was going to kill Charlie with the stick. Being present and even consenting to the crime does not suffice to find accomplice liability. Even if someone aids the defendant with the knowledge that a crime **may** be committed, if he does not aid them with the intent to aid or encourage he will not be liable as an accomplice.

Withdrawal

An accomplice can absolve himself from the crime of accomplice liability if he withdraws from the crime before it became unstoppable. If he merely encouraged the commission then repudiation suffices. If he actively aided the commission then he must try and neutralize his assistance.

New York Distinction

In New York the rules for withdrawal are a little different.

An accomplice can escape accomplice liability for the substantive offense if he:

- a) Voluntarily and completely renounces his criminal purpose
- b) Withdraws prior to the commission of the offense
- c) Makes a substantial effort to prevent the crime.

Other ways in which New York accomplice law differs from the federal law are:

- An accomplice cannot benefit from a defense used by the principle that goes to negates principal's mental state. Thus if principal is insane, the accomplice can still be liable.
- An accomplice is not necessarily absolved even if the principle is acquitted or immune from prosecution.
- A defendant cannot be convicted based entirely upon the uncorroborated testimony of an accomplice except in a police disciplinary hearing.

Topic 5 Inchoate Offences and Defenses

A Solicitation

Solicitation is asking someone to commit a crime. If they agree, the crime of solicitation merges into the crime of conspiracy.

B Conspiracy

i) Definition

Conspiracy occurs when there is an

- i) **Agreement** between two or more persons with
- ii) An **intent** to enter to an agreement with
- iii) An intent to **achieve the objective** of the agreement with
- iv) The **performance of an overt act** in furtherance of the agreement.

An agreement need not be explicitly expressed. The overt act need only be committed by any one of the participants. An example of an overt act would be showing up at an agreed meeting place to commit a crime.

Conspiracy is its own separate crime and does not merge into the resultant crime committed. Each conspirer is liable for all the crimes of co-conspirers, if crimes were committed in the foreseeable furtherance of conspiracy.

Note – a defendant cannot be found guilty based solely upon the uncorroborated testimony of a fellow conspirer.

Note also that conspiracy is different from accomplice liability. The latter requires that a crime was committed, while the former requires only an agreement to do a crime.

ii) Withdrawal from conspiracy

Withdrawing from a conspiracy cannot remove liability for the crime of conspiracy. However, withdrawal does remove the liability of the resultant crimes of co-conspirers.

New York Distinction

- 1) A single defendant can be convicted of conspiracy even if the other defendants escape liability.
- 2) Withdrawal, both in the case of conspiracy and of solicitation, will absolve one from liability for the crimes of conspiracy/solicitation if:
 - a) One voluntarily completely renounces the conspiracy/solicitation AND
 - b) Makes a substantial effort to prevent the crime AND
 - c) The effort results in preventing the crime from occurring.
- 3) A defendant that only takes part in the conspiracy but does not take part in the committal of the resultant crimes is only liable for his crime of conspiracy but not for the resultant crimes of his co-conspirers.

C Attempt

One needs to have specific intent plus take a substantial step beyond mere preparation in the direction of the commission of the crime. One can be guilty of an attempted crime, even if, factually, the crime could not have occurred, if the defendant was of the belief that the crime could occur. However, where a defendant thinks that he is attempting a crime that is in reality not a crime, for example, a defendant tries to have sex with an 18-year-old with the belief that having sex with someone under 21 is statutory rape, he would not be guilty of attempted rape, because **legal impossibility cannot** constitute a crime, even the crime of attempt. **Factual impossibility can** constitute the attempted crime.

Topic 6 Defenses to Crimes

- A Insanity
- B Intoxication
- C Infancy
- D Self-defense
- E Duress and Necessity
- F Mistaken fact
- G Entrapment
- H Consent

A Insanity

There are four different versions or tests for insanity:

- i) The **McNaughton** test. This is where, at the time of the conduct, the defendant lacked the ability to know the lawfulness of his actions or the ability to understand the nature of his actions.
- ii) **Irresistible Impulse**. The defendant lacked the capacity for self control or free choice.
- iii) **Durham rule**. The defendant's conduct is a product of mental illness.
- iv) **ALI Rule**. The defendant lacked the ability to conform his conduct to the requirements of the law.

B Intoxication

There are two forms of intoxication:

- i) Voluntary (such as someone getting drunk) – This is only a defense to specific intent crimes such as murder in the first degree.
- ii) Involuntary (if someone spikes your drink) – **Reminder-** involuntary intoxication is a defense to ALL crimes including strict liability crimes.

C **Infancy**

Under the age of seven there is no criminal liability.

Under the age of fourteen there is a rebuttable presumption of no criminal liability.

D **Self-defense**

The “self-defense” plea can only be used in connection with the use of **deadly force** when the victim believes:

- a) he is without fault AND
- b) he is confronted with unlawful force AND
- c) he is threatened with
 - i) imminent death or
 - ii) great bodily harm or
 - iii) to prevent a violent entry made with the intent to do physical harm to an occupant of the dwelling.

Non-deadly force, used as reasonably appears necessary, can be used in “self-defense” any time:

- a) the victim reasonably believes that physical force is about to be used against them, OR
- b) when there is an unlawful entry or attack upon defendant’s dwelling, OR
- c) to protect personal property (a watch for instance,) if oral requests would not suffice.

New York Distinction *plus* Minority Rule

Where possible, the defendant has to retreat rather than use self-defense, except for three cases:

- 1) when the defendant is in his own home
- 2) when a defendant is being threatened with rape, burglary, arson or robbery
- 3) police officers do not need to retreat

The original aggressor/provoker never has self-defense open to him unless he withdraws from his original attack plus he communicates that he is withdrawing and ending the attack.

Note deadly force is any act that results in a death.

E **Duress and Necessity**

For **multistate** questions, duress and necessity are defenses to all crimes except for homicide.

New York Distinction Duress and necessity are affirmative defenses to all crimes including homicide.

General New York distinction re defenses and affirmative defenses:

Once a defendant raises a “defense,” the prosecution must disprove it beyond a reasonable doubt. Examples of “defenses” are infancy and self-defense. When a defendant is using an “affirmative defense,” the defendant must prove this by a preponderance of the evidence. Examples of affirmative defenses are entrapment, duress and necessity.

F Mistaken Fact Defense

Mental-state requirement of crime	Can use mistaken fact defense for
Specific intent	Any mistake
Malicious + general intent	Only reasonable mistakes
Strict liability	Never

G Entrapment

Entrapment is an affirmative defense and can only rarely be used. It must be proved by the defendant by a preponderance of the evidence. It occurs if

- i) The idea to commit the crime was suggested to the defendant by a law enforcement officer, AND
- ii) The defendant was not predisposed to committing the crime prior to the suggestion.

However, the burden is on the defendant to show that he was not predisposed and would not have committed such a crime were it not for the police officer. The threshold for the burden of proof is very high. It must be proved beyond a preponderance of evidence. It will not suffice that the defendant was approached by a police officer. The police officer must heavily cajole him. Evidence of a defendant’s prior criminal acts will go a long way towards disproving that he was not predisposed to commit this particular criminal act.

A person cannot be entrapped by a private citizen unless that citizen is operating under instructions from a law enforcement officer.

H Consent

The defense of consent can almost never be used.

See following page for Common Law Crimes.

PART 2

Common Law Crimes

- 1 Battery**
- 2 Assault**
- 3 Homicide**
- 4 Rape**
- 5 Larceny**
- 6 Embezzlement**
- 7 False pretences**
- 8 Robbery**
- 9 Burglary**
- 10 Kidnapping**
- 11 Arson**

1 Battery

The crime of battery is performed by striking someone.

New York Distinction

There is no battery under New York law. Instead, assault includes common law battery. Assault under New York law requires the victim to suffer physical injury, i.e., physical impairment or substantial pain.

2 Assault

- i) Attempted battery - a specific intent crime OR
- ii) Threatening battery - a general intent crime - to be guilty of this assault, the defendant must have intentionally made the victim fear he would be subject to a battery.

3 Homicide

A Common law homicide

This covers

- a) Second degree murder
- b) Common law manslaughter
- c) Involuntary manslaughter

The victim must be human. Unless explicitly stated otherwise, murder means common law/ second degree murder, which is a malice crime and therefore does not have voluntary intoxication or mistaken fact as a defense.

a) **Common law/ second degree murder**

Common law or second degree murder occurs where a defendant commits an act that results in the death of another, AND

- a. The defendant intended to kill, or
- b. The defendant intended to do great bodily harm, or
- c. The defendant committed an act carrying a substantial risk of causing death (also known as “highly reckless murder”), or
- d. The defendant intended to commit a felony.

The following are multistate defenses to common law felony murder:

1. The defendant must be guilty of the underlying felony (if he has a defense to the felony he has defense to felony murder).
2. The felony must be act other than that of murder
3. Deaths must be foreseeable or it is not murder.
4. Death caused while fleeing from a felony scene are felony murders. However, if the act of felony and the death are separated by a safety point (for example, the man rests at his home after committing the felony), then it will not be a felony murder.
5. The defendant is not liable for the death of a co-felon during resistance by a victim or the police.

b) **Common law voluntary manslaughter**

Common law voluntary manslaughter always involves a death caused by a provoked crime of passion. Note that a mercy killing, for example, euthanasia, can never be voluntary manslaughter and will instead be first degree murder.

c) **Involuntary manslaughter**

Involuntary manslaughter can be either

- i. Murder through criminal negligence, or
- ii. Misdemeanor manslaughter, i.e., killing while committing a misdemeanor or an enumerated felony. An enumerated felony is one of the felonies not listed as being capable of causing a felony murder.

On **multistate** questions, **first degree murder** is not a common law murder. Rather, it was created by statute. In a multistate exam, a first degree murder will either be labeled as such or a statute will be provided indicating it as a first degree murder.

B New York Statutory Homicide Law

First Degree Murder

First degree murder is intentional killing plus one of nine additional aggravating circumstances.

Some of the commonly tested examples are

- The intended victim was a police/court/parole/probation officer engaged in official duties at the time of the killing and the defendant knew or should have known that the person was an officer.
- The defendant committed murder for hire.
- A non-participating victim was intentionally killed by the defendant during or during flight from a robbery/burglary/kidnapping/arson/rape/attempted murder in the second degree.

Second Degree murder

- a) Any **intentional killing** (including killing Adam while trying to kill Ben, i.e., transferred intent intentional killing). This does not include extreme heat of passion killings and aiding a suicide, both of which would be considered manslaughter, OR
- b) **Highly reckless murder**. This means demonstrating a depraved indifference to human life. For example, a person recklessly engages in conduct that creates a grave risk of death and, in fact, causes a death, OR
- c) **Felony murder**. For example, murder while committing burglary, robbery, arson or a kidnapping. Note that a conviction on the felony is not necessary to secure a conviction on a felony murder. There can be no liability for defendants less than thirteen years old.

Note that a felony, in New York, is any crime that carries a sentence of one year in prison or longer.

Defenses to the crime of *accomplice* to felony murder

- 1) If the defendant did not commit or aid in the commission of the homicidal act
AND
- 2) The defendant was not armed with a deadly weapon AND
- 3) The defendant did not reasonably believe that the co-defendant was armed with a deadly weapon AND
- 4) The defendant did not think that anyone else would engage in actions that would result in death.

If all these conditions are present, then although the accomplice might be liable for accomplice liability of the commission of the felony, he will not be liable for felony murder.

Manslaughter in the first degree

Manslaughter in the first degree occurs where the defendant commits an act which results in the death of a person, AND the defendant

- a) Intended to do serious bodily injury OR
- b) Where the defendant was provoked into killing. The defense of provocation is an affirmative defense that the defendant must raise and prove.

Manslaughter in the second degree

Manslaughter in the second degree is reckless killing, such as driving under the influence of alcohol.

Negligent homicide

Negligent homicide is where the defendant kills someone through criminal negligence.

4 Rape

The slightest penetration is rape.

Statutory rape is a strict liability crime. Consent and mistaken fact are not defenses.

5 Common law larceny

Requires

- i) Unlawful taking and
- ii) Carrying away of
- iii) Personal property of another
- iv) Without their consent (consent through fear is not considered consent)
- v) With intent to permanently deprive the owner of his interest in his property.

If the defendant believed he had a legal right to the property, it is not larceny.

New York law

In New York, by statute, deliberately issuing a bad check is larceny.

Also, in New York, larceny is graded, dependant on the value of the property stolen.

Class D felony is for goods with a value greater than \$3,000.

Class C felony = grand larceny second degree - where the property was worth more than \$50,000 or more.

Class B felony = grand larceny first degree - where the property is worth \$1 million or more.

6 Embezzlement

This is the:
Fraudulent
Conversion
Of personal property of another,
by a person in lawful possession of property (for example, a trustee channeling trust funds for his own use.)

7 Obtaining property by false pretenses

Obtaining the **title** (as opposed to possession which would be larceny by trick)
To personal property of another
By intentional false statement of past or existing fact
With intent to defraud another

A false promise regarding a future act does not count as the crime of false pretences.

8 Robbery

This is a
Taking of
Personal property of another
From someone else's person or presence
By force or threats of force to victim, family member or anyone in victims presence
With intention of permanent deprivation.

It is the use of force or threats that distinguish this from larceny.

New York law

In New York, robbery (like larceny and homicide) is split into different degrees.

First degree robbery

- a) The defendant causes serious physical injury, or
- b) The defendant is armed or threatens the use of a dangerous weapon, or displays what appears to be a firearm. The victim must see something to believe there is a weapon - the defendant's words alone will not suffice. If it turns out the weapon was not loaded, it will reduce the offence to second degree.

Second degree robbery

- a) The defendant is aided by another who is present, or
- b) The defendant physically injures someone, or
- c) There is a threat of immediate physical force.

Third degree

Third degree robbery occurs whenever property is stolen by force.

9 Burglary

This requires

- i) Breaking in using at least some force (opening a closed but unlocked door suffices), or fraud or intimidation
- ii) Entering (even partially)
- iii) Into a dwelling (must be a premises used for sleeping purposes)
- iv) Of another (even if they don't own the property)
- v) At nighttime
- vi) With intent to commit a felony (intent suffices, an actual felony does not need to have been carried out for there to be a burglary)

New York law In New York, the intent to commit any crime will suffice (not just a felony.) Also, the act does not need to occur at night. In addition, the building need not be a dwelling. Finally, there is no "entry" requirement. So if the defendant is unlawfully remaining in the building, this will suffice.

Thus, in New York, the only elements to committing **third degree burglary** are

- 1) Knowingly entering or remaining unlawfully
- 2) In a building
- 3) With intent to commit a crime

Second degree burglary is burglary aggravated by

- a) The building being a dwelling, AND
- b) The defendant injuring someone, OR
- c) The defendant being armed.

Note that a killing while in the commission of a second degree burglary constitutes one of the aggravating circumstances that comprise murder in the first degree.

10 First degree kidnapping

(First degree kidnapping is only applicable in **New York**)

The elements of the crime are

Abduction plus

- i) A person is held for ransom, or
- ii) A person is restrained with intent to inflict physical injury, or
- iii) The victim dies.

All other kidnapping is second degree kidnapping, in New York, or, outside of New York, abduction. Either counts as a felony murder if the victim dies.

11 Arson

Arson requires the

- i) Malicious (i.e., deliberate or highly reckless)
- ii) Burning (requiring some structural damage by fire - damage must be at least charring)
- iii) Of the dwelling (though, normally, any premises will suffice)
- iv) Of another

New York law In New York, arson is split into degrees.

Fourth degree - Recklessly damaging a building or motor vehicle by intentionally starting a fire or causing an explosion.

Third degree - As above, but intentionally damaging a building.

Second degree - As above, with knowledge that a person is in the building or might be in the building.

First degree - Not tested on exam.

See following page for Criminal Procedure Law.

Criminal Procedure Law

Topic 1 Exclusionary procedure

The Exclusion Rule bars evidence obtained in violation of the Fourth, Fifth and Sixth Amendments. These violations will be explained a little later.

Let's begin with the limitations on exclusion.

- 1) The Exclusion Rule does not apply to the conduct of grand juries
- 2) The Exclusion Rule is not an available remedy in civil proceedings
- 3) In order to qualify for exclusion, the search in question must either violate the federal constitution or a federal statute.
- 4) Exclusion is not an available remedy in parole revocation proceedings.
- 5) “Good faith” defenses to the application of the exclusion rule
 - i) Where the police rely in good faith on a judicial opinion, later changed by another opinion.
 - ii) No exclusion where the police rely in good faith on a statute or ordinance later declared unconstitutional.
 - iii) No exclusion where there was good faith reliance on a defective search warrant.

New York distinction

New York rejects the good faith defense of reliance on a defective search warrant.

- 6) Where evidence is used to impeach the credibility of a defendant or a defendant's statements, it can be used even where it violates the exclusionary rules

Fruit of Poisonous Tree doctrine

Not only is illegally seized evidence excluded, any further evidence derived as a result of the illegally seized evidence will also be excluded,

unless:

- i) The police came across the evidence independently from the illegality, or
- ii) The police can show it was inevitable that they would have discovered this evidence anyway, or
- iii) There was an intervening act of free will on the part of the defendant that resulted in the evidence being uncovered.

Topic 2 Law of Arrest

Arrest warrants are not normally required when arresting someone in a public place. However, the non-emergency arrest of an individual in his own home requires an arrest warrant.

Even where the arrest takes place in a public place, the police do require probable cause to arrest anyone, or to compel a defendant to come to police station for either fingerprinting or interrogation.

- i) **Approaching a person for information** - This can be done at any time, except at a police officer's whim or caprice. A person may refuse to answer and may run away - this does not give the police probable cause to arrest.
- ii) **Common law right to enquire** - In order to question a person, the police officer must have a founded belief that criminal activity is afoot. The detention must be brief, and if the defendant gives answers, the police must release the defendant.
- iii) **Stopping and frisking** - Probable cause is not required for a brief stop and frisk; it will suffice if there is a reasonable suspicion of criminal activity, supported by articulable facts.
- iv) **Arrest** - There must be probable cause that the person has committed a crime.

Topic 3 Search and Seizure

The Fourth Amendment right protects people from illegal searches by the government. When tackling a question on searches, you have to examine the following issues:

i) Was it a Government search?

If not, there is no Fourth Amendment violation.

Who is the Government?

- 1 Public police (for example, not private store detectives or security unless they are deputized with a power to arrest)
- 2 Individuals acting at direction of police

ii) Did the defendant have a reasonable expectation of privacy? (i.e., did he have standing?)

If not, the defendant has no Fourth Amendment right.

A person **always** has standing if he lives on, or is an overnight guest on, or owns, the property that is being searched.

Passengers in cars who are not the owners of the car or the property seized from the car do not have standing to object to the seizure of property from the car.

Individuals briefly on someone else's property solely for the purpose of cutting drugs do not have standing to object to a search.

A defendant never has standing with regard to "items held out to the public." This includes:

- i) Sound of your voice
- ii) The paint off someone's car
- iii) Style of your handwriting
- iv) Account records held by a bank
- v) Monitoring the location of your car on the street or private driveway
- vi) Anything that can be seen across open fields
- vii) Anything that can be seen while flying over public airspace
- viii) Odors emanating from luggage
- ix) Garbage set out on the curb for collection

If it is a government search and the defendant has standing, then the government requires a search warrant.

iii) Did the government have a valid search warrant?

For a valid search warrant to be issued there must be

- 1) Probable cause that a crime has been committed.
- 2) The warrant must state the place to be searched and the objects to be seized.
- 3) The warrant must be issued by someone who is neutral and detached from law enforcement agencies.

Court clerks can issue warrants for violations of city ordinances.

New York Distinction In order to have a valid warrant based in part on an informer's tip, the affidavit must set forth sufficient underlying facts and circumstances to allow the magistrate to know how the informer got his information, and it must set forth the credibility and the reliability of that informant. (Very popular question on New York exam.)

iv) If there is no valid warrant – there are eight exceptions where a search warrant is not required (VERY IMPORTANT)

- 1 Search incident to a lawful arrest
- 2 Automobile exception
- 3 Plain view
- 4 Consent
- 5 Stop and frisk
- 6 Evanescent evidence

- 7 Hot pursuit
- 8 Someone on probation may be searched without a warrant where there are reasonable grounds to suspect criminal activity

1 Search incident to a lawful arrest

The search must be contemporaneous in time and place to the arrest (i.e., limited to a search of the defendant and his wingspan (which means the distance he/she can reach for a weapon).

In New York, the police may only search the wingspan if they suspect the arrested person may be armed.

There must be a lawful arrest.

When a person is lawfully arrested in a car, their wingspan includes the entire interior of the car but not the trunk. The police may not look in closed bags or containers for evidence.

2 Automobile exception

When police have probable cause to believe that a vehicle contains evidence of a crime, they may search the car without a warrant. They may also search the belongings of passengers inside the car. If they only have probable cause to suspect a specific bag or a specific container, they may only search the container or bag and not the whole car.

3 Plain view exception

When a policeman is legitimately present, and sees contraband in plain view, they may carry out a warrantless search and seize anything they see that is suspect in plain view.

4 Consent

The police may search without a warrant if they have an informed and intelligent consent.

If a police officer incorrectly claims he has a valid warrant, it negates any consent that is given. However, the police do not need to inform the person that he/she can refuse their request to search. Where two or more people have an equal right to use a property, any one of them may consent to the search

5 Stop and Frisk

A police officer may search a person if he has a reasonable suspicion that the person is engaged in criminal activity. A stop and frisk is less intrusive than an arrest. The level of suspicion that is needed for an arrest (probable cause) is not required for a stop and frisk. Instead, only reasonable suspicion is required.

6 Evanescent evidence

Evanescent evidence is evidence that is at risk of physically disappearing or becoming destroyed. For example, if the police need to scrape under a person's fingernails, they may do so without a warrant because otherwise the defendant can wash it away. Similarly, if the police have reason to believe that a room contains a decomposing body, they may enter the room without a warrant to prevent the destruction of evidence as the body decomposes while they are obtaining a warrant.

7 Hot pursuit

The police can enter and search any property in hot pursuit of a suspect. They may enter any property during this pursuit and not just the property of the suspect.

8 Someone on probation

Someone on probation may be searched without a warrant where there are reasonable grounds to suspect criminal activity

WIRETAPPING

Wiretapping and eavesdropping are considered searches and thus require a warrant.

The exception is known as "the unreliable ear." This doctrine provides that if you talk to someone that has agreed to be wired or tapped, then your conversations can be used in evidence against you.

Topic 4 Confessions

MIRANDA RIGHTS

For a confession to be admissible, it must be voluntary. To be considered voluntary, the defendant must be advised that he does not need to say anything and anything he does say can and will be used against him in a court of law. He must also be advised of his right to counsel, and that if he does not have counsel that one can be appointed for him. If the defendant is not warned about either his rights to remain silent or his rights to counsel, in both cases **this is a violation of his Fifth Amendment rights against self incrimination.**

For Miranda to apply, the defendant has to be in custody and there must be an interrogation, thus Miranda does not apply to spontaneous admissions. An interrogation is any conduct where police knew or should have known that they might get a damaging statement. A defendant does not waive his Miranda rights by shrugging or remaining silent. If the defendant waives his

rights, the police may question him about anything they like, and not just about the crime he was arrested on suspicion of committing.

THE FIFTH AMENDMENT RIGHT TO COUNSEL

Once a person asserts his right to terminate the interrogation and requests an attorney, a reinitiation of interrogation by the police, without his attorney present, violates the defendant's Fifth Amendment right to counsel. The Fifth Amendment right to counsel only applies when a person asks for counsel upon hearing his/her Miranda rights.

A person who asks for counsel at any other time is invoking his Sixth Amendment rights.

New York law New York affords greater protection than the U.S. constitution. New York provides for an indelible right to counsel. This indelible right attaches

- 1) when defendant is in custody and requests counsel, or
- 2) at arraignment, or
- 3) upon the filing of an accusatory instrument, or
- 4) when there has been any significant judicial activity.

In New York, a person who the police know is represented by counsel in a particular matter only waives his rights when he does so in front of his counsel. However, if the police only **know** that he is represented by counsel on a **different** matter, but they do not know if he is also represented by counsel in the present matter, the defendant can waive his rights without the presence of counsel, as long as he understood his rights.

Topic 5 Pretrial Identification

There are two bases upon which you can attack a pretrial identification technique

- 1) Denial of counsel
- 2) Denial of due process. Some identification processes are so improper as to exclude in-court identification. The Government can defeat the exclusion if they can show an independent source of identification. Ample opportunity to independently observe the defendant at the time of the crime will allow in-court identification.

Post-charge lineups and show ups give right to counsel. There is no right to counsel when showing photographs.

Topic 6 Miscellaneous Issues

Bail

Bail issues are immediately appealable and preventive detention is constitutional.

Grand Juries in New York

- 1) Consist of sixteen to twenty-three people, twelve of whom must concur to indict.
- 2) A witness that has been granted immunity may consult with counsel, but not in the grand jury room.
- 3) A witness that has waived immunity may be accompanied by counsel into the grand jury room.
- 4) A grand jury indictment, in New York, must be based upon legally sufficient evidence.
- 5) Any witness that testifies before the grand jury will be immune from prosecution in regard to any transaction about which he testifies.
- 6) If a defendant requests the opportunity to testify before a grand jury, the request must be granted provided the defendant waives immunity.

Prosecutorial duty to disclose evidence in New York (VERY IMPORTANT)

New York provides that, upon demand, a defendant may obtain for inspection and copying:

- 1) His own or co-defendant's statement to the police
- 2) Taped or bugged conversations intended to be used at trial
- 3) Relevant photos or drawings made by the police
- 4) Reports of physical, mental or scientific tests
- 5) Any property obtained from the defendant
- 6) The approximate date, time and place of the offense charged
- 7) Anything that the state or federal constitution requires to be disclosed to the defendant prior to trial
- 8) All specific instances of defendant's conduct that prosecutor intends to use to impeach defendant's credibility at trial

Between the time the jury is sworn and the prosecutor's opening statement, the prosecutor must give the defense any prior written or recorded statements and the criminal records of persons to be called as prosecution witnesses.

Notice of alibi and intent to present insanity defense

The defendant must notify the prosecution, within thirty days of pleading not guilty, and within twenty days after arraignment, notice of its intent to use a defense of insanity.

Within twenty days after arraignment, the prosecutor may serve the defendant with an alibi demand and if he does, the defendant has eight days to reply.

The failure to produce **Rosario** material by the prosecution calls for a reversal of the verdict.

RIGHT TO A JURY TRIAL

A defendant has this right whenever a maximum sentence exceeds six months.

Criminal contempt - where a defendant is sentenced in contempt proceedings, to a sentence exceeding six months, the defendant has a right to a jury trial unless the sentence was imposed during a regular trial, in which case he has no right to a jury trial.

There is no constitutional right to a twelve-member jury or to a unanimous verdict, although it is unlikely an eight-to-four conviction would survive. There must be a minimum of six jurors, and if only six are used, the verdict must be unanimous.

Cross Sectional Requirement

It is unconstitutional for the prosecutor or the defense to exercise peremptory challenges on account of the race or gender of prospective jurors.

Ineffective assistance of counsel

(Will only be tested on **New York** exam.)

The defendant must show deficient performance by counsel, and that, but for the deficiency, the result of the proceedings would have been different.

EXAM TIP - If you think the defendant is guilty on the facts of the case, any deficiency of counsel is irrelevant.

GUILTY PLEAS

By pleading guilty, a defendant is waiving his Sixth Amendment right to a trial.

The Supreme Court will not disturb guilty pleas after sentencing.

The judge must advise of all of the following, on the record:

- The nature of the charge;
- The maximum and mandatory minimum sentences;
- The judge must explain to the defendant that he has the right to plead not guilty and have a trial;
- The judge must advise the defendant that if he pleads guilty, he is forgoing his right to a trial, and that proceedings will proceed immediately to sentencing.

Basis for withdrawing a guilty plea

The following reasons can be used to withdraw a guilty plea:

- 1) Where the plea was involuntary, i.e., there was an misunderstanding about the nature of the plea;
- 2) Occasionally, the excuse of ineffective counsel will influence the judge to allow a plea withdrawal;
- 3) Lack of jurisdiction;
- 4) Failure of the prosecutor to keep an agreed-upon plea bargain.

Sentencing

As a general rule, a defendant may not be given a harsher sentence after a successful appeal of the case.

Death penalty

Any death penalty statute that does not give the defendant a chance to present mitigating facts and circumstances is unconstitutional.

No crime can carry an automatic death penalty.

A statute may not limit what a defendant may present as a mitigating factor; all relevant mitigating evidence must be admissible or the statute is unconstitutional.

Double jeopardy

Under the Fifth Amendment, a defendant may not be tried for the same offense once jeopardy has attached.

Double jeopardy applies in a jury trial once the jury is sworn, in a non-jury trial when the first witness is sworn.

Double jeopardy does not normally apply to civil proceedings.

Double jeopardy exceptions

- If a jury cannot agree on a verdict;
- Retrial after successful appeal by defendant;
- When a defendant breaches a plea bargain agreement, the original charges can be reinstated;
- If a case is dropped at the behest of the defendant due to technicalities that have nothing to do with the merits of the case, if the prosecution then resolve the technical difficulties, they can restart the trial.

What is considered the “same offense”?

Two crimes are not the same offense if the crimes require different elements.

If a person is tried for an offense, he/she cannot be tried for a lesser offense that in part makes up the greater offense. For example, a person cannot be retried for solicitation if has already been tried for conspiracy.

Similarly, where a person is tried for a lesser offense, he/she cannot be tried for the greater offense. The only exception is where a person is tried for battery and the victim later dies; the person can then be tried for murder.

Fifth Amendment privilege against compelled testimony or interrogation

No one can be compelled to give oral testimony that might be self-incriminating. Anyone can utilize this privilege, in any type of case, as long as the response may tend to incriminate them. However the state can force a person to submit body samples, such as saliva, blood or semen, etc., even though this might lead to their incrimination.

It is unconstitutional for a prosecutor to make a negative comment on a defendant's failure to testify or on his/her silence on hearing the Miranda warnings.

However, in a civil case, a plaintiff cannot bring an action and then when asked to show that the causes of his action have been met, claim the Fifth. In other words the Fifth Amendment cannot be used as a shield and as a sword. If a plaintiff brings a suit, he has to prove that the necessary elements of an action are present. He may not hide behind the Fifth Amendment as a way out of proving his case. If he does, the case must be dismissed as he has failed to show a cause.

The Fifth Amendment right can be negated in three ways:

- 1) Where the defendant is granted immunity, he cannot plead the fifth;
- 2) Where there are no possibility of incriminations (for example, statute of limitations has run out);
- 3) If a person takes the witness stand, he/she waives his/her Fifth Amendment right.