

**CRIMINAL LAW (20 OF 33 Qs) (OTHER 13 ARE CRIM PRO)**

**I. General Matters (Jurisdiction)**

**A. Jurisdiction**

1. State acquires jurisdiction if: conduct happened there OR result happened there
2. For crimes of omission, jurisdiction lies where the act should have been performed

**B. Merger**

1. Generally NO merger of crimes in American Law
2. EXCEPT – Solicitation & Attempt merge into the substantive offense - Conspiracy does NOT merge with the substantive offense – You can be convicted of conspiring to rob and robbery.

**II. Essential Elements of Crime (An Act or an Omission)**

**A. Act**

1. Any bodily movement; EXCEPT
  - a. Conduct *not the product of one's own volition* (someone pushes you into a 3<sup>rd</sup> person)
  - b. Reflexive or convulsive acts (epileptic seizure)
  - c. Unconscious or asleep (sleepwalking - not falling asleep at the wheel)
2. **Omission** ⇒ when there is a legal duty to act
  - a. Statute (filing a tax return)
  - b. Contract (lifeguard)
  - c. Relationship between parties (parents have duty to protect their children)
  - d. **Voluntary assumption of duty of care inadequately performed (on MBE often).** (you assume duty when you say you will save someone drowning, then turn back b/c you don't like the person)
  - e. **Conduct created peril** Creation of peril for the victim by the defendant (push person into pool)

**B. Mental State** (Very important topic - 8 ~ 10 Qs on this topic)

**TIP:** Learn 2nd degree of a crime, Take 2nd degree and add a gun = 1st degree, Take 2nd degree and remove an element = 3rd degree

SPECIFIC INTENT (11):	MALICE (2):	GENERAL INTENT (4/5):	STRICT LIABILITY (3)
(1) <i>solicitation</i> (2) <i>conspiracy</i> (3) <i>attempt</i> (4) <i>1<sup>st</sup> degree "premeditated" murder</i> (statutory), in contrast to 2 <sup>nd</sup> degree/common law murder, a <i>malice</i> crime (5) <i>assault</i> * (6) <i>larceny</i> (7) <i>embezzlement</i> (8) <i>false pretenses</i> (9) <i>robbery</i> (10) <i>burglary</i> (11) <i>forgery</i>	(1) <i>murder</i> (common law, & 2 <sup>nd</sup> degree statutory murder) (2) <i>arson</i>	(1) <i>battery</i> (& assault if it's defined as a threat, rather than as an attempted battery) (2) <i>rape</i> (3) <i>kidnapping</i> (4) <i>false imprisonment</i>	(1) <i>statutory rape</i> (2) <i>selling liquor to minors</i> (3) <i>bigamy</i> (in some jurisdictions)
mistake (reasonable or unreasonable), is a valid defense	mistake is a defense as long as it's <i>reasonable</i>	mistake is a defense as long as it's <i>reasonable</i>	only defense: statute is unconstitutional

1. **Specific Intent** ⇒ intent to engage in proscribed conduct
  - Qualifies for 2 additional defenses not available for other types of crimes
    - (i) *Mistake of fact*
    - (ii) *Voluntary Intoxication*
2. **Malice** ⇒ reckless disregard of an obvious or high risk that the particular harmful result will occur
3. **General Intent** ⇒ (big catch-all category) awareness of factors constituting a crime
  - \* **Transferred Intent** (always two crimes for this)

- (i) D intends the harm that is actually caused, but to a different victim or object (e.g. Murder for B, Attempt of murder for B)
  - (ii) No merger here - Never merge any crimes that have different victims
4. **Strict Liability** – the “no intent crimes” so you can’t use any defenses that negate intent
- a. Formula – if crime is (a) in the *administrative, regulatory, or morality* area, and (2) NO adverbs like “*knowingly, willfully, or intentionally*” assume meant to be a no-intent crime of strict liability.
  - b. See Q. 16 & 17, p.478 Drills and Release Questions

### III. **Accomplice Liability**

- A. Elements – not enough to be simply be present (thereby appear to be consenting) or fail to call police; MUST:
  - 1. **ACTIVELY** aiding, abetting, or assisting/consenting to the crime
  - 2. With the *intent to promote or facilitate commission of the crime*
- B. Liability – liable for crime itself *and* all foreseeable crimes
- C. If the principal isn’t convicted, there can be no accomplice liability
- D. Accessory after fact (helping someone escape) – not liable for the crime itself; a separate lesser charge

\* **NY Distinctions – Accomplice Liability**

- 1. *Accomplice cannot benefit from a principal’s defense that negates mental state (i.e principal is insane, accomplice cannot benefit from this)*
- 2. *Accomplice is not absolved from liability even if principal is acquitted, immune, or not prosecuted*
- 3. *Principal may not be convicted solely on the uncorroborated testimony of an accomplice.*
  - *Withdraw (Affirmative defense) – voluntarily renounces + prior withdraw + effort to prevent*

\* **NY Distinctions – Criminal Facilitation**

- 1. *Facilitator knowingly aided – but not reach culpability of accomplice level*
- 2. *Facilitator need only believe that it was probable that he was rendering aid*
- 3. *Conduct alleged must have aided in the commission of the object felony*
- 4. *Facilitator may not be convicted on uncorroborated testimony of the person facilitated*
  - *Withdraw (Affirmative defense) – takes steps to prevent felony*

### IV. **Inchoate Crimes** ⇒ crime committed prior to, or in preparation for, a more serious offense

A. **Solicitation** ⇒ asking some to commit a crime

- 1. *Crime ends when asking is done* – refusal or legal incapacity is NO defense
- 2. *Merger* into completed crime – when solicited person accepts, then becomes conspiracy because *solicitation merges with conspiracy*
- 3. NOTE: if the solicitor withholds certain facts from the other party so that the solicited acts, under the circumstances *as believed by the party solicited*, would not be criminal, then a criminal solicitation has not occurred; the solicitor has not incited the other person to commit a crime, but may have committed an *attempt* through his scheme to have an *innocent agent* act for him

\* **NY Distinctions – Solicitation**

*Solicitation is a separate offense, independent of the substantive crime committed (not necessarily incidental to the commission to the substantive crime)*

B. **Conspiracy** ⇒ an agreement between two or more parties to commit a crime (ALWAYS ON BAR)

- 1. Elements
  - a. *Agreement* (does not have to be expressed), AND
  - b. *Intent to agree*, AND
  - c. *Intent to pursue/achieve unlawful objective (i.e. not unlawful if you conspire to rob your own house)*
- 2. Overt Act (additional requirement)
  - a. Majority (& NY): agreement + overt act (any little act in furtherance of conspiracy (i.e showing up at place you agreed to rob))
  - b. Minority (& Common Law): agreement itself
- 3. Liability – each conspirator liable for ALL crimes of co-conspirators (if in *furtherance of the conspiracy & foreseeable (i.e drug conspiracy co-conspirator in NY responsible for co-conspirator crimes in FL even if they don’t know each other)*)
- 4. *Impossibility* is NOT a defense to a charge of conspiracy
- 5. NO Merger – does NOT merge with substantive offense
- 6. *Withdrawal* – can never withdraw for conspiracy itself (BUT can withdraw from co-conspirators subsequent crimes)

\* **NY Distinctions - Conspiracy**

1. NY follows majority rule: **agreement + Overt Act** required requirement
2. **Can conspire with undercover police officer (unilateral theory of conspiracy):** a single defendant may be convicted of conspiracy; there is no defense to a conspiracy charge based on co-conspirator's irresponsibility, incapacity or failure to have requisite culpability
3. Can withdraw from conspiracy but have to **renounce** the conspiracy and **prevent** the crime
4. **One who simply conspires is not vicariously liable for other conspirators subsequent crimes**

C. **Attempt** ⇒ specific intent and behavior that brought D within close proximity to the completed crime

1. Elements

a. **Specific Intent; AND**

b. **Subsequent step beyond mere preparation in the direction of the commission of the crime** – mere preparation for a crime is (no attempt)

2. Abandonment and Factual impossibility are NOT a defense

\* **NY Distinctions – Attempt)**

1. Must come “very near” or “dangerously near” completion of intended crime
2. Abandonment (affirmative defense) – voluntary & complete renunciation + try to prevent crime

V. **Defense to Crimes**

\* **NY Distinctions – Defense in general**

1. Defense – prosecution must disprove **beyond a reasonable doubt** (e.g. infancy, self-defense)
2. Affirmative defense – D must raise and prove by **preponderance of the evidence** (e.g. insanity, duress, entrapment, withdraw)

A. **Insanity – affirmative defense**

1. McNaghten Rule – D lacked ability to know wrongfulness of his actions or understand the nature and quality of his actions
2. Irresistible Impulse – D lacked capacity for self control and free choice
3. Durham Test – D’s conduct was product of mental illness
4. Model Penal Code – D lacked ability to appreciate conduct or conform conduct to the requirements of law
5. **NY Rule:** similar to McNaghten Rule
  - D not responsible if, *at the time of conduct, as a result of mental disease or defect, D lacked capacity to know or appreciate either the nature and consequences of such conduct or that such conduct was wrong*

B. **Intoxication**

1. Voluntary – defense only to *specific intent* crimes (i.e. after drinking, A breaks into B’s house then punches B and gets caught speeding – vol intox is a defense to burglary, but not battery (general intent) or speeding (strict liability))
2. Involuntary – defense to all crimes including strict liability
  - Insanity & Involuntary Intoxication are applicable to all, including strict liability

C. **Infancy**

1. Under 7 – no criminal liability
2. Under 14 – rebuttable presumption of no criminal liability

\* **NY Distinctions – Infancy**

1. Age 7 ~16 : subject to family court jurisdiction as juvenile delinquent for misdemeanor or felony
2. **EXCEPT**
  - a. Age 13 ~ 15 : may be prosecuted for 2<sup>nd</sup> degree murder
  - b. Age 14 ~ 15 : responsible for serious offense against persons or property

D. **Self-defense**

1. Non-deadly Force – may use when reasonably believes *force* is about to be used on them
2. Deadly Force
  - a. Majority – may use when reasonably believes *deadly force* is about to be used
  - b. **Minority** (NY) – may use (i) reasonably believes *deadly force* is about to be used; AND (ii) victim retreated
    - Exceptions to duty to retreat:
      - (i) No retreat in home
      - (ii) No retreat in rape or robbery
      - (iii) No retreat required for police officers
  - c. MBE – tells you when minority rule is applied
3. Aggressor’s right to use self-defense
  - a. Effectively retreated; AND
  - b. Communicated to victim that he has withdrawn.

– See Q. 26, p.480 MDR

**E. Defense of a Dwelling**

– Deadly force may NEVER be used for solely defending your property

**F. Duress** – someone forces you to commit a crime

– MBE – duress is defense to all crimes EXCEPT for homicide

\* **NY Distinctions – Duress**  
*Duress is affirmative defense to all crimes, including homicide*

**G. Mistake of Fact Defense**

**Mental State of Crime Charged      Application of the Defense**

- |                            |  |
|----------------------------|--|
| 1. Specific Intent         | : ANY mistake (reasonable or unreasonable) that negates intent |
| 2. Malice / General Intent | : reasonable mistakes only                                     |
| 3. Strict Liability        | : NEVER  |

**H. Consent**

– NEVER a defense

**I. Entrapment**

– MBE – almost never available because of predisposition on the part of D to commit the crime negates entrapment

\* **NY Distinctions – Entrapment**  
*Entrapment is an affirmative defense in NY – D must raise and prove that criminal designed by authorities + not predisposed*

**VI. Common Law Crimes (circa England 1700) (MBE 8 ~ 10 Qs) w/ NY distinctions**

**A. Battery** ⇒ unlawful application of force to another resulting in either bodily injury or an offensive touching

1. Completed assault
2. General intent crime – NEVER strict liability

\* **NY Distinctions – Battery**  
*No crime of “battery”; there is only the crime of “assault” which encompasses common law battery  
Attempted assault is equivalent to common law assault.*

**B. Assault** – 2 theories

1. Attempted Battery – assault as an attempted battery (swing and miss punch) (specific intent crime)
  2. Threat – intentional creation of a reasonable apprehension (general intent crime)
- See Q. 31 & 32, p.482 MDR

**C. Homicide**

**1. Murder**

- a. Significant Points
  - (i) Victim must be human
  - (ii) If regular murder (Common Law), then murder in 2<sup>nd</sup> degree (malice crime)
  - (iii) MBE – 1<sup>st</sup> degree murder is labeled as such, or give set of statute that define it as a 1<sup>st</sup> degree murder (voluntary intoxication and mistake of fact defenses available here to reduce 1<sup>st</sup> degree to malice)
- b. Intent for murder (Common Law)
  - (i) *Intent to kill*; OR
  - (ii) *Intent to inflict serious bodily harm*; OR
  - (iii) *Highly reckless murder* (reckless indifference to an unjustifiably high risk to human life); OR
  - (iv) **Felony murder** (murder while committing felony)
    - (a) BARRK – burglary, arson, rape, robbery, kidnapping
    - (b) *Need not be convicted of the underlying felony – have intent to commit underlying felony*

**2. Manslaughter**

- a. **Voluntary Manslaughter** – requires **PASSION** or provoked killing. No time to cool off.
- b. **Involuntary Manslaughter**
  - (i) Killings from *criminal negligence* (grossly negligent) (i.e. falling asleep at the wheel)
  - (ii) **Misdemeanor manslaughter** – killing while committing misdemeanor or unemunerated felony (not a BARRK felony)

\* **NY Distinctions – Homicide Statute**

1. **1<sup>st</sup> Degree Murder** (very narrow)
  - a. **Intentional killing; AND**
  - b. **Special circumstances** (see p.5 in CMR NY supplement)
    - (i) **Victim was a police officer**
    - (ii) Victim was **intentionally** killed by D during the course of following felonies or flight thereof – **robbery, burglary, kidnapping, arson, rape, sodomy, escape or attempted murder in 2<sup>nd</sup> degree**
    - (iii) **Murder for hire**
    - (iv) **Victim was a judge**
    - (v) **Victim was a witness or related to a witness in case against D**
    - (vi) **D was in custody or escaped from custody & was serving life sentence**
    - (vii) **Torture murder**
    - (viii) **D killed more person in same criminal transaction**
    - (ix) **Serial Murder**

\* **NY Distinctions – Homicide Statute (continued)**

2. **2<sup>nd</sup> Degree Murder**
  - c. **Intentional murder (without special circumstances)**
  - d. **Highly reckless murder (reckless indifference to human life) (i.e 100 mph on Park Ave)**
  - e. **Felony murder – victim was Unintentionally killed by defendant during flight from felony**
2. **Manslaughter**
  - a. **1<sup>st</sup> Degree Manslaughter**
    - (i) **Serious bodily injury resulting in death (Involuntary manslaughter)**
    - (ii) **Heat of passion (Voluntary manslaughter)**
    - (iii) **Unjust Abortion**
  - b. **2<sup>nd</sup> Degree Manslaughter**
    - (i) **Killing from recklessness – disregard of substantial risk (i.e. 65mph on Park Ave)**
3. **Criminally Negligent homicide – applies in negligent driving of autos**

**3. Defenses to Felony Murder**

- a. D must be **guilty of the underlying felony. If D has defense to underlying felony, D is not liable for felony murder (drunk while robbing someone and then kills him).**
- b. Felony must be distinct from the killing itself
- c. Death must be foreseeable
- d. Death caused while fleeing is felony murder, but once D reaches point of safety not felony murder (i.e. spends the night at his mother's house)
- e. **RED LINE VIEW: D is not liable to the death of co-felon as a result of resistance of victim or the police**

\* **NY Distinctions – special NY affirmative defense to felony murder for accomplice (requires all 4)**

1. **D did not commit or aid in commission of homicidal act; AND**
2. **D was not armed with a deadly weapon; AND**
3. **D had no reasonable grounds to believe co-felons were armed with deadly weapons; AND**
4. **D did not reasonably believe that any other participants intended to engage in conduct likely to result in death**

**D. Kidnapping** (not important in MBE)

- Elements: kid + napping

\* **NY Distinctions – any degree of kidnapping qualifies as felony murder**

1. **1<sup>st</sup> Degree**
  - a. **Abduction +**
  - b. **Ransom, or Restrain with intent to inflict physical injury, or victim dies**
2. **2<sup>nd</sup> Degree – abduction**

**E. Rape**

1. **Slightest penetration completes crime of rape**
2. **Statutory rape – strict liability (no consent or mistake of fact defenses allowed)**

**F. Property Crime**

1. **Larceny –**

- a. Unlawful *taking* (stealing or by trespass) and *carrying away* (however slight) of tangible *personal property*;
  - b. *Without consent* (consent gained by fear of fraud is not valid);
  - c. *With intent of depriving permanently* (at the time of taking)
    - Good faith defense (affirmative defense) – if taking in the belief that it is one’s own, then NOT larceny
    - See *Q. 34, p.482 MDR*- if you see “in the belief that”, it means it is not common law larceny
2. **Embezzlement** ⇒ illegal conversion of property over which D had lawful possession
- a. Embezzler has *lawful possession* (not title), AND
  - b. *Illegal conversion*
    - Embezzler does not have to benefit at all
3. **False Pretenses** ⇒ obtaining title to property of another, by intentional false statement of facts
- a. *Conveyance of title* by false pretense (representation)
  - b. Must be *present or past fact*; false promise to do something in the future does not apply
4. **Robbery** ⇒ taking from a person or his presence, either by violence (any slight amount will do) by putting in fear (threat must be imminent harm and not future harm) (yanking necklace=robbery; picking pocket=larceny)
- **Robbery = Larceny + Assault** (or battery)

\* **NY Distinctions – Robbery**

1. *3<sup>rd</sup> Degree – forcibly stealing property; no physical injury and no firearm*
2. *2<sup>nd</sup> Degree – 3<sup>rd</sup> Degree + aggravating factors of*
  - a. *aided by another; OR*
  - b. *cause physical injury; OR*
  - c. *display firearm*
3. *1<sup>st</sup> Degree*
  - a. *forcibly stealing property and armed with deadly weapon; OR*
  - b. *– forcibly stealing property and caused serious physical injury*
  - **NOTE: Big difference from 2<sup>nd</sup> Degree is seriousness of injury**

5. **Extortion** ⇒ obtaining property by means of threats to do harm or to expose information
- a. Blackmailing
  - b. Distinguish from robbery
    - (i) Don’t have to take anything g from person or his presence
    - (ii) *Future harm* rather than imminent harm

G. Crimes against habitation

1. **Burglary** ⇒ breaking into a habitation with intent to commit felony
- a. *Breaking*
    - (i) Actual (even if no breaking of outside door, can be breaking if they open an interior door); or
    - (ii) Constructive (by threat or force)
  - b. *Entering* (any part of D’s body enters the house)
  - c. *Dwelling house of another*
  - d. *At NIGHT* (look for words “when the sun went down”)
  - e. With the *intention to commit a felony* inside – must exist at the time of breaking

\* **NY Distinctions – Burglary**

1. *3<sup>rd</sup> Degree*
  - a. *Breaking or entering or remaining inside*
  - b. *Any structure*
  - c. *Any time of day*
  - d. *Intent to commit any kind of crime*
2. *2<sup>nd</sup> Degree (if any applies) is 3<sup>rd</sup> degree plus*
  - a. *dwelling; or*
  - b. *injury to a non-participant; or*
  - c. *burglars are armed*
3. *1<sup>st</sup> Degree*
  - a. *MUST be dwelling (including motor vehicles); AND*
  - b. *2<sup>nd</sup> degree factors – either injury to non-participants or burglars are armed*

2. **Arson** ⇒ malicious burning of the dwelling house of another
- a. *Only applies to fire*: must be a **material wasting of fiber of building by fire** (i.e. if you only burn the carpet in a building, it is not arson – also does not apply to smoke damage or water damage)

b. *Only applies to house of another*

- \* **NY Distinctions – Arson** (*applies to BOTH building and motor vehicle*)
  - 1. *4<sup>th</sup> Degree*
    - a. *Reckless damaging*
    - b. *By Intentionally starting a fire or cause explosion*
  - 2. *3<sup>rd</sup> Degree*
    - a. *Intentionally damaging*
    - b. *By Intentionally starting a fire or cause explosion*
  - 3. *2<sup>nd</sup> Degree*
    - a. *3<sup>rd</sup> Degree, AND*
    - b. *Knowledge that non-participant is present or reasonable possibility of presence*
  - 4. *1<sup>st</sup> Degree*
    - a. *2<sup>nd</sup> Degree, AND*
    - b. *Cause an explosion of fire by incendiary or explosive device*

## CRIMINAL PROCEDURE (13 OF 33 Qs)

### I. EXCLUSIONARY RULE

⇒ Judicially created doctrine that prohibits introduction of evidence obtained in violation of a defendant's Fourth, Fifth, and Sixth Amendment rights.

#### A. Fruit of the Poisonous Tree Doctrine ⇒ evidence obtained from exploitation of the illegally obtained evidence

1. Generally, not only exclude evidence illegally seized, but all evidence obtained or derived from illegal act
2. 3 ways to break the chain
  - a. Independent Source – had another “legal” source for that evidence
  - b. Inevitable Discovery – would have been discovered anyway
  - c. Intervening act of free will by D – *usually tested*

NEW: If the original violation is a Miranda violation, evidence found from the D's statement ARE admissible.

#### B. Limitations on exclusion

1. Inapplicable to Grand Juries
2. Inapplicable to Civil Proceedings, Parole Revocation Proceedings
3. In order to qualify for exclusionary rule, search in question must violate either Fed Constitution or statute.
4. Inapplicable to Parole Revocation Proceedings
5. 3 Good Faith Defense to exclusion
  - a. Good faith Reliance on judicial opinion later changed
  - b. Good faith Reliance on statute or ordinance later declared unconstitutional
  - c. Good faith Reliance on defective search warrant

\* **NY Distinctions**

*Does not recognize good faith reliance on defective search warrant. If warrant no good, you can't save the evidence*

6. Use of excluded evidence for impeachment purposes
  - a. All illegally seized evidence can be used to impeach credibility of D's testimony (but not the testimony of other defense witnesses)
  - b. Voluntary confession in violation of Miranda rights is admissible for impeachment

### II. LAW OF ARREST

A. Arrests warrant – generally not required in a public place; but required for home arrest

B. Probable cause requirement – for either finger printing or interrogation in **station house detention**

\* **NY Sliding Scale of Police Authority to Arrest**

1. **Minimum Intrusion**
  - a. Request for information: *except on “whim or caprice”*
  - b. Individual right not to respond (or even run away) does not give probable cause for arrest
2. **Common Law Right to Inquire**
  - a. Must have “founded suspicion” that criminal activity is afoot
  - b. Then can detain for question; detention must be brief; if individual supplies information must release
3. **Stop & Frisk**
  - a. Reasonable Suspicion
  - b. Warrantless seizure of anything reasonably believed to be a weapon
4. **Police Pursuit: Reasonable Suspicion**
5. **Arrest: Probable Cause**

### III. SEARCH & SEIZURE (MOST IMPORTANT TOPIC 8 ~13 Qs)

*Most important topic; See Chart on p.5 of Convisor Mini Review*

#### A. Government Conduct

1. Public police, both on and off duty
2. Any individual acting at the direction of public police
3. Private police are not government conduct, unless they are deputized with power to arrest

#### B. D has **reasonable expectation of privacy**

1. Standing – to object to the legality of search

- a. Automatic Standing
    - (i) Own the premises searched
    - (ii) Live on the premises searched, regardless of ownership interest
    - (iii) Overnight guests
  - b. Sometimes standing
    - (i) Legitimately present when the search takes place
    - (ii) Own the property seized
  - Expected questions on MBE
    - (i) Overnight guest – YES, they have standing
    - (ii) Passengers in car – NO (if no claim of ownership of car or property taken)
    - (iii) Individual (e.g. drug dealer) briefly on premises on someone else's property solely for the business purpose of selling drugs – NO
2. Seizure of Public Items – simply implicates no right of privacy (you hold it out to the public every day)
- a. Sound of your voice
  - b. Your Handwriting
  - c. Paint outside of one's car (they can scrape paint off your car for an accident investigation)
  - d. Account records held by a bank
  - e. Monitoring the location of your car in a public street or public driveway
  - f. Anything that can be seen open across the *open fields*
  - g. Anything that can be seen from *flying over public air space*
  - h. Odor from one's luggage
  - i. Garbage left for collection

**C. Validity of Search Warrant**

- 1. Requirement – probable cause (fact specific standard); question of probable cause would most likely be in NY Bar regarding informers
- 2. MBE
  - a. Warrant must be precise on its face, state particularity the place to search and items to be seized
  - b. Issued by neutral & detached magistrate: issuer must be neutral from law enforcement (e.g. court clerks are sufficiently neutral, not the state attorney general)
  - c. If relied on invalid warrant, could apply good-faith exception (*in NY, no such exception*)
  - d. Can rely on hearsay
  - e. Can rely on informers
    - (i) Totality of circumstances approach: fair probability or substantial basis
    - (ii) Informers' identities can be concealed

\* ***NY Search Warrant – Warrant based on informer***  
***Underlying affidavit based on informer's tip (frequently tested in NY Bar) must meet the following 2 part test***

- 1. ***Basis of Informant's Knowledge:*** *Must set forth sufficient underlying facts & circumstances to allow the magistrate to know how informant got his information; AND*
- 2. ***Veracity or reliability of the source of information:*** *Must establish reliability & credibility of the informant (usually by talking about prior use of the informant)*

**D. Exceptions to Warrant Requirement**

**1. Search Incident to Lawful Arrest**

- a. Arrest must be lawful
- b. Search must be contemporaneous in time & place with the arrest
- c. Geographical limitation – the person and his wing span
  - (i) When a person is validly arrested in a car: their wing span will include entire interior compartment and everything in it, BUT not the trunk

\* ***NY Search Incident to Arrest – Broader protection***  
*Police can NOT remove closed containers/bags in a car, once occupant has been removed from the car*

**2. Automobile Exception**

- a. Need probable cause to believe that the car contained the fruits of crime or contraband
- b. Can search car, trunk, etc. If looking for stolen tvs, they can't look in small bags or wallets. Can also open containers – limited to grab area
- c. Probable cause can arise after the car is stopped, but must arise before anything or anybody is searched

### ain View

- a. Lawfully on premises
- b. Evidence in plain view

### 4. Consent

- a. Voluntary & Intelligent consent
- b. Fact specific
  - (i) Police saying that they have warrant negates consent
  - (ii) Police need not warn you that you have right not to consent
- c. 3<sup>rd</sup> party consent – where 2 or more people have equal right to use property, anyone can consent

### 5. Stop & Frisk

- a. Legal standard – reasonable suspicion (less than probable cause)
- b. Weapons are always admissible so long as stopping was reasonable
- c. Evidence of crime (but not a weapon) – how much like a weapon or contraband could have it seemed from the outside (i.e. burglar tools would seem like a weapon from the outside)

### 6. Hot Pursuit & Evanescent Evidence

- a. Hot pursuit of fleeing felon (not more than 15 minutes behind the fleeing felon) – no wing span limit, may search **ALL** the premises of **ANYBODY**'s home
- b. Evanescent evidence – evidence that could go away (e.g. scrapings under the finger nails)

### B. Wiretapping and Eavesdropping (CHECK THIS)

1. All wiretapping requires warrant
2. Exception – *unreliable ear* (a speaker assumes risk that other person is government informer or wired)

## IV. CONFESSIONS

### A. MIRANDA WARNINGS

- In General
  - a. Violation of Fifth Amendment privilege against compelled self-incrimination
  - b. *MBE at least 3 Qs; NY loves this*
- 1. Constitutional Rights
  - a. Right to remain silent
  - b. Anything said can be used against
  - c. Right to presence of attorney
  - d. If can't afford attorney, one will be appointed
- 2. Important Factors
  - a. *Custody Requirement* – whether the person's freedom of action is denied (probation interviews & routine traffic stops are not custodial). Person is not free to leave at the time of the interrogation.
  - b. *Interrogation Requirement* – any words or conduct by the police that they know or should know they would likely elicit a damaging statement (mere asking of questions are not interrogation)  
Spontaneous admissions are OK *i.e.* "blurts out"  
*See Q 28 on p481 Drills and Release*
- 3. Waiver
  - a. *Knowingly, voluntary, intelligent*
  - b. Fact specific question – no waiver from silence or shoulder shrugging
- 4. Impeachment purposes – confession taken in violation of *Miranda* but otherwise voluntary may be used to impeach D if he testified at trial
- 5. NOTE: as long as *Miranda* warnings have been given & adversary judicial proceedings have NOT commenced, voluntary statements are admissible EVEN IF (i) *the police lie to D's lawyer about their intent to question him*, & (ii) *fail to inform D that his lawyer is attempting to see him*

\* *NY Distinction – Infants*  
*Attempts to keep parent from child held by police may invalidate child's confession.*

### B. Fifth Amendment Right to Counsel

1. Once asserted and terminates interrogation, re-initiation of interrogation without attorney present violates Fifth Amendment Rights
2. Applies only when a person asserts this right (must be specific) after hearing *Miranda* rights
3. *NOT Offense specific*

### C. Sixth Amendment Right to Counsel

1. Right to Counsel after judicial proceeding have begun
2. *Offense specific* – attorney must be present for only interrogation of attorney's case only (not unrelated, uncharged offenses)

- \* **NY Distinction – NY Right to Counsel – Commonly tested (read p4-5 on NY distinctions outline)**
  1. Affords greater protection to D than Federal Constitution
  2. Provides “**indelible**” right to counsel in 4 cases
    - a. D in custody, and police are conducting activity “overwhelming to lay person” and D requests counsel; OR
    - b. At arraignment; OR
    - c. Upon filing of an accusatory instrument (a formal charge); OR
    - d. When there has been any significant judicial activity
  3. Waiver – **may be obtained from a criminal D who is actually and known to be represented by an attorney and only in the presence of counsel**

## V. PRETRIAL IDENTIFICATION

### A. Substantial Basis for Attack

1. Denied 6<sup>th</sup> Amendment Right to Counsel
  - a. Post-charge lineup or showup give rise to Right of Counsel
  - b. NO right to counsel at photo identification - MBE**
2. Denial of 14<sup>th</sup> Amendment Due Process
  - a. Identification is unnecessarily suggestive and there is substantial likelihood of misidentification

### B. Remedy

1. Exclude of in-court identification
2. **State can defeat the remedy by showing: - MBE**
  - a. Independent Source (e.g. ample opportunity to observe the D at the time of crime)
  - b. Then the identification is allowed

- \* **NY Distinction – Investigatory lineups**  
*No right to counsel exists (held prior to formal prosecutorial action) EXCEPT:*
  1. Police are aware that D is represented by counsel on another charge; AND
  2. D explicitly requests attorney

## VI. PRETRIAL PROCEDURES

### A. Bail

1. Bail issues are immediately appealable
2. Preventive detention is Constitutional

### B. Grand Juries – NOT important in MBE; very important in NY

- \* **NY – Grand Jury**
  1. Consist of 16 ~ 23 jurors – 12 of whom must agree to indict
  2. Right to Counsel
    - a. GJ witness granted immunity not allowed to bring counsel (can consult outside proceeding room)
    - b. GJ witness who waives immunity can bring counsel into the proceeding room
  3. GJ indictment must be based on **legally sufficient evidence (evidence must be admissible in trial)**
  4. All GJ witnesses are granted transactional immunity
    - Immune from any transactions he testifies; so long as the testimony is responsive to question
  5. D as GJ witness – D’s request must be granted provided that D waives immunity

### C. Prosecutorial Duty to Disclose – commonly tested in NY (Rosario Case)

- \* **NY – Prosecutor’s Duty to Disclose (& Defendant’s duty) (p7-8 of NY Distinctions Outline of CMR)**
  1. *NY provides, upon D’s demand*
    - a. *D’s or co-D’s statement, including GJ testimony;*
    - b. *Tapes or bugged conversations intended to be used in trial;*
    - c. *Relevant photos or drawings made by the police;*
    - d. *Reports of physical, mental, or scientific tests or experiments;*
    - e. *Any other property obtained from D;*
    - f. *Approximate date, time, place of the offense charged;*
    - g. *Anything that State or Federal Constitution requires to be disclosed to D prior to trial;*
    - h. *All specific instance of D’s conduct that prosecutor intends to use at trial to impeach D’s credibility*
  2. *Prosecutor must also, between time jury is sworn in and Prosecutor’s opening statement, give any prior written or recorded statements of all witnesses and known criminal records of prosecution witnesses*
  3. *Notice of Alibi and Intent to present insanity defense*
    - a. *Insanity defense – within 30 days of pleading “not guilty plea”*
    - b. *Alibi defense – within 20 days after arraignment, prosecutor can serve D with a request of alibi defense, D must reply within 8 days*
  4. *D’s duty of disclosure – D must make available any relevant prior written or recorded statements by a defense witness*
- \* *Change in NY law*
  - a. *Old Law – any mistake in Rosario disclosure was reversible*
  - b. *New Law – failure of disclosure is reversible, ONLY IF D can show reasonable possibility that non-disclosure materially contributed to the trial*

## VII. TRIAL

### A. Right to Jury Trial (Sixth Amendment)

1. When the Right Attaches
    - a. Constitutional Right – *if maximum authorized sentence exceeds 6 months*; also, when sum of sentences for criminal contempt exceeds 6 months
    - b. NO constitutional Right – *if maximum authorized sentence is 6 months or less*
    - c. Bail issues are immediately appealable
  2. Number and Unanimity of Jurors – *at least 6 jurors; if 6 jurors then must be unanimous. No right to unanimous 12 person jury. Supreme Ct has allowed 10-2 and 9-3 convictions.*
  3. Cross-sectional Requirement
    - a. Right to have jury selected from a representative cross-section of community; BUT not have right to proportional representation of all groups on D’s particular jury (must be fair cross section of jury pool)
    - b. Peremptory Challenges – *unconstitutional, for D and P, to exercise peremptory challenges to exclude from jury prospective jury based on race and gender*
  4. Right to Impartial Jury – *if a juror was biased*
- B. Right to Counsel - *Counsel’s conduct was unreasonable and there is a reasonable probability that counsel’s conduct affected the outcome of the case.*
1. Right to Counsel only applies to
    - a. Felony trials
    - b. Misdemeanor trial if imprisonment or if a suspended sentence is imposed
  - Only in NY, most likely in essay

- \* **NY – Ineffective assistance of counsel; must show**
  1. **Deficient performance** by counsel; AND
  2. **But for such deficiency, the result of the proceeding would be different**

## VIII. GUILTY PLEA – analytically, these are waivers of the right to jury trial

- A. Basic Trends
  1. Intelligent choice among alternatives – court will not disturb guilty pleas after sentencing
  2. Contract view – treats plea bargains like contracts
- B. If Pleading Guilty, Judge must advise D personally (to determine voluntariness and intelligence of the plea):
  1. Nature of charge;
  2. Maximum authorized sentence and any mandatory minimum;
  3. Right not to plead guilty; AND
  4. D waives right to a trial

- Requirement of adequate record
  - If error, remedy is withdrawal of plea and pleading a new
- C. Withdrawal of plea after sentence
1. Plea was involuntary (i.e. D wasn't told by Judge of maximum authorized sentence)
  2. Lack of jurisdiction
  3. Ineffective assistance of counsel
  4. Failure/Breach of P to keep at the agreed upon plea bargain (BAR exam question)

D cannot be given a harsher sentence on re-trial after a successful appeal.

**IX. DEATH PENALTY - PRINCIPLES**

- MBE questions
- A. Any DP statute, that does not give D a chance to present mitigating facts & circumstances is unconstitutional
  - B. No automatic category for the imposition of death penalty (i.e. you kill a cop you get death – unconstitutional)
  - C. State may not by statute limit mitigating factors; all relevant mitigating evidence must be admissible or the statute is unconstitutional
  - D. Only a jury, not a judge, may determine the aggravating factors justifying the imposition of death penalty

**X. DOUBLE JEOPARDY (FIFTH AMENDMENT)**

- A. When Double Jeopardy attaches
  1. In a jury trial – when jury is sworn in
  2. In judge trial – first witness is sworn in
  3. Generally NOT attached in civil trial
- B. Exceptions permitting retrial
  1. Jury is unable to agree on a verdict
  2. Mistrials for manifest necessities (i.e. D gets sick mid-trial and needs an operation)
  3. Retrial after successful appeal is not Double Jeopardy
  4. **Breach of an agreed upon plea bargain by D (on BAR exam)**

ATTACH:	NOT ATTACH:
<ul style="list-style-type: none"> <li>• after acquittals</li> <li>• after convictions</li> <li>• mistrials due to prosecutorial misconduct</li> </ul>	<ul style="list-style-type: none"> <li>• hung jury</li> <li>• dismissal at preliminary hearing</li> <li>• mistrial for manifest necessity</li> </ul>

- C. Same Offenses – MBE
1. 2 crimes do not constitute same offense, if each crime requires proof of additional element, which the other does not require (e.g. Manslaughter by car and Hit & Run)

\* ***NY Distinctions – Same Transaction Test***  
*All crimes arising from a single criminal transaction must be tried together*

2. Lessor Included Offense
  - a. Attachment to Greater offense – bars retrial for lessor included offenses
  - b. Attachment to Lessor offense – bars retrial for greater included offenses (ONE EXCEPTION: retrial for murder is permitted if the victim dies after attachment of jeopardy for battery)
- D. Separate Sovereigns
  1. Double Jeopardy not apply to trials by separate sovereigns
  2. But state & locality are same sovereign

**XI. FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION**

- A. Who and When
  1. Anybody can assert the privilege
  2. May be asserted in any kind of proceeding
    - If not assert the very first time in a civil/congressional/administrative proceeding, then considered waived in subsequent criminal proceeding
- B. Scope of Protection – testimonial but NOT physical evidence. But cant compel us to take lie detector or undergo custodial interrogation.

- C. Prohibition against burdens on assertion of privilege – unconstitutional for prosecution to make a negative comment on D's failure to testify or silence after Miranda warnings
- D. Elimination of Privilege
  - 1. *Grant of Immunity* (Use & Derivative Use Immunity) – but prosecutor may use prior evidence derived from independent source

\* ***NY Distinctions***

*Grants transactional immunity, which is broader – can't be prosecuted about any transaction about which testified*

- 2. *No possibility of Incrimination* (e.g. statute of limitation)
- 3. *Waiver* – D by taking the witness stand, waives his Fifth Amendment privilege