

CRIMINAL PROCEDURE

1) Constitutional restraints

- a) First 8 amendments apply to federal govt. Most rights apply to the states through the due process clause of the 14th amend. Rights binding on the states (and fed govt):
 - i) 4th amend – prohibition against unreasonable searches and seizure and the exclusionary rule;
 - ii) 5th amend – privilege against compulsory self-incrimination;
 - iii) 5th amend – prohibition against double jeopardy;
 - iv) 6th amend – right to speedy trial, public trial, trial by jury
 - v) 6th amend – right to confront witnesses
 - vi) 6th amend – right to a compulsory process for obtaining witnesses;
 - vii) 6th amend – right to assistance of counsel in felony cases and in misdo cases where imprisonment is imposed;
 - viii) 8th amend – prohibition against cruel and unusual punishment.
- b) Rights not binding on states
 - i) Right to indictment by grand jury.
 - ii) Not yet decided whether 8th amend prohibition against excessive bail creates a right to bail. But most state constitutions create a right to bail and prohibit excessive bail.

2) **Exclusionary rule**

- a) Scope of rule
 - i) **Prohibits introduction of evid obtained in violation of a def's 4th, 5th, and 6th amend rights.**
 - ii) All **fruits of the poisonous tree** must also be excluded. (evid obtained from exploitation of the unconstitutionally obtained evid)
 - iii) Exceptions to the fruit of the poisonous tree:
 - (1) Evid derived from statements obtained in violation of Miranda.
 - (2) Evid obtained from a source independent of the original illegality.
 - (3) An intervening act of free will by defendant.
 - (a) I.e., def is illegally arrested but is released and later returns to the station to confess.
 - (4) Inevitable discovery.
 - (a) Prosecution can show that the police would have discovered the evid whether or not the police acted unconstitutionally.
 - (5) Violations of the knock and announce rule.
 - iv) Tough to have live witness testimony excluded. Def may also not exclude a witness's in-court identification on the ground that it is the fruit of an unlawful detention.

- b) Limitations on the rule
 - i) Inapplicable to grand juries, civil proceedings, violations of state law, internal agency rules, and parole revocation proceedings.
 - ii) Good faith reliance on law, defective search warrant, or clerical error
 - (1) Exclusionary rule does not apply when police arrest someone erroneously but in good faith when thinking they are acting pursuant to a valid arrest warrant or law.
 - iii) Use of excluded evid for impeachment purposes
 - (1) Evid can still be used to impeach def's credibility if he takes the stand.
 - (a) Voluntary confession taken in violation of Miranda is admissible to impeach
 - (b) Evid obtained from an illegal search can be used to impeach def, but not others', statements.
 - iv) Knock and announce rule violations
 - (1) Exclusion is not an available remedy for violations for the knock and announce rule pertaining to the execution of a warrant.
 - c) **Harmless error test**
 - i) If illegal evid is admitted, resulting conviction should be overturned on appeal unless govt can show beyond a reasonable doubt that the error was harmless.
 - ii) In habeas proceedings, def should be released if he can show that error had a substantial and injurious effect or influence on jury's verdict.
 - iii) Harmless error never applies to denial of right to counsel at trial – this error is never harmless.
 - d) Enforcing the exclusionary rule
 - i) Admissibility of evid decided by judge, not jury.
 - ii) Govt has burden o establishing admissibility by a preponderance of the evid.
 - iii) Def can testify at this suppression hearing without his testimony being used against him at trial.
- 3) **Fourth amend**
- a) **Right to be free from unreasonable searches and seizures.**
 - b) **Arrests**
 - i) Within the scope of 4th amend and so must be reasonable.
 - ii) Seizure occurs when **a reasonable person would believe that he is not free to leave or terminate an encounter with the govt.**
 - iii) Probable cause
 - (1) Arrest must be based on probable cause.
 - (a) Trustworthy facts or knowledge sufficient for a reasonable person to believe suspect has committed or is committing a crime.
 - (2) Warrant is not required to arrest in a public place.
 - (a) Police must have a warrant for a nonemergency arrest of a person in his home.

c) Other detentions

i) **Stop and frisk**

- (1) If police have reasonable suspicion, supported by articulable facts (not just a hunch):
 - (a) That person is involved in a crime, they can detain someone for investigative purposes.
 - (b) That person is armed and dangerous, they can frisk for weapons.
- (2) Detention must be no longer than necessary to conduct investigation to verify suspicion.
 - (a) Police can ask for name and can arrest for failure to comply.
 - (b) Detention can turn into arrest if other probable cause for arrest arises during detention.

ii) **Automobile stops**

- (1) Must have reasonable suspicion that law was violated to stop a car.
- (2) If special law enforcement needs are involved:
 - (a) Roadblocks are allowed to stop cars without individualized suspicion.
 - (i) Roadblocks must:
 1. Stop cars on basis of neutral, articulable standard; and
 - a. I.e., every car
 2. Be designed to serve purposes closely related to a particular problem pertaining to cars and their mobility
 - a. I.e., roadblock to test for drunk drivers is ok. Roadblock to search for illegal drugs is not because purpose is only to detect evid of ordinary criminal wrongdoing.
- (3) Automobile stops are a seizure of car's driver and of passengers.
 - (a) So passengers have standing to raise wrongful stop as reason to exclude evid found during the stop.
- (4) Police may order people in car to get out. If police reasonably believes detainees to be armed, he may frisk occupants and search passenger compartments for weapons.
- (5) Pretextual stops
 - (a) If police reasonably believe driver violated a traffic law, they may stop the car, even if the ulterior motive is to investigate whether some other law – for which police lack reasonable suspicion – has been violated.

iii) **Detention to obtain a warrant**

- (1) If police have probable cause to believe suspect has drugs hidden in his home, they may, for a reasonable time, prevent him from going into the home unaccompanied so they can prevent him from destroying the evid while they get a search warrant.

iv) Occupants of premises

- (1) A valid search warrant to search for contraband allows the police to detain occupants of premises during a proper search.

v) Station house detentions

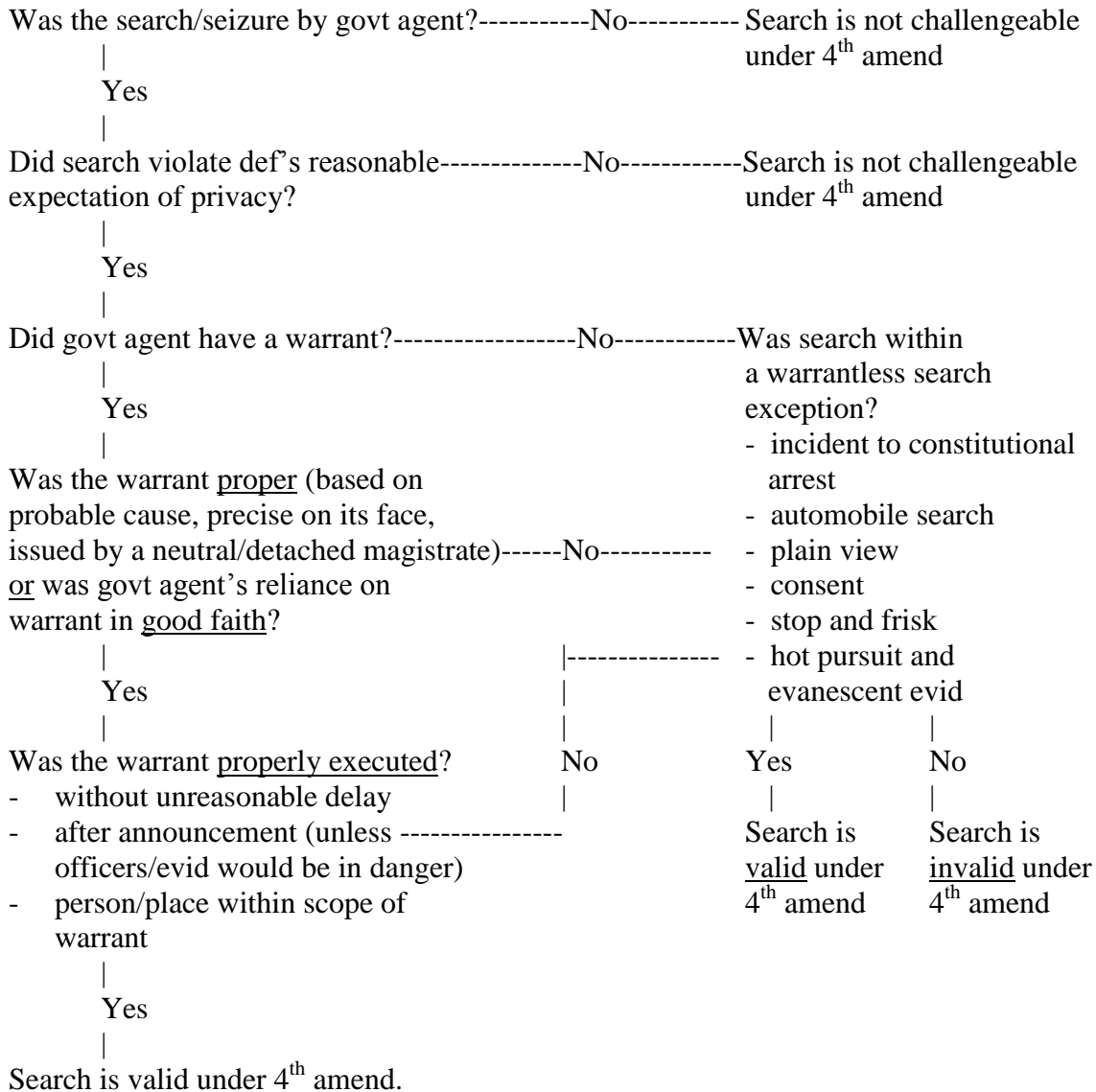
- (1) Police must have probable cause for arrest to bring a suspect to the station for questioning or fingerprinting.

vi) Seizure of person (by subpoena) for grand jury appearance is not within 4th amend

vii) Deadly force

- (1) It is a seizure when deadly force is used to apprehend someone.
- (2) Deadly force may only be used if it is reasonable to do so under the circumstances.
 - (a) I.e., where suspect poses a danger to life (his or others)

Search and seizure



d) **Evid search and seizure**

i) Must be reasonable to be valid under 4th amend.

(1) Reasonableness requires a warrant except in 6 circumstances.

ii) Analyze using this model:

(1) Does def have a 4th amend right?

(a) Seizure by **govt** concerning place or thing in which def had a **reasonable expectation of privacy**?

(2) Did govt have a valid warrant?

(a) Issued by a **neutral and detached magistrate**

(b) On a showing of **probable cause** and

(c) **Reasonably precise** as to the place to be searched and items to be seized.

(3) If no valid warrant, was it a valid warrantless search and seizure?

iii) **Govt conduct required.**

(1) 4th amend does not protect against searches by private people, including private security guards.

iv) **Reasonable expectation of privacy**

(1) Person has a legit expectation of privacy any time:

(a) He owned or had a right to possession of the place searched;

(b) The place searched was in fact his home, whether or not he owned it or had a right to possession of it; or

(c) He was an overnight guest of the owner of the place searched.

(2) There is no reasonable expectation of privacy in objects held out to the public.

(a) Use of technology not in general public use to get info from inside the home that could not otherwise be obtained without entering violates reasonable expectation of privacy.

(i) I.e., use of thermal imager as opposed to a telephoto camera lens.

(3) **No reasonable expectation of privacy in:**

(a) Sound of one's voice

(b) One's handwriting

(c) Paint on the outside of one's vehicle

(d) Account records held by a bank

(e) Location of one's vehicle on public roads or its arrival at a private residence

(f) Areas outside the home and related buildings (curtilage), such as a barn

(g) Garbage left for collection

(h) Land visible from a public place, even if from a plane or helicopter

(i) Smell of one's car or luggage (sniff test)

v) **Searches pursuant to a warrant**

(1) **Probable cause**

(a) Warrant will be issued only if there is probable cause to believe that evid will be found on person or premises at time warrant is executed.

(i) Officers must give magistrate an affidavit setting forth the circumstances.

(b) **Use of informers**

(i) Affidavit based on informer's tip must meet the totality of the circumstances test:

1. Affidavit may be found sufficient even though reliability and credibility of informer or his basis of knowledge is not established.

2. Informer's identity need not be revealed.

(c) Search warrant will be invalid if def establishes:

(i) A false statement was included by the affiant;

(ii) The affiant intentionally or recklessly included the false statement; and

(iii) The false statement was material to the finding of probable cause.

(iv) This test is very restrictive. If affiant believed the lie or lie is not material because there is other sufficient evid, affidavit is valid. Def is rarely successful in this challenge.

(v) If police reasonably relied on the warrant, even if it is found to not be supported by probable evid, evid seized may be used by prosecution.

1. This good faith exception applies only if police obtained a warrant and it id invalid.

2. This exception does not apply if police failed to get a warrant.

(2) **Warrant must be precise on its face**

(a) If warrant does not describe with reasonable precision on its face, it is invalid. Even if underlying affidavit does have such detail, warrant is still invalid.

(3) Warrant can be used to search premises of non-suspects, as long as there is probable cause to believe evid will be found there.

(4) **Neutral and detached magistrate is required**

(a) State attorney general is not neutral.

- (5) **Execution of warrant**
- (a) Only police may execute a warrant and it must be executed without unreasonable delay.
 - (b) Police must knock and announce their purpose, and wait a reasonable time for admittance.
 - (i) Unless officer has reasonable suspicion, based on facts, that announcing would be dangerous, futile, or would inhibit the investigation.
 - (ii) Evid seized in violation of knock and announce rule will not be suppressed. Exclusionary rule does not apply here.
 - (c) Police can seize contraband, fruits, or instrumentalities of crime discovered, whether or not specified in the warrant.
 - (d) Police can detain occupants of premises during a proper search but search warrant does not allow search of persons not named in the warrant.
- vi) **Exceptions to warrant requirement** – all warrantless searches are unconstitutional unless they fit into one of these exceptions:
- (1) **Search incident to constitutional arrest**
- (a) Incident to a constitutional arrest, police may:
 - (i) Search person
 - (ii) Search areas into which he might reach to obtain weapons or destroy evid
 - (iii) Make protective sweep of area if they believe accomplices may be present
 - (b) Search must be contemporaneous in time and place with arrest.
 - (c) If arrest was unconstitutional, any search incident to arrest is also unconstitutional.
 - (d) Automobiles
 - (i) Police may search passenger compartment of car incident to arrest only if at time of search:
 - 1. Arrestee is unsecured and still may gain access to the interior; or
 - 2. Police reasonably believe evidence of offense for which person was arrested may be found in car.
 - a. So cops can put person in squad car and then go back to search car.
 - (e) Police can search and inventory arrestee's belongings at station. Same with an impounded vehicle.

(2) Automobile exception

- (a) If there is probable cause to believe that the car has evid of crime, they may search the whole vehicle and any container that might reasonably contain the item for which there was probable cause.
 - (i) If warrantless search of car is valid, then police may tow vehicle to station and search it later.
 - (ii) If car itself is contraband, police can tow it from a public place without a warrant.
- (b) Police have broad authority to search the car, depending on what they are looking for.
 - (i) Looking for drugs, can look in anything inside the car.
 - (ii) If looking for undocumented aliens, cannot look inside of a small suitcase.
- (c) Search may extend to bags of passenger.
- (d) If probable cause only to search container inside car, then cannot search rest of car.

(3) Plain view

- (a) Police may make a warrantless seizure when they:
 - (i) Are legitimately on the premises;
 - 1. Police must be where they have a lawful right to be, such as on a public sidewalk or in a home executing a warrant. If so, anything officer sees, smells, hears, is admissible.
 - (ii) Discover evid of crime (or contraband);
 - (iii) See such evid in plain view; and
 - (iv) Have probable cause to believe that the item is evid of crime.
 - 1. It must be immediately apparent.

(4) Consent

- (a) Warrantless search is valid if police have a voluntary and intelligent consent.
 - (i) Knowledge of right to withhold consent is not a prerequisite.
- (b) Any person with apparent equal right to use or occupy the property may consent to a search.
 - (i) However, occupant cannot give valid consent when a co-occupant is present, that co-occupant objects to the search, and the search is directed against the co-occupant.
 - (ii) I.e., homeowner parent can consent to search of kitchen and probably a search of son's room unless the facts strongly indicate that the parent does not have a right to go into the room, such as door is locked, only son has key, etc.

(5) Stop and frisk

- (a) Police may stop a person without probable cause for arrest if there is an articulable and reasonable suspicion of criminal activity.
 - (i) If reasonably believes person may be armed and dangerous, can conduct a protective frisk.
 - (ii) Remember, a stop is not an arrest so no probable cause is needed. But police must have a reason to believe criminal activity is afoot.
 - 1. So seeing someone pace in front of a jewelry store may justify a stop.
 - 2. A frisk will be justified only if police reasonably thinks that suspect has a weapon.
- (b) Scope
 - (i) Limited to pat down of outer clothing, unless officer has specific information that weapon is hidden somewhere.
 - (ii) Police may order occupants out of a car and frisk them and search passenger compartment if there is reasonable belief occupant is dangerous.
- (c) Admissibility
 - (i) During pat down, officer may reach into suspect's clothing and seize any item reasonably believed to be, based on its plain feel to be a weapon or contraband. These items are admissible evid.

(6) Hot pursuit and evanescent evid

- (a) Police in hot pursuit of a fleeing felon may make a warrantless search and seizure.
 - (i) Can even follow suspect into a private dwelling.
- (b) Police can seize, without a warrant, evid likely to disappear before a warrant can be obtained.
- (c) Contaminated food or drugs, persons injured or threatened with injury, and burning fires justify warrantless searches and seizures.

<u>Valid Warrantless Searches</u>			
Type of search	Need probable cause?	Requirement to be Contemporaneous?	Other limitations?
Search incident to constitutional arrest	Yes (for arrest)	Yes	Constitutional arrest
- search incident to incarceration (inventory search)	No	No	Established routine
Automobile exception	Yes	No	Containers – limited to those that could contain evid sought
Plain view	Yes (to believe item is evid)	Yes	Lawfully on premises; evid in plain view
Consent	No	Yes	Voluntary and intelligent consent; apparent authority to consent; cannot be against wishes of co-occupant who is present and objecting to search
Stop and frisk			
- stop	No	Yes	Reasonable and articulable suspicion of criminal activity
- frisk	No	Yes	Reasonable belief that person is armed; limited to pat down of outer clothing
Hot pursuit, evanescent evid	No	Yes	Emergency situation – no time to get a warrant

- (f) Searches of govt employees desks and file cabinets where the scope is reasonable and there is a work-related need or reasonable suspicion of work-related misconduct.
 - (g) Drug tests of railroad employees involved in an accident
 - (h) Drug tests of persons seeking customs employment in positions connected to drug interdiction
 - (i) Drug tests of public school students who participate in extracurricular activities
- (3) Public school searches
 - (a) Warrant or probable cause is not required for officials to search public school students or their possessions – only reasonable grounds are necessary. It will be held reasonable only if:
 - (i) It offers a moderate chance of finding evid of wrongdoing;
 - (ii) The measures adopted to carry out the search are reasonably related to the objectives of the search; and
 - (iii) The search is not excessively intrusive in light of the age and sex of the student and nature of the infraction.
- viii) **Searches in foreign countries and at the border**
 - (1) Foreign countries
 - (a) 4th amend does not apply to searches by govt officials in foreign countries and involving an alien (at least where alien has no substantial connection to US)
 - (i) I.e., 4th amend was held to not bar the use of evid obtained in a warrantless search of alien's home in Mexico.
 - (2) Border
 - (a) No warrant is necessary for searches at border.
 - (b) No one (including citizens) have 4th amend rights at the border.
 - (c) Roving patrols inside US border may stop cars for questioning if an officer reasonably suspects vehicle contains illegal aliens.
 - (d) Border officials may stop vehicle at a fixed checkpoint inside border for questioning of occupants and may disassemble vehicle even without reasonable suspicion.
 - (3) International mail
 - (a) Can be opened if authorities has reasonable cause to suspect mail contains contraband.
 - (4) Immigration
 - (a) Ok to do factory survey of work force to determine citizenship of employees.
 - (b) Illegally obtained evid (in violation of 4th amend) can be used in a civil deportation hearing.

- ix) **Wiretapping and eavesdropping**
 - (1) Wiretapping constitutes a search under 4th amend. Valid warrant authorizing it may be issued if:
 - (a) There is probable cause;
 - (b) Suspected persons involved in the conversations to be overheard are named;
 - (c) Warrant describes with particularity the conversations that can be overheard;
 - (d) Wiretap is limited to a short period of time;
 - (e) Wiretap is terminated when desired information is obtained; and
 - (f) Return is made to the court, showing what conversations have been intercepted.
 - (2) Exceptions
 - (a) Speaker has no 4th amend claim if he makes no attempt to keep a conversation private.
- e) Method of obtaining evid that shocks the conscious
 - i) Evid obtained in a manner offending a sense of justice is inadmissible under the Due Process clause.
 - ii) Reasonableness of searches within a person's body is determined by balancing society's need against the magnitude of the intrusion.
 - (1) Taking blood sample is usually upheld.
 - (2) Surgery requires great need.
 - (a) I.e., to remove a bullet
- 4) **Confessions**
 - a) Admissibility of def's confession involves analysis under 4th, 5th, 6th, and 14th amends.
 - b) **14th amend – voluntariness**
 - i) for self-incriminating statement to be admissible under the Due Process clause, it must be voluntary, as determined by the totality of the circumstances.
 - (1) Statement will be held involuntary only if there is some official compulsion.
 - (a) I.e., confession is not involuntary merely because it is the product of mental illness.
 - ii) If involuntary confession is admitted, harmless error test applies
 - (1) I.e., conviction need not be overturned if there is other overwhelming evid of guilt.

c) **6th amend right to counsel**

- i) Right to counsel guaranteed in all criminal proceedings after judicial proceedings have begun (formal charges filed).
 - (1) Prohibits police from deliberately eliciting an incriminating statement from def outside presence of counsel after def has been charged unless he has waived his right to counsel.
 - (2) Note: there can be no violation of 6th amend right to counsel before formal proceedings have begun. So def who is arrested but not yet charged does not have a right to counsel under 6th amend but does have a right to counsel under 5th amend Miranda.
- ii) Stages where right to counsel applies
 - (1) Custodial police interrogation
 - (2) Post-indictment interrogation
 - (3) Preliminary hearings to determine probable cause to prosecute
 - (4) Arraignment
 - (5) Post-charge lineups
 - (6) Guilty plea and sentencing
 - (7) Felony trials
 - (8) Misdemeanor trials when imprisonment is actually imposed or suspended jail sentence imposed
 - (9) Overnight recesses during trial
 - (10) Appeals as a matter of right
 - (11) Appeals of guilty pleas
- iii) Stages not applicable
 - (1) Blood sampling
 - (2) Handwriting or voice samples
 - (3) Pre-charge or investigative lineups
 - (4) Photo identifications
 - (5) Preliminary hearings to determine probable cause to detain
 - (6) Brief recesses during def's testimony at trial
 - (7) Discretionary appeals
 - (8) Parole and probation revocation proceedings
 - (9) Post-conviction proceedings
- iv) 6th amend right is **offense specific**
 - (1) So def's 6th amend right attach regarding the charge for which he is being held, he may be questioned about unrelated, uncharged offenses.
- v) **Waiver**
 - (1) Right to counsel can be waived.
 - (2) Waiver must be knowing, voluntary, and intelligent.
 - (3) Waiver does not need the presence of counsel, at least if counsel was appointed by the court.

vi) **Remedy**

- (1) At non-trial proceedings:
 - (a) Harmless error rule applies.
- (2) At trial:
 - (a) Failure to provide counsel results in automatic reversal of conviction.
 - (b) Erroneous disqualification of privately retained counsel results in automatic reversal.

vii) **Impeachment**

- (1) Statement obtained in violation of 6th amend right to counsel may be used to impeach def's contrary trial testimony.

d) **5th amend privilege against compelled self-incrimination**

i) **Miranda warnings**

- (1) For a confession to be admissible under 5th amend, person in custody must, prior to interrogation, be informed that:
 - (a) He has right to remain silent;
 - (b) Anything he says can be used against him in court of law;
 - (c) He has right to an attorney; and
 - (d) If he cannot afford an attorney, one will be appointed for him if he so desires.

(2) **When required**

- (a) Anyone in custody of govt and accused of crime must be given Miranda warnings prior to interrogation by police.
- (b) Govt conduct
 - (i) Miranda warnings necessary only if def knows he is being interrogated by a govt agent.
- (c) Custody
 - (i) Whether in custody depends on whether the person's freedom of action is denied in a significant way based on the objective circumstances.
 - 1. I.e., arrest = custody. Routine traffic stop is not custody.
- (d) Interrogation
 - (i) Includes any words/conduct by police that they should know would likely elicit a response from def.
 - (ii) So Miranda warnings are not required before a spontaneous statement made by def.
 - (iii) Routine booking questions are not interrogation.
- (e) Waiver
 - (i) Miranda rights can be waived but prosecution must prove it was knowing, voluntary, and intelligent.
- (f) Miranda applies to both inculpatory and exculpatory statements.
- (g) Miranda does not apply to a witness before a grand jury.

(3) Right to terminate interrogation

- (a) Terminate police interrogation at any time prior to or during interrogation by invoking either:
 - (i) The right to remain silent or
 - 1. If invoked, police must scrupulously honor and not badger accused.
 - 2. Allowed to later question accused on an unrelated crime.
 - (ii) The right to counsel.
 - 1. Must be unambiguously and specifically stated by def.
 - 2. All questioning must stop until:
 - a. Counsel is provided, unless
 - i. Counsel must be present during further interrogation.
 - b. Accused then waives his right to counsel.
 - i. I.e., by reinitiating questioning
- (b) Difference in what def asks:
 - (i) If def says he wants to remain silent, police may re-question him about a different crime after a break, if fresh warnings are given.
 - (ii) If def says he wants counsel, police may not question def until counsel is provided or def initiates questioning.

(4) Effect of violation

- (a) Generally, evid obtained in violation of Miranda is inadmissible under the exclusionary rule.
 - (i) Can be used to impeach def's trial testimony, but not as evid of guilt.
- (b) Warnings after confession
 - (i) If police get a confession with no Miranda, then give def Miranda warnings, and then get a subsequent confession:
 - 1. Subsequent confession will be inadmissible if this "question first, warn later" nature was intentional.
 - 2. May be admissible if failure to give Miranda was inadvertent.
- (c) Fruits of an unwarned confession
 - (i) If police fail to give Miranda warnings and suspect gives police information that leads to non-testimonial evid, evid will be suppressed if the failure was purposeful.
 - (ii) If failure was not purposeful, evid will probably not be suppressed.

(5) Public safety exception

- (a) Interrogation without Miranda has been allowed where it was reasonably prompted by a concern for public safety.
 - (i) I.e., to locate a hidden gun that could have caused injury to innocent people.

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Was def's statement voluntary?-----No-----Inadmissible
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Yes
|
Was def in custody when -----No-----Admissible unless def has already been charged
statement was made?              if so, there is a 6th amend right to counsel
|                                to all post-charge interrogations re: offense
Yes                               charged.
|
Was the statement made in
response to known police -----No-----Inadmissible
interrogation (any words or
conduct likely to elicit a
response)
|
Yes
|
Were Miranda warnings given?-----No----Inadmissible unless the interrogation was
|                                prompted by concern for public safety.
Yes
|
|--- If def invoked only right to remain silent and
|    police continued questioning, confession
|    inadmissible unless police scrupulously
|    honored by not badgering def and waiting
|    a significant time for questioning
Did def knowingly and voluntarily
waive both the right to remain -----No
silent and the right to an attorney?
|
|--- If def requested counsel, a confession in
|    response to further questioning without
|    counsel is inadmissible unless def
|    reinitiated questioning.
Yes
|
Admissible

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Note: if inadmissible confessions are erroneously admitted into evid, resulting conviction need not be reversed if admission is harmless error.

5) Pretrial identification

- a) Substantive bases for attack
 - i) **6th amend right to counsel**
 - (1) Right to counsel at any post-charge lineup.
 - (2) No right to counsel at photo identifications or handwriting samples or fingerprints.
 - ii) **Due process**
 - (1) Def can attack an identification as denying due process if the identification is unnecessarily suggestive and there is a substantial likelihood of misidentification.
 - iii) Def may not refuse to participate in a lineup based on 5th amend right against self-incrimination (since lineup is not testimonial evid).
- b) Remedy
 - i) If unconstitutional identification, remedy is exclusion of the in-court id.
 - ii) Independent source
 - (1) A witness may make an in-court id despite the existence of an unconstitutional pretrial id if the in-court id has an independent source.
 - (a) Most common – opportunity to observe at time of crime
 - iii) Hearing on admissibility of id evidence
 - (1) Should be determined by judge but exclusion of jury is not constitutionally required.
 - (2) Govt bears burden of proving that:
 - (a) Counsel was present
 - (b) Accused waived counsel, or
 - (c) There is an independent source for in-court id.
 - (3) Def must prove an alleged due process violation.

6) Pretrial procedures

- a) Preliminary hearing to determine probable cause to detain
 - i) Def liberty can be restricted only on a finding of probable cause.
 - ii) If probable cause has already been determined, this hearing is not needed.
 - (1) I.e., arrest was pursuant to a warrant or grand jury indictment
 - iii) If probable cause not determined and there are significant restraints on arrestee's liberty, this hearing must be held within a reasonable time (48 hours).
- b) Pretrial detention – bail
 - i) Most state constitutions create right to be released on bail unless the charge is a capital one.
 - ii) Bail generally can be set no higher than is necessary to assure def's appearance at trial.
 - iii) Refusal of bail or excessive bail is immediately appealable. But it has been upheld that no bail is ok if person poses danger or flight risk.

- iv) Exam tip – 8th amend right to bail has never been applied to the states, so it is not a good argument against a state's denial of bail.
 - (1) However, if a state provides for bail, arbitrary denials will violate Due Process.
 - v) Standards for commitment and release of def incompetent to stand trial must be identical with those for commitment of persons not charged with a crime – otherwise, denial of equal protection.
- c) Grand juries
- i) 5th amend right to indictment by grand jury has not been incorporated into 14th amend. Some state constitutions require it.
 - ii) Proceedings
 - (1) Conducted in secret.
 - (2) Def has no right to notice that grand jury is considering an indictment, to be present and confront witnesses at the proceeding, or to introduce evid before the grand jury.
 - (3) Witness subpoenaed to testify
 - (a) Does not have a right to receive Miranda warnings.
 - (b) Not entitled to a warning that he is a potential def when called to testify before the grand jury.
 - (c) Witnesses have no right to have an atty present.
 - (4) No right to have evid excluded
 - (a) Grand jury may base its indictment on evid that would be inadmissible at trial.
 - (5) On exam, for MBE, keep differences between grand jury proceedings and criminal trials:
 - (a) The def – or grand jury witness – has no right to have counsel present during his grand jury testimony;
 - (b) Grand jury can consider evid that would be excluded at criminal trial; and
 - (c) The def – or grand jury witness – must appear if called, although he can refuse to answer specific questions on grounds that they may incriminate him.
 - (6) No right to challenge subpoena on 4th amend grounds that grand jury lacked probable cause, or for any reason at all, to call a witness for questioning.
 - (7) Exclusion of minorities
 - (a) Conviction resulting from an indictment by a grand jury where minorities were excluded will be reversed without regard to harmless error.
 - (b) This is the only defect sufficient to quash a grand jury indictment.

d) Speedy trial

- i) Whether a def's 6th amend right to a speedy trial has been violated – look at totality of the circumstances. Factors:
 - (1) Length of delay
 - (2) Reason for delay
 - (3) Whether def asserted his right
 - (4) Prejudice to def
- ii) Remedy – dismissal with prejudice
- iii) When right attaches
 - (1) Right to speedy trial does not attach until def has been arrested or charged.
 - (a) Def need not know of the charges for speedy trial rights to attach.
 - (2) If def is charged and incarcerated in another jx, reasonable efforts must be used to obtain presence of def.
 - (3) It is violation of right to speedy trial to indefinitely suspend charges.

e) Prosecutorial duty to disclose exculpatory info and notice of defenses

- i) Govt has duty to disclose material, exculpatory evid to def.
 - (1) Failure to disclose, whether willful or inadvertent, violates the Due Process clause.
 - (2) It is grounds for reversing conviction if def can prove:
 - (a) Evid is favorable to him because either impeaches or is exculpatory; and
 - (b) Prejudice has resulted.
 - (i) There is a reasonable probability that the result of the case would have been different if undisclosed evid was presented at trial.
- ii) Def must notify prosecution if he is going to use an alibi or insanity defense.
 - (1) If alibi, def must provide a list of witnesses. Prosecution must give def list of witnesses who will rebut.
 - (2) Prosecutor may not comment on lack of producing a witness or failure to present alibi.

f) Competency to stand trial

- i) Distinguished from insanity
 - (1) Insanity
 - (a) A defense based on def's mental condition at time crime was committed.
 - (b) Def acquitted for insanity may not be retried.
 - (2) Incompetency to stand trial
 - (a) Not a defense to a charge but is a bar to trial.
 - (b) Based on def's mental condition at time of trial.
 - (c) If def later regains competency, he can then be tried and convicted.

- ii) Standard
 - (1) Def is incompetent to stand trial if he:
 - (a) Lacks a rational as well as factual understanding of the charges and proceedings, or
 - (b) Lacks sufficient present ability to consult with atty with a reasonable degree of understanding.
 - (2) Def has burden of showing incompetence by preponderance of evid.
- 7) **Trial**
- a) Right to a fair trial
 - i) **Right to a public trial**
 - (1) 6th and 14th amends guarantee right to a public trial (and pretrial proceedings).
 - (a) Press and public have 1st amend right to attend the trial, even when parties agree to close it.
 - ii) **Right to an unbiased judge**
 - (1) Due process is violated if judge is shown to have:
 - (a) Actual malice against def, or
 - (b) A financial interest in a guilty verdict.
 - iii) Must judge be lawyer?
 - (1) Minor misdo:
 - (a) Def has no right to have trial judge be a atty if upon conviction, def has right to trial de novo in court with atty-judge.
 - (2) Serious crimes:
 - (a) Judge must be lawyer-trained.
 - iv) Due Process is violated if:
 - (1) Trial is conducted in way making it unlikely that the jury gave the evid reasonable consideration.
 - (2) State compels def to stand trial in prison clothing.
 - (3) State compels def to stand trial or appear in penalty phase visibly shackled, unless there are concerns about courtroom safety.
 - (4) Jury is exposed to influence favorable to the prosecution.
 - b) **Right to trial by jury**
 - i) Only for serious offenses.
 - (1) No constitutional right to jury trial for petty offenses or juvenile delinquency proceedings.
 - (2) Serious offense = imprisonment for more than 6 months.

- ii) Contempt proceedings.
 - (1) No right to jury for civil contempt proceedings.
 - (2) For criminal contempt, if cumulative penalties more than 6 months, need jury trial.
 - (a) If judge imposes punishment for contempt during trial, penalties can be more than 6 months without a jury.
- iii) Probation
 - (1) Def can be placed on probation for up to 5 years without a jury, as long as revocation of probation would not result in imprisonment of more than 6 months.
- iv) Jurors
 - (1) Does not need to be 12, but there must be at least 6 to satisfy this right.
 - (2) Less than unanimous have been upheld, but probably would not approve an 8-4 vote for conviction.
 - (3) 6 person juries must be unanimous.
- v) Cross-section of community
 - (1) Def has right to have jury selected from representative cross-section of the community
 - (a) Def need only show the under-representation of a distinct and numerically significant group in the venire to show his jury trial right was violated.
 - (b) No right to proportional representation in his particular jury.
 - (2) Peremptory challenges
 - (a) Equal protection clause forbids use of peremptory challenges to exclude jurors solely on their race or gender.
 - (b) To challenge this:
 - (i) Def must show facts or circumstances that raise an inference that exclusion was based on race or gender.
 - (ii) Upon showing, prosecutor must have a race-neutral explanation for the strike.
 - 1. An unreasonable explanation is sufficient, as long as race-neutral.
 - (iii) Judge then determines whether reason is genuine or pretext for purposeful discrimination.
 - 1. If judge believes prosecutor was sincere, strike may be upheld.

vi) Right to impartial jury

- (1) Def has right to question jurors on racial prejudice when race is part of case.
- (2) Death penalty
 - (a) Opposing it
 - (i) State may not automatically exclude for cause all jurors who have doubts about the death penalty.
 1. It must be that juror's view would impair juror's performance of duties.
 2. Death sentence imposed by jury from which juror was improperly excluded is subject to automatic reversal.
 - (b) For it
 - (i) Def is allowed to ask if juror would automatically give death penalty upon guilty verdict.
 1. Juror who says yes must be excluded for cause.
 - (3) If court refuses to exclude juror for cause, who should be excluded, and def has to use a peremptory challenge, there is no constitutional violation.

vii) Inconsistent verdicts are not reviewable.

- (1) I.e., def found guilty, co-def found not guilty, on same evid.

viii) Sentence enhancement

- (1) If law says sentence can be increased if additional facts are proven, proof of facts must be submitted to a jury and proven beyond a reasonable doubt.
 - (a) Def's right to jury trial is violated if judge decides.
- (2) Judges are allowed to decide whether sentences are to run concurrently or consecutively.

c) **Right to counsel**

- i) Violation of this right at trial requires reversal.
 - (1) For nontrial denials, harmless error is applied.
 - (2) On exam – remember that right to counsel is available in misdo cases only if imprisonment is actually imposed.
 - (a) So if a nonfelony is involved and def asks for counsel, is denied, and is convicted, whether the right to counsel has been violated depends on his sentence. If no imprisonment, right not violated. If sent to prison, right was violated.
- ii) Right to defend oneself
 - (1) Judge decides whether def can defend himself, if def's waiver is knowing and intelligent and based on consideration of def's emotional and psychological state, he is competent to so proceed.
 - (a) Def has no right to self-representation on appeal.

iii) **Effective assistance of counsel**

- (1) 6th amend right. Also extends to 1st appeal.
- (2) Effective counsel is generally presumed.
- (3) To show ineffective assistance of counsel, must show:
 - (a) Deficient performance by counsel; and
 - (i) Must be specific – not just lack of time to prepare, complexity of charges or defenses, or accessibility of witnesses.
 - (ii) Trial tactics and failure to raise a constitutional defense that is later invalidated is not ineffective assistance.
 - (b) But for the deficiency, the result of the proceeding would have been different.
- (4) Conflicts of interest.
 - (a) If atty advises court of conflict at or before trial and court refuses to appoint separate counsel, def is entitled to automatic reversal.
 - (b) Def's conflict with his atty is rarely grounds for relief.
 - (c) There is no right to be jointly represented with co-def.
- (5) If def is going to use insanity def, state must provide a psychiatrist for preparation of the defense.
- (6) Right to counsel does not prohibit seizure of money/property even if def was going to use it to pay atty.

d) **Right to confront witnesses**

- i) 6th amend provides right to confront adverse witnesses.
 - (1) Def can choose to voluntarily leave.
- ii) Face to face confrontation not required when preventing it serves an important public purpose.
 - (1) I.e., protecting child witness from trauma.

iii) Co-def's confession

- (1) If 2 people are tried together and 1 gave confession that implicates the other, right of confrontation prohibits use of that statement.
- (2) Such a statement may be used if:
 - (a) All portions referring to other co-def can be eliminated;
 - (b) The confessing def takes the stand and subjects himself to cross-exam;
or
 - (c) The confession of the nontestifying co-def is being used to rebut the def's claim that his confession was obtained coercively.

- iv) Prior testimonial statement of unavailable witness
 - (1) Under confrontation clause, prior testimonial evid (statements made at prior judicial proceedings) may not be admitted unless:
 - (a) Declarant is unavailable; and
 - (b) Def has an opportunity to cross-examine declarant at time statement was made.
 - (2) Testimonial = statements from preliminary hearing, grand jury hearing, former trial.
 - (a) Includes police interrogation conducted to establish past acts. But if statements were intended to aid police in responding to an ongoing emergency, these are not testimonial.
 - (3) Results of forensic lab testing are testimonial.
 - (a) So lab report is not admissible under confrontation clause unless technician who produced the report is unavailable and def had a chance to cross-examine him.
 - (4) Def can forfeit this right by wrongdoing that was intended to keep the witness from testifying.
- e) **Burdens of proof**
 - i) Due process clause requires that the state prove guilt beyond a reasonable doubt.
 - ii) Burden of proof may be imposed on def for an affirmative defense, like insanity or self-defense.
- 8) **Guilty pleas and plea bargaining**
 - a) **Taking the plea**
 - i) Plea must be voluntary and intelligent.
 - (1) Court must determine this by addressing def personally in open and on the record. Judge must see that def knows/understands:
 - (a) Nature of charge and crucial elements of crime charged;
 - (b) Maximum and minimum penalties; and
 - (c) He has right not to plead guilty and by pleading guilty, he waives right to a jury trial.
 - (2) Plea is not involuntary because it was entered in response to prosecution's threat to charge a more serious crime if not accepted.
 - b) Collateral attacks on guilty plea after sentence
 - i) Plea can be set aside for:
 - (1) Involuntariness
 - (2) Lack of jx
 - (3) Ineffective assistance of counsel
 - (4) Failure to keep the plea bargain

- c) Plea bargain
 - i) Enforced against both parties, but not the judge, who does not have to accept the deal.
- d) Guilty plea does not admit legality of incriminating evid and does not waive 4th amend claims in a subsequent civil damages action.

9) **Rights regarding sentencing and punishment**

- a) Procedural rights in sentencing
 - i) Def has right to counsel during sentencing.
 - ii) Sentence can be based on hearsay and uncross-examined reports.
 - (1) Def has no right to confrontation or cross-examination.
- b) Resentencing after appeal and reconviction
 - i) If greater punishment is imposed in second trial, judge must set forth the reasons for the harsher sentence.
 - (1) Ensures that def is not being punished for appealing.
- c) Substantive rights in punishment
 - i) 8th amend prohibits cruel and unusual punishment.
 - (1) Penalty grossly disproportionate to seriousness of offense is cruel and unusual.
 - ii) Death penalty
 - (1) Can only be imposed for murder only under statute that gives judge or jury reasonable discretion, full info on def, and guidance in making the decision.
 - (a) Must allow consideration of all mitigating evid.
 - (2) If based on aggravating factor of def's prior conviction, sentenced must be reversed if prior conviction is invalidated.
 - (3) 8th amend prohibits death penalty for:
 - (a) Rape if death was neither the intended result nor the actual result.
 - (b) Felony murder unless def's participation was major and he acted with reckless indifference to life.
 - (c) Def who is insane at time crime was committed or mentally retarded.
 - (d) Def under age of 18 when crime was committed.
 - iii) Judge can consider whether he believes if def perjure himself while testifying in determining a sentence.

10) **Constitutional problems on appeal**

- a) There is no federal constitutional right to an appeal.
- b) Right to counsel extends to first appeal.

11) Collateral attack upon conviction

- a) Still an avenue if appeal has proven unsuccessful
- b) Habeas corpus proceeding
 - i) No right to have counsel appointed during this.
 - ii) Def has burden of proof by preponderance of the evid to show an unlawful detention.

12) Rights during punishment

- a) Prisoner's rights – rarely appear on exam. Important rules:
 - i) Due process impinged only if prison regulations impose atypical and significant hardship in relation to the ordinary incidents of prison life.
 - ii) No 4th amend right in cells – no reasonable expectation of privacy.
 - iii) Prisoners must be given reasonable access to courts.
 - iv) 1st amend rights may be burdened by regulations reasonably related to penological interests.
 - (1) Incoming mail can be broadly regulated, but outgoing mail generally not.
 - v) Right to adequate medical care under 8th amend.
- b) Def convicted of felony can be prevented from voting and this can continue beyond term.

13) Double jeopardy

- a) When attaches
 - i) Under 5th amend, person may not be retried for same offense.
 - ii) Attaches at jury trial at the empaneling and searing of the jury. Or in bench trial, when first witness is sworn.
 - iii) Commencement of juvenile proceeding bars subsequent criminal trial for same offense.
- b) Exceptions permitting retrial:
 - i) When 1st trial ends in a hung jury.
 - ii) When there is manifest necessity to discontinue the 1st trial or when termination occurs at request of def on any grounds not acquittal.
 - iii) When def has successfully appealed a conviction, unless ground for reversal was insufficient evid to support guilty verdict.
 - (1) Retrial is allowed when reversal is based on weight of evid.
 - (2) On retrial, def may not be charged for a greater offense. Though a harsher sentence may be imposed (though not death penalty, if that was not sentence in first trial).
 - iv) When def breaches the plea bargain.

- c) Same offense
 - i) General rule – 2 crimes are same offense unless each crime requires proof of an additional element that the other does not require, even though same facts may be necessary to prove both.
 - ii) Multiple punishments are allowed if there was legislative intent to have cumulative punishments.
 - (1) Def can be sentenced for both robbery and using a weapon during commission of crime.

Same offense under Double Jeopardy clause

Is def charged with 2 crimes based on same conduct?-----	No-----
Yes	
Did legislature clearly intend to allow conviction	
Of both crimes based on the same conduct?-----	Yes clearly-----
	Double jeopardy
	prohibition <u>not</u>
	<u>violated</u>
No, intent is unclear	
Does each crime require proof of an additional-----	Yes-----
fact that the other does not?	
No	
Double jeopardy prohibition <u>violated</u>	

- iii) Lesser included offenses
 - (1) Attachment of jeopardy for a greater offense bars retrial for lesser included offenses.
 - (a) Vice versa, with exception that retrial for murder is allowed if victim dies after attachment of jeopardy for battery.
 - (2) Exception – new evid
 - (a) If unlawful conduct that is subsequently used to prove the greater offense:
 - (i) Has not occurred at time for prosecution for lesser crime, or
 - (ii) Has not been discovered despite due diligence.
- iv) Double jeopardy is not violated when def is indicted for crime the conduct of which as already used to enhance def's sentence for another crime.

- v) Double jeopardy only applies to criminal prosecutions.
 - (1) Civil action can be brought after the criminal trial.
- d) Double jeopardy does not apply to trials by separate states, or fed and state.
 - i) Attachment does not matter when there are 2 separate sovereigns. They can try def for same offense.
 - ii) But state and municipality cannot try def for same offense.
- e) Prosecution can appeal any dismissal on def's motion that is not an acquittal on the merits.
- f) Collateral estoppel – def may not be tried or convicted of a crime if prior prosecution resulted in a factual determination inconsistent with one required for conviction.

14) **Privilege against compelled self-incrimination**

- a) Asserted by people, not corps. It is personal to person who may be incriminated.
- b) Person may refuse to answer a question whenever his response may furnish a link in the chain of evid needed to prosecute him.
 - i) Must be claimed in civil proceeding to prevent it from being waived in criminal proceeding.
- c) Method for invoking
 - i) Criminal def has right not to take the stand.
 - ii) But other witnesses, privilege does not prevent them from being sworn in or asked questions.
 - (1) Person must listen to the question and invoke privilege rather than answer.
- d) Scope
 - i) 5th amend privilege does not protect physical evid, only testimonial or communicative evid.
 - (1) To be testimonial, it must relate to a factual assertion or disclose information.
 - (2) No self-incrimination objection to a lineup or other id procedure, even if asked to say certain words.
 - ii) Only compelled testimony evid is privileged.
 - iii) Act of producing documents does not involve self-incrimination.
 - iv) Violation does not occur until a person's compelled statements are used against him in a criminal case.
- e) Prosecutor cannot comment of def's silence after being arrested and given Miranda warnings, or failure to testify at trial.
 - i) Prosecutor can say this if def's atty says that def was not allowed to tell his side of the story.
 - ii) Judge can instruct jury to not draw any inference from def's failure to testify.

- f) Grant of immunity
 - i) Witness can be compelled to testify if granted immunity from prosecution.
 - ii) Use and derivative use immunity guarantees that testimony and evid will not be used against witness.
 - (1) Witness can still be prosecuted if prosecutor shows that evid used against witness was derived independently from the immunized testimony.
 - iii) Immunized testimony my not be used as impeachment of def's trial testimony.
 - (1) But can be used in trial for perjury.

15) Juvenile court proceedings

- a) Rights that must be given to child:
 - i) Written notice of charges
 - ii) Assistance of counsel
 - iii) Opportunity to confront and cross-examine witnesses
 - iv) Right not to testify
 - v) Right to have guilty established by proof beyond a reasonable doubt.
- b) No right to trial by jury.

16) Forfeiture actions

- a) Can be brought directly against property and are regarded as quasi-criminal in nature.
- b) Owner of personal property is not constitutionally entitled to notice and hearing before property is seized.
 - i) A hearing is required before final forfeiture.
- c) Owner of real property is entitled to notice and an opportunity to be heard before seizure, unless govt can prove exigent circumstances.
- d) May be subject to 8th amend.
 - i) Excessive fines clause of 8th amend applies only to punishment fines, not civil fines.
 - ii) So penal forfeitures are subject to 8th amend. But will not be excessive unless grossly disproportionate to the gravity of the offense.
- e) Innocent owner defense is not required by due process clause, where innocent owner voluntarily entrusted the property to the wrongdoer.
 - i) I.e., defense that owner took all reasonable steps to avoid property being used by another for criminal purposes.