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Criminal Procedure Outline:

I. Exclusionary rule
   a. Where someone has been a victim of illegal search or coerced statement, the remedy is to exclude that from a criminal proceeding
   b. in general -- scope of rule
   c. limitations to exclusionary rule:
      i. inapplicable to grand juries,
         1. grand jury witness may be compelled to testify based on illegal evidence
      ii. inapplicable to civil proceedings,
      iii. in order to qualify for exclusion, search must violate either federal constitution or statute
      iv. internal agency rules, and parole revocation proceedings
      v. Defense to exclusionary rule: **good faith reliance** on
         1. judicial opinion later changed by another judicial opinion
         2. statute or ordinance later declared unconstitutional
         3. a defective search warrant
            a. Exception to reliance on defective search warrant:
               i. Cops don't get benefit of defense if affidavit so lacks probable cause that no reasonable cop would rely on it
               ii. Warrant is invalid on its face
               iii. Affiant (ie, cop) lied to or misled the magistrate
               iv. Magistrate "wholly abandoned his judicial role"
      vi. use of any and all illegally seized evidence for *impeachment* purposes
         1. only D's trial testimony may be impeached with this excluded evidence
      vii. *Miranda* violations
         1. confessions obtained in violation of *Miranda* may be used against D to impeach D if D testifies
   d. Harmless error test
      i. If illegal evidence admitted, conviction should be overturned on appeal unless govt can show BRD that error was harmless
   e. *Fruit of the Poisonous Tree*
      i. Exclude all evidence derived from illegally obtained evidence
      ii. Does NOT apply when original police illegality was a *Miranda* violation or where violation of *knock and announce* rule
      iii. Breaking the chain from illegal evidence to other evidence
         1. independent source
         2. inevitable discovery

3. intervening acts of D's freewill

II. Fourth Amendment
   a. Definitions:
      i. Seizure: reasonable person would believe he is not free to leave or terminate encounter with govt
      ii. Arrest: police take person into custody against will for purposes of criminal prosecution or interrogation
   b. Warrant requirements:
      i. Not required for arrest in public place
      ii. Required for non-emergency arrest in D's own home
   c. arrests and other detentions
      i. Station house Detention
         1. cops need PC[1] to arrest you to bring you to station house for
            a. interrogation; or
            b. fingerprinting
   d. evidentiary search and seizure [HUGE]
      i. see p. 5 flow chart on Conviser
      ii. Requirements for having a 4th Amend claim:
         1. governmental conduct
         2. reasonable expectation of privacy
         3. if 1 and 2 met, then did police have a search warrant?
            a. Test validity of warrant
            b. If invalid, try to save evidence by good faith defense
            c. If no good faith, fit it into one of the exceptions?
   e. Breaking down the flowchart:
      i. Governmental conduct: who?
         1. publicly paid police
         2. private individual acting at the direction of public police
         3. private paid police ONLY IF deputized with power to arrest
      ii. D has a reasonable expectation of privacy
         1. must have **standing** to object;
            a. <u>automatic</u> categories of standing:
               i. own or right to possession of the premises searched
               ii. live on premises searched
               iii. overnight guests
            b. <u>sometimes</u> have standing:
               i. legitimately present when search takes place (eg, *passengers in cars*)[2]
               ii. own the property seized
         2. no REP of something held out to the public:
            a. sound of voice
            b. style of handwriting

[1] Trustworthy facts or knowledge sufficient for a reasonable person to believe that the suspect has committed or is committing a crime

[2] *Drug dealer's brief presence* for a business purpose, such as cutting up drugs, has no standing to object to search of premises

c. paint on outside of car
d. account records held by bank
e. location of one's vehicle on public roads OR in your driveway
f. areas outside curtilage of home
g. anything seen by looking across open field or flying over in public airspace
h. odors in luggage (sniff test)
i. garbage on curb for collection

iii. Did police have a search warrant?
1. usually told you in the question

iv. Test validity of the warrant :
1. must **have PC** for warrant:
a. can rely on hearsay for PC
b. use of informers:
i. **RULE**: valid warrant based in part on informer's tip even though informer is anonymous so long as TOC in affidavit can permit magistrate make a "common sense evaluation of PC"
2. warrant must be **precise on its face**
a. must state with particularity:
i. place to be searched
ii. things to be seized
3. issued by a **neutral and detached judicial officer**
a. ie, neutral from law enforcement:
i. court clerks
b. if not neutral, can't save evidence using good faith defense ('wholly abandoned judicial role")

v. if warrant is bad, use good faith defense to try and save evidence

vi. if good faith defense fails or cops never had a warrant at all, then try to fit search into the <u>6 exceptions to warrant req</u>:
1. search incident to lawful arrest
a. arrest must be lawful
b. search must be contemporaneous in time and place with arrest
c. can only search person and "<u>grab area</u>" (wingspan)
i. wingspan includes entire interior compartment of the car, but NOT the trunk
d. [also includes inventory search incident to incarceration, so long as searches done as routine booking, no PC needed]
2. automobile exception
a. **need PC** (can arise after stop of car but *before* anything or anybody is searched)
b. if PC, can search entire car (inc. trunk) and any container that *could reasonably contain* item for which they have PC to search

3. plain view
    a. cop is *legitimately present* at place of viewing;
    b. evidence in plain view; and
    c. have PC to believe the item is evidence, fruit, or instrumentality of a crime [ie, it must be immediately obvious]
4. consent
    a. voluntary and intelligent
        i. cops saying they have a warrant *negates* consent
        ii. cops don't need to warn you that you have a right NOT to consent
    b. authority to consent
        i. **RULE:** where two or more people have an equal right to use a piece of property, either can consent
        ii. BUT, if search directed at co-occupant and co-occupant is present and objects, then occupant can't give a valid consent
5. stop and frisk
    a. articulable and reasonable suspicion (**RS** is less than PC)
    b. frisk only if reasonable belief that person stopped has weapon
        i. weapons are always admissible if stop based on RS
        ii. non-weapons admitted if could seem like a weapon from a "plain feel"
6. hot pursuit, evanescent evidence
    a. hot pursuit of fleeing felon
        i. cops can enter <u>anyone's home</u> without a warrant and seize any illegal material found

f. wiretapping and eavesdropping
    i. all requires a warrant and limited in duration, EXCEPT
        1. everyone assumes the risk that person to whom one is speaking with either consent to govt monitoring or will be wired ("unreliable ear")

III. *Miranda*
    a. Constitutional prerequisites
        i. Remain silent
        ii. Say can be used against you
        iii. Right to attorney (appointed if poor)
        iv. Can terminate interview any time
    b. *Miranda* reqs
        i. Must be **custody**
            1. ie, not free to leave (jail, own home, hospital bed)
            2. probation interviews and routine traffic stops are NOT custodial
        ii. And **interrogation**

            1. ie, more than mere questions, but is any conduct that police knew or should have known that they would elicit a response or a damaging statement
        iii. Once we have custody and interrogation, then cops must give warnings and take a *Miranda* waiver:
            1. waiver must be knowing, intelligent, and voluntary
            2. NB: can be no waiver from silence or shoulder-shrugging
    c. Miranda warning NOT required to admit a <u>spontaneous statement</u> ("blurt")
    d. Fifth Amend Right to Counsel
        i. If D refuses questioning and requests counsel, **reinitiation** of interrogation by police without attorney present violates the 5th Amend right to counsel
        ii. In effect, D says: "I need help of attorney to deal with custodial interrogation."
        iii. Therefore, 5th Amend right to attorney is <u>NOT offense-specific</u>
        iv. NB: if D simply wishes to remain silent but doesn't request atty, then cops may later initate questioning on an unrelated crime

IV. Sixth Amend Right to Counsel
    a. Ie, use of counsel at any time other than with *Miranda* rights
    b. 6th Amend right is <u>offense-specific</u> and attaches after judicial proceedings have begun (eg, once formal charges have been filed)

V. Pre-Trial Identification
    a. Attacking pre-trial id
        i. Denial of 6th Amend right to counsel[3]
            1. **post-charge** line ups and show ups give rise to right to counsel
            2. <u>no right to counsel at showing of photographs, handwriting or voice exemplars, etc</u>
        ii. Denial of due process
            1. unnecessary, suggestive, and substantially likely to produce a misidentification (eg, suspect white, only one white person in lineup)
    b. Remedy
        i. Exclude <u>in-court</u> identification, but, state can defeat remedy if
            1. it shows *independent source* to support in-court identification
                a. esp: ample opportunity to observe D during commission of the crime

VI. Pre-Trial Issues
    a. Bail
        i. Bail issues are immediately appealable
        ii. Preventive detention is consitutional
    b. Grand Juries
        i. States do NOT have to use grand juries
            1. western states use informations
        ii. exclusionary rule does not apply

[3] NB: evidence of a prior identification upon perceiving a suspect is NONHEARSAY if the declarant testifies at trial and is subject to cross examination

            1. ie, GJ witness can be compelled to testify on illegally seized evidence
        iii. proceedings of GJ's are secret
            1. no right to appear or send witnesses
        iv. Exclusion of Minorities from GJ
            1. about the only defect sufficient to quash a GJ indictment
    c. Exculpatory evidence
        i. Prosecutor must disclose to D, or else DP violation where prejudice results from lack of disclosure
    d. Defendant
        i. Must disclose alibi witnesses
        ii. Must be competent to stand trial (if not, can be tried when regains competency)

VII. Trials
    a. Right to public trial
    b. Right to an unbiased judge
        i. Bias means
            1. financial interest in outcome
            2. actual malice against D
    c. Right to Jury Trial
        i. When does it attach?
            1. where max sentence for crime **exceeds 6 months**
        ii. Contempt
            1. if sum of sentences from criminal contempt exceeds 6 months, then alleged contemnor can go back and have a jury trial
        iii. Number/Unanimity of Jurors
            1. min number is 6 (must be unanimous)
            2. no federal right to unanimous 12-person jury
        iv. Cross-sectional Requirement
            1. D has right to have county jury pool to reflect a fair cross-section of county, BUT
            2. D's own jury does not have to reflect the cross-section
        v. Peremptory challenges
            1. racial and gender based discrimination
            2. RULE: unconsitutional for prosecutor or defense to use peremptory challenges to exclude jurors on account of race or gender
                a. If issue, burden-shifting test applies
    d. Right to counsel
        i. Only where imprisonment actually imposed
        ii. Ineffective Assistance of Counsel [essay topic]
            1. Must show:
                a. deficient performance by counsel
                b. but for such deficiency, the result would have been different
            2. Unless have argument that D was innocent,

a. D should be denied relief

e. Right to confront witnesses (6th Amend)
   i. co-D's confession cannot be admitted unless:
      1. portions referring to other D eliminated;
      2. confessing D takes stand to be confronted; or
      3. used only to rebut D's assertion that his confession obtained coercively
   ii. prior testimonial statements of an unavailable witness
      1. only admitted if D had an opportunity to cross-examine the declarant at the time the statement was made

VIII. Guilty pleas and plea bargaining
   a. Guilty pleas are waivers of right to jury trial
   b. General **RULE:** Supreme court will not disturb guilty pleas after sentence. But, EXCEPTIONS:
      i. plea was **involuntary**;
      ii. court **lacked jurisdiction**;
      iii. **ineffective assistance** of counsel; or
      iv. **failure of prosecutor to keep plea bargain**[4]
   c. Supreme court has adopted contract theory of plea bargaining
      i. terms should be on the record, and
      ii. both sides should be held to terms of the agreement
   d. For a judge to accept the guilty plea, he **must talk to D** *on the record* about:
      i. the nature of the charge (can be explained to D by attorney)
      ii. maximum authorized sentence and any mandatory minimum
      iii. tell D he has a right to plead not guilty and demand a jury trial
   e. Remedy for mistake in guilty plea:
      i. D can withdraw plea and plead again

IX. Sentencing
   a. General **RULE**: D cannot be given a harsher sentence on retrial after a successful appeal
   b. D has right to counsel during sentencing

X. Death Penalty [recite these sentences on an essay test]
   a. Any death penalty statute that does not give D a chance to present mitigating facts and circumstances is unconstitutional.
   b. There can be no automatic category for imposition of the death penalty.
   c. The state may not, by statute, limit the mitigating factors; all *relevant* mitigating evidence must be admissible or the statute is unconstitutional.
   d. Only a jury, and not a judge, may determine the aggravating factors justifying imposition of the death penalty.
   e. Death penalty and 8th Amend bar against cruel and unusual punishment:
      i. Cannot be imposed for rape
      ii. People who are mentally retarded or insane *at the time of execution* cannot be executed
      iii. Persons under 18 at time of crime cannot be executed

XI. Rights of prisoners

[4] Prof thinks this is the bar exam question; ie, breach of contract issue

a. No 4th Amend rights in cell
b. DP only violated if prison regulations impose "atypical and significant hardship" on ordinary prison life
c. Where legitimate penological interests exist, prisons may impose speech regulations (eg, search all incoming mail, but not outgoing)

XII. Double Jeopardy
a. When does jeopardy attach?
    i. At a jury trial when the jury is empaneled and sworn in
    ii. At a bench trial when the first witness is sworn
    iii. Jeopardy <u>does not attach</u> when proceedings are *civil*.
b. EXCEPTIONS permitting retrial:
    i. Jury is unable to agree on a verdict (must be unanimous either way in most states); ie, hung jury
    ii. Mistrial for manifest necessity (eg, D gets appendicitis)
    iii. Retrial after successful appeal
    iv. Breach of plea bargain by D
        1. original plea and sentence can be vacated
c. What constitutes the same offense?
    i. **RULE**: Two crimes do not constitute the same offense when each crime requires proof of an additional element the other does not.
    ii. <u>Lesser included offenses:</u>
        1. when put in jeopardy for either offense, retrial of other offense is barred, EXCEPT
        2. if in **jeopardy for battery** and victim later dies, CAN be tried for murder
d. Separate sovereigns exception
    i. Double jeopardy does not attach; can be tried by both sovereigns
    ii. NB: state and locality/municipality inside state are same sovereign

XIII. 5th Amend Privilege against Compelled Self-Incrimination
a. when asserted?
    i. asserted by anyone while under oath if response might tend to incriminate them
        1. NB: failure to assert first time question is asked in non-criminal, then it's a waiver for all subsequent criminal proceedings.
    ii. asserted in any case (inc, civil, administrative, etc)
b. scope of the protection
    i. does not protect use of body parts or documents for evidence
    ii. only **protects against compelled testimony**;
        1. lie detector test
        2. custodial police interrogation
    iii. unconstitutional for prosecutor to make a *negative comment* on D's failure to testify or remaining silent upon hearing *Miranda* warning
c. Elimination of the 5th Amend privilege
    i. Granting of immunity
        1. use and derivative use: can't use testimony against testifier (but can still prosecute using other evidence)

ii. No possibility of incrimination
    1. eg, SOL has run on crime
iii. Waiver

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