



CRIMINAL PROCEDURE ESSAY WORKSHOP
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CHAPTER 1: SUMMARY OF ISSUES; SUBSTANTIVE LAW

Editor's Note 1: The Professor refers to specific page numbers throughout this lecture. The content does not always match these references due to formatting changes.

A. Summary of Issues Tested

1. 4th Amendment

- Government conduct/State Action
- Reasonable expectation of privacy—as to place searched and items seized
- Seizure of Persons
- Search/Seizure
- Warrant requirement
- Exceptions to warrantless search
 - Stop and frisk
 - Search incident to lawful arrest
 - Automobile exception
 - Plain view
 - Exigent circumstances
 - Consent
- Exclusionary rule—Fruit of the poisonous tree & Exceptions

2. 5th Amendment

Miranda Rights – Custodial Interrogation

3. 6th Amendment

Right to Counsel

4. Due Process Clause, 14th Amendment & 5th Amendment

Line-ups

5. Additional Issues

- Confrontation Clause
- Guilty Plea – Procedural Requirements
- Right to Discharge Attorney & Substitute a New Attorney

- Right to Represent Oneself
- Right to a Separate Trial from Co-defendant
- Right to a Speedy Trial
- Right to Testify at Trial

B. Substantive Issues

Themis Templates

4th Amendment (Search and / Seizure)

The 4th Amendment prohibits unreasonable searches and seizures. In order to assert a 4th Amendment violation, a defendant must demonstrate government conduct and that he had a reasonable expectation of privacy.

Exam Tip 1: Be sure to address government conduct and reasonable expectation of privacy in separate paragraphs.

Government Conduct

To demonstrate government conduct, the defendant must prove that the government or police were involved in the unreasonable search and seizure.

FACTS from exam:

Reasonable Expectation of Privacy (REP)

Defendant must also prove that he has a REP as to the places searched and items seized by the government.

FACTS from exam:

Exam Tip 2: Many fact patterns involve a seizure (stop) of a defendant that is then followed by a search and seizure of items. Be sure to discuss whether the seizure (stop) of the defendant was appropriate first. Then, discuss the search and seizure of items.

Seizure of a Person

A seizure occurs if under the totality of circumstances, a reasonable person would not feel free to leave. Types of seizure include arrest, stop and frisk, police checkpoints, and traffic stops.

Arrest

An arrest in the defendant's home generally requires an arrest warrant. However, an arrest warrant is not required to make an arrest in a public place. If an officer witnesses a felony or misdemeanor, he can make a warrantless arrest. Also, if an officer has **probable cause** to believe that a felony has been committed (not witnessed by the officer), an officer can make a warrantless arrest.

FACTS from exam: [Be sure to discuss the factual basis for probable cause to believe that the defendant committed a crime].

Terry Stop (Investigatory Stop) and Frisk

An officer can stop a person if he has **reasonable suspicion** that the person is engaged in or has engaged in criminal activity.

FACTS from exam: [Be sure to discuss why the factual basis for reasonable suspicion to believe that the defendant is engaged in or has committed a crime].

Police Checkpoints

Police checkpoints are generally valid, as long as the stop is conducted in a non-discriminatory manner and the purpose of the checkpoint is for an articulable reason beyond general crime prevention. For example, DUI checkpoints are legal, but checkpoints that are generally looking for contraband are not.

FACTS from exam:

Traffic Stops

Traffic stops are valid if the officer has reasonable suspicion or probable cause that a traffic law has been violated.

FACTS from exam:

Search

A search occurs when governmental conduct violates the defendant's reasonable expectation of privacy.

Exam Tip 3: Commonly tested searches involve the search of a person, automobile, and around or inside a house/apartment.

FACTS from exam: [Be sure to use the facts and explain why the defendant does/does not have a reasonable expectation of privacy in the area that is searched].

Valid Search Warrant

Exam Tip 4: If there is a warrant involved in the fact pattern, discuss the validity of the warrant as well as its execution (as applicable) before moving on to warrantless exceptions. If there is no warrant or the warrant is invalid, then move on to the warrantless exceptions.

To be valid, a warrant must (i) be issued by a detached and neutral magistrate, (ii) be based upon probable cause, and (iii) describe with particularity the defendant and crime or the places to be searched and items to be seized.

FACTS from exam: [Analyze all three elements of the warrant requirement].

Subject to certain exceptions, under the "knock and announce" rule, the police must also announce their presence and state their purpose.

FACTS from exam:

Finally, evidence collected in violation of a defendant's 4th Amendment right to privacy may nonetheless be admissible if police officers acted in good faith reliance upon a defective search warrant as measured by a reasonable person standard.

FACTS from exam: [Only discuss if there are facts indicating the warrant was defective].

Exceptions to a Warrantless Search

Warrantless searches constitute a 4th Amendment violation, and evidence seized during the search will be inadmissible unless subject to an exception.

Exam Tip 5: Discuss ALL exceptions that apply (since fact patterns usually point to more than one exception), regardless of whether the exception will ultimately allow the evidence to be admitted.

Terry Stop (Investigatory Stop) and Frisk

An officer can stop a person if he has **reasonable suspicion** that the person is engaged in criminal activity.

FACTS from exam: [Be sure to discuss why the factual basis for reasonable suspicion to believe that the defendant is engaged in or has committed a crime].

Frisk of a Person – The officer can then frisk or pat down the outer clothing of the defendant for purposes of officer safety. If the officer feels an object whose identity is immediately obvious as contraband, it can be seized during the frisk under the “plain feel” exception.

FACTS from exam:

Exam Tip 6: Watch out for facts about the police exceeding the scope of the frisk/pat-down (such as reaching into pockets). The officer can only reach into pockets if the frisk makes it obvious that there is contraband (drugs, gun, knife) on the defendant's person.

Automobile Frisk – If an officer lawfully stops a car (reasonable suspicion that a traffic violation has occurred), the officer may frisk the inside of the car if she has reasonable suspicion that there is a weapon in the car. However, the officer can only frisk the areas of the car that may contain a weapon.

FACTS from exam:

Finally, if the police's suspicion leads to probable cause that a crime is being committed or has been committed, the officer can arrest the detainee and then make a full search (see below for Search Incident to Lawful Arrest).

FACTS from exam:

Search Incident to Lawful Arrest

A search incident to a lawful arrest must be reasonable in scope and incident to a lawful arrest that is based upon probable cause.

Lawful arrest

FACTS from exam: [Explain why the arrest was valid and based on probable cause].

Scope of Search

The police may conduct a contemporaneous search of the arrestee and his immediate surrounding area (i.e. wingspan), such as pockets and containers. If the arrestee is at home, the police can search closets or other spaces adjoining the place of arrest in the home where an attack is likely. If the arrestee is in a vehicle, the police may search the glove compartment if the arrestee is within reaching distance of it or it is reasonable that evidence might be in the vehicle.

FACTS from exam: [Explain why the arrest was valid and based on probable cause].

Exam Tip 7: Watch out for the police not having probable cause, or the police exceeding the scope of the search permitted.

Automobile Exception

Under the automobile exception, the police can search any part of defendant's car if they have **probable cause** that it contains contraband or other evidence of a crime.

FACTS from exam: [Use the facts and explain why there is probable cause that the car contains contraband or other evidence of a crime].

Plain View

No warrant is required to seize evidence in plain view if the police are lawfully in the location from which the evidence can be viewed and the criminal nature of the item is immediately apparent.

FACTS from exam:

Exam Tip 8: The police have to be lawfully in a location when they view the evidence. If they are not lawfully in the location (for example they unlawfully enter D's house and then see illegal drugs or stolen money), the exception does not apply.

Exigent Circumstances ("Hot Pursuit")

Under a totality of circumstances test, exigent circumstances may make a warrantless search constitutional if probable cause exists. Exigency can be determined by many factors, including hot pursuit of a fleeing felon, reasonable apprehension that a delay in getting a warrant would result in the immediate danger of evidence destruction, or police and/or public safety.

FACTS from exam: [Look for facts that support exigency and explain why the facts justify upholding the warrantless search.]

Consent

If a party consents to a search, a warrant is not required. The consent must be voluntary, and there must be no threats of harm, compulsion, or the false assertion of lawful authority.

FACTS from exam:

Exam Tip 9: Watch out for facts indicating that the police exceeded the scope of the consent that was given by the defendant. If the search exceeds the scope, it is invalid.

Exclusionary Rule and “Fruit of the Poisonous Tree”

Exam Tip 10: Before you conclude your 4th Amendment analysis, do not forget to discuss the exclusionary rule and any exceptions that might apply, like inevitable discovery, independent source, the passage of time, or good faith reliance on a facially valid warrant.

The exclusionary rule applies to evidence seized as a result of government illegality, as well as the “fruit of the poisonous tree”, which is any evidence derived from the illegal government action.

FACTS from exam:

Exam Tip 11: When applying the Fruit of the Poisonous Tree doctrine to exclude an item of evidence, be sure to explain how the item was derived from (or “tainted”) by an earlier illegal government search or seizure.

Example: A police officer illegally searches defendant and finds a gun. The police officer takes the gun, but releases the defendant. Later, the officer discovers that the gun is stolen and obtains an arrest warrant. The defendant is arrested one week later for the stolen gun. At the time of arrest, the defendant is searched and found with cocaine in his pocket.

The defendant would move to exclude the gun under the exclusionary rule due to the illegal search. He would also move to exclude the cocaine under the Fruit of the Poisonous Tree doctrine because it was found during an arrest that was derived from (tainted by) the initial illegal search that led to the gun.

Exceptions to the exclusionary rule include:

- Inevitable discovery through lawful means: If the evidence would have been discovered through a legal means, despite the illegal action, the evidence will be admissible.
- An independent source unrelated to the taint: The evidence was discovered by an independent source.
- The passage of time: Sufficient time has passed in between the illegal action and discovery of the evidence.
- Good faith reliance: The police execute a warrant believing it is valid in good faith and find evidence, but the warrant is later found to be defective; the evidence is admissible.

5th Amendment

The 5th Amendment provides that no person shall be compelled in a criminal case to testify against himself. The right applies to testimonial evidence coercively obtained by the police.

Miranda Warnings - Custodial Interrogation

Police officers must give defendants Miranda warnings when the defendant is in custody and being interrogated. Miranda warnings inform the defendant of his right to remain silent and the right to an attorney.

Exam Tip 12: There must be both custody and interrogation for Miranda to apply. If one of the elements is missing, the police do not have to give the defendant his Miranda rights.

Custody

A person is in custody if he reasonably believes he is not free to leave or is otherwise deprived of his freedom in a significant way.

FACTS from exam:

Interrogation

A person is subject to interrogation if the police engage in any conduct that is likely to elicit a response, whether incriminating or exculpatory.

Exam Tip 13: If the defendant is speaking to a government informant, but does not know that the informant is working for the government, this is not an interrogation for 5th Amendment purposes. Miranda protects defendants from the coercive effect of questioning by the police; if the defendant does not know that he is speaking to a government agent, the coercive element does not exist, so there is no interrogation and Miranda is not required.

FACTS from exam:

Exam Tip 14: A police line-up is not a custodial interrogation. If the defendant is placed in a line-up, he is not entitled to Miranda rights. If the defendant has invoked Miranda, he may still be placed in a line-up without the presence of his attorney. See below for more on police line-ups.

Waiver of Miranda

A defendant may waive his Miranda rights, but it must be a voluntary waiver and cannot be the result of government coercion.

FACTS from exam:

Invoking Miranda

If the defendant unambiguously asserts his right to an attorney, then the police cannot question him without either providing an attorney or obtaining a waiver of the right to counsel.

FACTS from exam:

Re-approaching Defendant

If a defendant invokes his Miranda rights, the police may not re-approach the defendant to question him about the charged crime or any other crime.

Editor's Note 2: Police can re-approach the defendant who has invoked his Fifth Amendment right to remain silent after a “substantial” amount of time has passed, and may re-approach a defendant who has invoked his Fifth Amendment right to counsel after a 14-day break after release from custody. In both cases, the defendant must receive fresh Miranda warnings.

FACTS from exam:

Spontaneous Statements

If the defendant voluntarily makes a statement, this statement will be admissible, even if he has previously invoked his Miranda rights.

FACTS from exam:

Standing

A defendant may only assert his own Miranda rights; he may not assert a Miranda rights violation on behalf of another person, such as a co-defendant who has had her Miranda rights violated.

FACTS from exam:

Exclusion of Statements

Statements made in violation of Miranda rights will be excluded, but they are admissible for impeachment purposes if the defendant chooses to testify and the prosecution seeks to impeach (discredit) the defendant’s testimony. Also, any physical fruits of the confession, such as evidence seized in reliance on statements made in the confession (such as the location of contraband) are not excluded.

FACTS from exam:

6th Amendment

Right to Counsel

The 6th Amendment right to counsel automatically applies at all critical stages of prosecution after formal proceedings begin. The right attaches when the state initiates prosecution through an indictment or formal charge and ends at the sentencing stage.

Exam Tip 15: The 6th Amendment Right to Counsel applies to critical stages, including post-charge in person line-ups and questioning by a government informant (even if the defendant does not know he is speaking to a government agent).

Note 1: Note the differences in the 5th Amendment Right to Counsel, which does not apply to line-ups or questioning by a government informant if the defendant does not know that the informant works for the government.

FACTS from exam:

Offense Specific

The 6th Amendment does not prevent the police from questioning the defendant about unrelated offenses that are not the charged crimes in question.

FACTS from exam:

Waiver

If a defendant waives his 6th Amendment right to counsel, it must be knowing and voluntary.

FACTS from exam:

Due Process Clause, 14th Amendment & 5th Amendment

Under the Due Process Clause, which is applicable to the states under the 14th Amendment and the federal government under the 5th Amendment, police line-ups must not be conducted in a manner that is unnecessarily suggestive or provides a substantial likelihood of misidentification.

Exam Tip 16: Whenever the facts include a police line-up, you should consider the 6th Amendment Right to Counsel (applies to post-charge in person line-ups) and the Due Process Clause. Both issues should be discussed.

FACTS from exam:

Additional Issues

The following issues have rarely been tested on the essay portion of the exam:

- Confrontation Clause
- Guilty Plea – Procedural Requirements
- Right to Discharge Attorney & Substitute a New Attorney
- Right to Represent Oneself
- Right to a Separate Trial from Co-defendant
- Right to a Speedy Trial
- Right to Testify at Trial

CHAPTER 2: PRACTICE QUESTION

July 2008, Question 8 [ID 282]

On April 10, a convenience store was robbed by someone carrying a gun. The store's video camera caught the robbery on tape. The tape was shown on the evening news.

On April 11, an anonymous caller contacted the police saying, "I saw that tape of the robbery. The robber kind of looks like Student. He's an 18-year-old student at the high school."

On April 12, two police officers took the tape to the high school and showed it to the principal, who said, "It could be Student. It's hard to tell because the tape is not clear." The tape was also shown to Student's homeroom teacher, who said, "It might be him, but I couldn't say for sure."

Later that day, the police officers went to the store where Student works after school. They asked the manager if they could talk with Student, who was called to the manager's office. The police introduced themselves to Student and said, "We'd like to talk to you." They walked with Student into the manager's office and shut the door. One police officer sat behind the manager's desk; the other, in full uniform with his revolver visible, sat near the door. Student sat between them. The manager's office measures eight feet by ten feet.

The police officers told Student they wanted to ask him some questions about the convenience store robbery on April 10. Student said he knew nothing about a robbery. He continued to deny that he had any knowledge of the robbery for about 20 minutes. Student did not ask to leave, and neither police officer told Student he was free to leave.

After about 20 minutes, the police officers told Student that they had a videotape of the robbery and that they had shown it to three people, all of whom positively identified Student as the robber.

Student said nothing for a few minutes. One of the police officers then said, "You know, if we can tell the prosecutor that you cooperated, she might go a lot easier on you. I'd hate to see you end up doing a long stretch in prison. Let's just say it's not a nice place." Student then blurted out, "I did the robbery. I used a little air gun."

Immediately after Student made that statement, the police officers informed Student that he was under arrest for the robbery of the convenience store. They read him his *Miranda* rights. Student stated he understood his *Miranda* rights and told the police officers that he was not going to say anything more to them. The police officers placed Student in handcuffs and took him to the police station where he was booked for armed robbery.

Student had had two earlier brushes with the law. When he was 16, he had been found delinquent in juvenile court for auto theft and had been placed on supervision for one year. When he was 17, he had received a ticket for underage drinking and had paid a fine of \$150. He is a "C" student, but his teachers believe he is an "underachiever."

Student's defense attorney has filed a motion to suppress Student's statements on three grounds:

Student's statements were obtained in violation of Student's Fourth Amendment rights.

Student's statements were obtained in violation of his *Miranda* rights.

Student's confession was not voluntary.

How should the trial court rule on each of the grounds in the motion to suppress? Explain.

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SAMPLE ANSWER

1. Student's Fourth Amendment Rights (30%)

The issue is whether the police interview of Student violated Student's Fourth Amendment right to be free from unreasonable seizure such that Student's statements should be suppressed.

A person has a Fourth Amendment right to be free from unreasonable seizure. A person is seized by the police when the officer, by means of physical force or show of authority, terminates or restrains freedom of movement. A seizure occurs when a reasonable person would believe that he was not free to leave. In this case, Student was taken into his manager's office for over 20 minutes with two officers, one of whom had a visible weapon. The door was closed, and one officer sat between Student and the door. Student was not told that he was free to leave. Under these circumstances, a reasonable person in Student's position would have believed that he was not free to leave until given permission by the officers.

The Fourth Amendment permits detention of an individual for a brief period of time if the police have a reasonable suspicion based on articulable facts that the individual in question has been recently involved in criminal activity. Whether reasonable suspicion exists is based on the totality of the circumstances. In this case, three people stated that the person on the tape of the convenience store robbery looked like Student. These identifications gave the police officers sufficient facts to form the basis of a reasonable suspicion that Student was the robber. Accordingly, Student's Fourth Amendment rights were not violated, and his statements should not be suppressed.

2. Miranda Rights (40%)

At issue is whether Student's statements should be suppressed because the police failed to read Student his *Miranda* rights when they questioned him in the manager's office.

Any statement obtained as the result of custodial interrogation may not be used against the suspect at a subsequent trial unless the police provided procedural safeguards effective to secure the privilege against self-incrimination.

An interrogation refers not only to questioning, but also to any words or actions that the police know or should know are likely to elicit an incriminating response. In this case, Student was clearly subject to an interrogation. The police officers asked him several questions regarding the robbery. Additionally, the police officers' statements regarding prison time and positive identifications would likely elicit an incriminating response.

A person is in custody when he is not free to leave or is otherwise deprived of his freedom in any significant way. The test is whether a reasonable person would believe that he is not free to leave. In this case, Student was questioned in the manager's office by two officers, one of whom had a visible firearm. Student was not told he was not free to leave and he was not restrained. Although Student may have felt that he was not free to leave, a reasonable person would not have believed he had been arrested or otherwise taken into formal custody. Thus, Student was probably not in custody, and there should be no suppression for a *Miranda* violation.

3. Voluntariness of Confession (30%)

The issue is whether Student's confession should be suppressed because it was involuntary.

Voluntary confessions are not protected by *Miranda*. A confession is involuntary only if the police coerced the defendant in to make the confession. Whether a statement is voluntary or coerced is determined based on the totality of the circumstances, including facts such as the conduct of the police, the characteristics of the defendant, and the time of the statement. Coerced statements cannot be used either substantively or for impeachment purposes.

A court could find that based on the totality of the circumstances, Student's statement was involuntary. Student is a high-school senior with minimal experience with the criminal justice system. The police questioned Student in a small, closed room. The police outnumbered Student two against one, and one of the police officers had a visible firearm. The police did not tell Student that he could leave and did not tell him that he was not obligated to answer their questions. Additionally, the police lied to Student about the positive identifications made regarding the robbery. In addition, the police made a veiled threat about what would happen to Student in prison if he did not confess. Thus, a court could find that Student's confession was involuntary.

However, most courts would likely consider Student's statement as voluntary. Student is an adult with average intelligence and some experience with the juvenile justice system. The interview in the office lasted only about 20 minutes. Although the officer's statements about the identifications were not completely true, the fact that Student was deceived does not render a statement involuntary. The statement by police officers about prison time and prison conditions could be perceived as general

observations. Accordingly, most courts would likely consider Student's statement voluntary, and the confession should not be suppressed.

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NCBE EDITOR'S NOTES FOR THIS ESSAY QUESTION

Credit should be given for reasonable arguments on either side of the issue for points 2 and 3.

(Themis Editor's Note: The foregoing model answer was drafted in accordance with the NCBE Grading Guidelines for this question. The analysis is illustrative of the discussions that might appear in a high passing answer and addresses all legal and factual issues the drafters intended exam candidates to raise. When self-grading, refer to the NCBE's weighting of each issue, which is indicated in parentheses for your reference.)

[END OF HANDOUT]

