Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we are going to be discussing an issue in our "Listen and Learn" series related to criminal procedure – the privilege against self-incrimination, and Miranda. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you can be the best law student and lawyer you can be. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series from the Law School Toolbox podcast! Today we are focusing on criminal procedure, specifically two constitutional protections afforded to accused persons by the 5th Amendment – the privilege against self-incrimination, and Miranda rights. We'll tackle the privilege against self-incrimination, which I'll refer to as the PSI, first.

Lee Burgess: As you're probably aware, the 5th Amendment, which is applicable to the states through the 14th Amendment, provides (among other things that aren't relevant to us today) that no person shall be compelled to be a witness against himself in a criminal case. The rule to write down for PSI is: A person may refuse to answer a question whenever his or her response might furnish a link in the chain of evidence needed to prosecute the person.

Lee Burgess: So, let's flesh this out a little bit. The first thing to know here, which may not be obvious given the wording of the 5th Amendment itself, is that the PSI can be asserted in any proceeding – criminal, civil, or administrative – by either party. Also, in a civil case, the person asserting the PSI must claim it the very first time a question is asked, or he has waived it for any subsequent criminal prosecution.

Lee Burgess: The most obvious scenario where we see the PSI invoked is at trial. I'm sure you've seen more than one TV show where the defendant "pleads the Fifth" to avoid testifying. But the scope of the PSI is actually much broader. In fact, it protects any testimonial or communicative evidence that is compelled, whether in a courtroom or somewhere else, like a police station or jail. The PSI does not apply to real or physical evidence, which means that it doesn't prevent the prosecution from using bodily evidence, like hair or blood, to incriminate a person. The PSI also doesn't cover incriminating identifications, like a witness picking a suspect out of a lineup.

Lee Burgess: Sounds straightforward, right? Well, there are a couple of wrinkles here. Remember what I said earlier about "testimonial or communicative" evidence? That doesn't just mean answering questions. It includes taking a lie detector test

– a suspect cannot be forced to do that if he or she asserts the PSI. Sometimes the PSI also covers written documents as well, which I know may seem confusing since we just established that the PSI does not apply to real or physical evidence. The key difference with a written document is that, like the results of a lie detector test, it can be communicative in nature, like a written statement, a diary entry, or notes from a meeting. Remember though that the evidence must be compelled, as in not produced voluntarily.

Lee Burgess: In the first example – a written statement – the PSI would protect the statement if the police required that the suspect produce it. But what if the suspect took incriminating notes at a meeting with the police, entirely of his own volition? Well, the police could probably seize those, since the PSI would not apply.

Lee Burgess: But the PSI will apply if the act of producing a writing is in and of itself incriminating, even if the suspect voluntarily made the writing. If producing the writing authenticates it as the suspect's, the production has testimonial significance, so the suspect can assert the PSI.

Lee Burgess: Okay, now that we have addressed the rule for PSI and the scope of the PSI, we can move on to the ways to get around it. Write this rule down: The PSI can be eliminated in three ways: one, if the government grants the suspect transactional or use and derivatives immunity; two, if there is no possibility of incrimination; or three, if the suspect waives it.

Lee Burgess: Transactional immunity means that the witness is protected from any prosecution relating to his or her testimony. Use and derivative immunity is narrower, preventing the prosecutor from using the immunized testimony or anything derived from it against the witness. If use and derivative immunity is enough to protect the accused person's PSI, the prosecution does not need to grant the broader transactional immunity.

Lee Burgess: The second way in which PSI may be extinguished, when there is no possibility of incrimination, usually applies when the statute of limitations has already run on the crime. Waiver – the third means of overcoming the PSI – occurs when a criminal defendant takes the stand. He or she then waives the PSI as to all legitimate subjects of cross-examination.

Lee Burgess: Now that we've covered the scope of the PSI and the three ways it can be eliminated, I'll touch on two other things to keep in mind when you see a PSI-related question. The first is that the prosecution can't comment negatively on a defendant's refusal to testify or answer questions based on the PSI, meaning it's not okay to suggest that silence is an admission of guilt. Second, the PSI does not apply to corporations. This means that a corporation's employees, and even its directors, owners, and shareholders, can be compelled to testify against the company, even if their testimony incriminates the corporation.

Lee Burgess: Now that we're clear on the ins and outs of the PSI, let's apply what we've learned to a hypothetical scenario. This hypo is adapted from an essay question on the July 2009 California bar exam:

Lee Burgess: "Officer Patty arrested Tom and his friend Dan after pulling their car over for speeding because she saw a bag of what she believed was cocaine in the car. Dan was driving. At the police station, Patty gave Tom and Dan Miranda warnings. Dan refused to answer any questions, but Tom waived his Miranda rights and stated, 'I did not know what was inside the bag or how the bag got into the car. I didn't see the bag before Dan and I got out of the car for lunch. We left the windows of the car open because of the heat. I did not see the bag until you stopped us. It was just lying there on the floor mat, so I put it under the seat to clear the mat for my feet.' The state charged Dan and Tom jointly with possession of cocaine. Could Tom refuse to testify at trial?"

Lee Burgess: For now, let's focus just on the PSI aspect of this hypo, even though Miranda is mentioned. We'll come back to it later after we go over the rules for Miranda. We know that Tom has made an incriminating statement. We'll start with the rule, as always: A suspect may refuse to answer a question that would incriminate them. Seems like a slam dunk then, right? Tom shouldn't have to testify. Not so fast, though. We need to make sure that the PSI is still intact. Recall the rule: There are three ways to overcome the PSI: If the suspect is granted immunity, if there is no possibility of incrimination, or if the defendant has taken the stand and therefore waived the PSI as to all legitimate subjects of cross-examination.

Lee Burgess: Here we know that Tom has not been granted immunity, and there is no evidence that the statute of limitations has run on the charge. He may have waived the privilege with respect to his statement to Patty, but he hasn't taken the stand yet, so he has not waived it as to testimony at trial. This is not a civil case, so it was not required that Tom assert the PSI the first time he was questioned about the crime. Tom can refuse to testify.

Lee Burgess: Let's talk about another protection that the 5th Amendment provides to accused individuals – Miranda rights. The rule to write down and commit to memory is: For a confession to be admissible, a person in custody must be read their Miranda rights prior to interrogation. I think we're all pretty familiar from movies and television with the contents of the Miranda warning, which informs the suspect that, one, she has the right to remain silent; two, anything she says can be used against her in court; three, she has the right to talk to an attorney and have one present for questioning, and four, if she cannot afford an attorney, one will be provided to her. If you're short on time on an essay, it's fine to skip writing these out, unless the facts of the question suggest there is an issue specifically with the content of the Miranda warning. Otherwise, it's fine

just to state the Miranda rule and move on. Nine times out of ten, the issue you'll need to spend time on is whether the suspect was in custody and whether there was an interrogation. If those two elements of the rule aren't met, the suspect is not entitled to Miranda warnings.

Lee Burgess: We need, then, to define custodial interrogation. The rule to write down for custody is: A person is in custody when he reasonably believes he is not free to leave. Interrogation is questioning, either expressly or through words or actions, initiated by law enforcement, that the police knew or should have known was likely to elicit an incriminating response. When you're structuring an essay where Miranda is at issue, often the interrogatory will ask you to state the bases under the 5th Amendment for excluding a suspect's statement. It's generally best to IRAC custody and interrogation separately. If only one is arguable, you don't need to spend a lot of time on the other, but try to break them out to maximize your points, each with their own header after your general Miranda rule.

Lee Burgess: Just like with PSI, Miranda rights only protect statements or acts that are testimonial or communicative, meaning the suspect's communication must relate to a factual assertion or disclose information. Crying, for example, is not testimonial. So, if a suspect is in police custody, subject to interrogation, and all he does is cry, there won't be a basis under Miranda for excluding evidence about that crying, even if the police never Mirandized him. Miranda also doesn't apply to voluntary or spontaneous statements. This goes back to the interrogation element of the rule – if the statement is not given in response to a question the police knew or should have known was likely to elicit an incriminating response, Miranda won't provide a basis to exclude it at trial.

Lee Burgess: Now, before we tackle a hypo, there are three additional aspects to remember. First up we have the public safety exception. This allows the police to conduct limited interrogation without Miranda warnings when the questions are reasonably prompted by a concern for the public safety or the safety of the officer. An example would be if the police officer is trying to secure a weapon.

Lee Burgess: Second, a suspect invoking Miranda rights must do so clearly and unambiguously. Just musing aloud, "Maybe I need a lawyer" or asking, "Should I talk to a lawyer?" won't cut it, and the cops can go right on questioning.

Lee Burgess: Third, a suspect may waive his Miranda rights, but the waiver must be knowing, intelligent, and voluntary. You can't have a waiver from silence or a shrug of the shoulders.

Lee Burgess: Okay, let's revisit our friend Tom from the cocaine bust. Now that we know more about Miranda, what arguments might Tom make to support a motion to

suppress his statement under the 5th Amendment? Do you think he'll be successful?

Lee Burgess: We know the rule: Any statement obtained as a result of a, one, custodial; two, interrogation may not be used against the accused unless the police first informed him of his Miranda rights, and the suspect waived those rights knowingly, voluntarily, and intelligently. There's no need here, especially if you're short on time, to state the rule for the contents of Miranda warnings. How can you tell this? Because we aren't told what Patty said; we are just told that she gave Miranda warnings. Therefore, we know that there is no issue as to the content of those warnings. If you had facts in which you were told something like, "Officer Patty told Tom he had the right to remain silent, the right to eat and drink, and the right to an attorney", you'd know that it was necessary to state exactly what is required for Miranda warnings and why Officer Patty's warnings didn't cut it. We don't have that here, so you can assume that there was nothing wrong with the content or the wording of the warnings.

Lee Burgess: Now let's apply the rule to our facts. Was Tom in custody when he made the statement? Remember the rule: A suspect is in custody if he reasonably believes he is not free to leave. Here, Officer Patty arrested Tom; he was at the police station. It seems reasonable that Tom would not have believed he was free to leave (and he wasn't). Was Patty interrogating Tom, meaning was she initiating words or actions that were reasonably likely to elicit an incriminating response from Tom? Well, we don't know for sure that Tom didn't just spontaneously volunteer that he had never seen the cocaine before. But we know that Dan refused to answer questions, so that suggests that Patty was questioning the two men. We likely have a custodial interrogation. Patty gave Tom Miranda warnings. We're told Tom waived his Miranda rights, so no need to spend time on whether his waiver was valid. Therefore, Tom's 5th Amendment rights were not violated and his statement was admissible at trial. It is not likely that the court will grant a motion to suppress it on the basis of the 5th Amendment.

Lee Burgess: Now, just to make sure we really know how to apply the rules to real life situations, let's do one more hypo. This one is loosely adapted from the July 2014 California bar exam. This time, our star is Dan, but this time he's on foot, not in his car:

Lee Burgess: "One hot day in July, Officer Quinn spotted Dan running down the street in a bulky winter coat. Officer Quinn stopped Dan and patted him down. During the pat down, a car radio fell out of Dan's coat. Quinn arrested Dan and brought him to the station. When they arrived, Quinn started asking questions about the radio. Dan responded that he did not want to talk. 'If you don't answer my questions', Quinn told Dan, 'I won't be able to tell the DA that you're cooperative.' Dan immediately confessed to stealing the radio and was charged

with larceny. After Dan hired a lawyer, Alexis, he informed Alexis that he planned to lie on the stand at trial and say his mother gave him the radio as a gift. Is Dan likely to prevail on a motion to suppress his confession under Miranda?"

Lee Burgess: We know immediately that Quinn didn't give Dan any Miranda warnings. That means the question is whether Dan was in custody and whether he was subject to interrogation. If he was, Quinn's failure to Mirandize Dan will mean his statement was taken in violation of the 5th Amendment. Did Dan feel free to leave? Probably not – he had been arrested and brought to a police station. Did Quinn ask him questions that he knew or should have known were likely to elicit an incriminating response? It sure seems like it. Car radios are normally found in the car. So, asking Dan about why a car radio fell out of the bulky coat he was wearing on a hot day, seemingly to disguise the radio, seems likely to elicit an incriminating response.

Lee Burgess: Looks like we have a custodial interrogation, and that Dan was entitled to Miranda warnings – unless his confession was voluntary. So, what do you think? Whether a suspect's statement was voluntary is determined based on the totality of the circumstances. It's true that he could have said nothing. But Quinn told him that he wouldn't put in a good report for him with the prosecutor if he stayed quiet. Dan might have been so afraid of Quinn telling the prosecution that he was uncooperative that he confessed even though he didn't want to. Therefore, under the circumstances, his statement may not have been voluntary. Dan is likely to prevail on his motion.

Lee Burgess: Now, one more question for this hypo. How is the court likely to rule if Alexis files a motion to prohibit Dan from testifying at trial on the basis of the 5th Amendment PSI? As we know, a defendant may refuse to testify at trial under the 5th Amendment. But Dan is not refusing to testify here in an effort to exercise his PSI. Rather, he has told his lawyer he planned to lie on the stand. Therefore, a court will not grant Alexis's motion.

Lee Burgess: And with that, we're out of time. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to Lee or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website contact form at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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