

Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we have another in our “Listen and Learn” series – this episode is on the Sixth Amendment. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. 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 on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on [BarExamToolbox.com](#), and we’d love to hear from you. And with that, let’s get started.

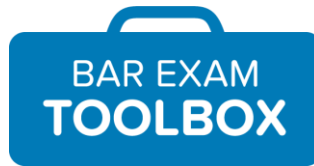
Lee Burgess: Hello, and welcome back to the “Listen and Learn” series from the Bar Exam Toolbox podcast! Today we are focusing on Criminal Procedure, specifically the Sixth Amendment of the Constitution and the rights and protections it provides to anyone accused of a criminal act. The Sixth Amendment is often tested on law school essays, bar exam essays, and the MBE, so it’s important to know it well.

Lee Burgess: Unlike the Fourth and Fifth Amendments, the Sixth Amendment will come up in Criminal Law and Procedure hypos after a person has been formally charged with a crime in court. Hint: If you’re reading an essay or MBE that has to do with someone facing criminal charges in court, it’s a pretty good indicator that the Sixth Amendment is at issue. So, in order to properly issue spot the Sixth Amendment, it’s important to understand the different rights the amendment protects. So, let’s look at those:

- Lee Burgess:
1. The right to counsel and effective assistance of counsel.
  2. The right to testify.
  3. The right to self-representation.
  4. The right to a speedy trial.

Lee Burgess: When we’re dealing with the Sixth Amendment, the right to counsel is the most heavily-tested topic, so we’re going to spend the majority of our time there. Before we do, let’s briefly go over the right to self-representation, which is the next most-heavily tested area of this amendment.

Lee Burgess: Under the Sixth Amendment, a defendant has a constitutional right to represent himself at trial. For a waiver of this right to be valid it must be made, one, voluntarily (it is the product of the defendant’s free will); and two, knowingly and intelligently (the defendant must understand the nature of the right being



waived and the consequences for waving it). However, a judge may deny a defendant's right to represent themselves if the defendant is not found competent to stand trial.

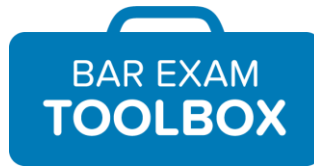
Lee Burgess: Be sure to also include your general rule for competence, which can be as simple as this: Courts often find that a person is competent to represent themselves if they are competent to stand trial. To be competent to stand trial, the defendant must understand the nature and consequences of the proceedings against him.

Lee Burgess: I have some good news for you! When self-representation is being tested, you'll know it! There's no hiding the ball here, because somewhere in your hypo, the defendant will say something along the lines of, "I want to represent myself" or, "Dan asked the court to represent himself."

Lee Burgess: So let's say Dan has been charged in court with first-degree murder and retained an attorney to represent him at trial. Since Dan retained his attorney, the attorney noticed Dan's behavior became more erratic. When his attorney tries to discuss his case, Dan just stares blankly and doesn't respond most of the time. However, during one of their conversations, Dan asked his attorney what the District Attorney charged him with. One week before trial, Dan tells the judge he wants to represent himself.

Lee Burgess: See what I mean about these hypos not hiding the ball? So let's walk through this scenario. It's important to note that Dan is being charged with first-degree murder – a far more serious crime than larceny or burglary. The fact that Dan is charged with the most serious crime will weigh on a judge's decision because if Dan is found guilty, he will inevitably go to prison. The consequences in Dan's case are more serious than if he was charged with a theft crime. This particular example illustrates competence, or lack thereof. Dan's behavior leading up to trial is erratic. He stares blankly when his attorney talks to him about his case, and even asked what the charges were. These facts illustrate that Dan doesn't understand the nature of the proceedings against him, let alone the consequences of the proceedings. Therefore, we can conclude that the judge will deny Dan's request to represent himself at trial, because Dan is not competent to stand trial.

Lee Burgess: Let's switch gears and talk about the more heavily-tested Sixth Amendment topic – the right to counsel. Under the Sixth Amendment, a criminal defendant has an absolute right to counsel at all critical stages of the proceedings, and the right attaches once formal adversarial judicial proceedings have commenced, such as formal charges, arraignment, or indictment. Once the Sixth Amendment



attaches, it prevents the police from questioning the defendant about the charges against him. The right to counsel is offense-specific and only applies to the offenses the defendant has been formally charged with. It does not prevent the police from questioning the defendant about unrelated offenses.

Lee Burgess: Now, keep in mind that the Sixth Amendment right to counsel is closely related to Miranda warnings under the Fifth Amendment, and the two are often tested together. Let's go through a hypo to illustrate how these two topics can go hand-in-hand. This one is loosely adapted from the [February 2006](#) and [July 2014 bar exams](#):

Lee Burgess: "Fred is a police officer that has been investigating Dave, a well-known drug dealer. One night, Fred was surveilling Dave from a van via monitors that were connected to hidden cameras and microphones in the warehouse Dave used for his drug deals. After hours of surveillance, Dave sold a large amount of cocaine to Victor, a member of the cartel. Fred watched the drug deal on the monitors in his van. Just as Fred was about to exit the van and arrest Dave for selling cocaine, Fred got distracted by a phone call from his boss. By the time Fred and his boss ended their call, the warehouse was empty and Dave was gone, so Fred went back to his office.

Lee Burgess: Unbeknownst to Fred, while he was on the phone with his boss, Dave shot Victor because he tried to underpay for the cocaine. Dave fled the warehouse because he thought Victor was dead. Paul, another police officer, was on patrol and saw Victor bleeding and stumbling down the street. Paul approached Victor and asked what happened. Victor pointed toward the distance and said, 'That's Dave. He shot me.' Paul looked to where Victor was pointing and saw Dave running away with a gun in his hand. Paul called in for backup and arrested Dave for assault and attempted murder against Victor.

Lee Burgess: At the police station, Paul questioned Dave about shooting Victor. Dave stated he did not want to talk. Paul told Dave things would be easier for him if he told his side of the story, and stood up to leave. Before Paul exited the interrogation room, Dave confessed to shooting Victor. He did not say anything about the cocaine or the drug deal with Victor.

Lee Burgess: Dave was charged with attempted murder. At his arraignment the next morning, Dave retained an attorney. A few days later, Fred learned that Dave had been arrested. Fred visited Dave in jail without an attorney, gave proper Miranda warnings, obtained a waiver, and interrogated him about the drug deal. Dave confessed to selling cocaine to Victor and several other drug-related crimes.



Lee Burgess: At Dave’s trial for attempted murder, the District Attorney sought to introduce Dave’s confession to Fred to prove Dave had a motive for the attempted murder, as well as his confession to Paul about shooting Victor. Dave filed a motion to suppress the confessions. How should the court rule on:

1. Dave’s motion to suppress his confession to Fred?

and

2. Dave’s motion to suppress his confession to Paul?”

Lee Burgess: This hypo illustrates how the Sixth Amendment and Fifth Amendment, particularly Miranda, can overlap in Dave’s confession to Paul about shooting Victor. But we won’t spend time there because those issues are outside the scope of this podcast. But have no fear though! If you’re looking for an in-depth discussion of the [Fifth Amendment and Miranda](#), we’ve got an episode for you, and we will link to it in the show notes.

Lee Burgess: So, if we look at Dave’s motion to suppress his confession to Fred, we know that the bulk of that analysis will be on the Sixth Amendment, because the facts specifically tell us that Fred gave proper Miranda warnings and obtained a waiver before he interrogated Dave. This is a major hint for the reader to assume that Fred’s interrogation did not violate Dave’s Fifth Amendment rights. But did Fred question Dave in violation of the Sixth Amendment? Let’s take a look.

Lee Burgess: When Fred questioned Dave about the drug deal, Dave was already charged with attempted murder. Thus, Dave’s Sixth Amendment right to counsel had attached as to the attempted murder of Victor. Remember, this right is offense-specific. The right to counsel will only attach as to the charges a defendant is formally charged with or has been arraigned on. Here, Dave was charged with attempted murder and police would have been prevented from questioning him about the attempted murder once he was formally charged. However, Fred interrogated Dave about drug-related crimes, not the attempted murder. At the time of Fred’s interrogation, Dave did not have a right to counsel for any offenses other than the attempted murder, because he was not charged with any other crimes. Since Fred interrogated Dave about offenses unrelated to the ones he was charged with, Fred did not violate the Sixth Amendment when he interrogated Dave. Therefore, the court will likely deny Dave’s motion to suppress his confession to Fred.

Lee Burgess: So, that was our overview of a criminal defendant’s rights under the Sixth Amendment. Remember to analyze these rights when you see facts that a criminal defendant has been formally charged with a crime.



Lee Burgess: And with that, we're out of time! If you enjoyed this episode of the Bar Exam 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 myself or Alison at [lee@barexamtoolbox.com](mailto:lee@barexamtoolbox.com) or [alison@barexamtoolbox.com](mailto:alison@barexamtoolbox.com). Or you can always contact us via our website [contact form](https://www.BarExamToolbox.com/contact-form) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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[Podcast Episode 154: Listen and Learn – The Exclusionary Rule \(Criminal Law and Procedure\)](#)

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