

**SUGGESTED ANSWER TO  
SUMMER 2009 CRIMINAL PROCEDURE II  
FINAL EXAMINATION**

QUESTION NO. ONE

A. Cognizability of Claims

Having pleaded guilty to a lesser offense, Chuck seeks to raise several issues on appeal. The general rule is that a plea of guilty forecloses the litigation of most issues on appeal. This rule applies even if the claims are alleged to be constitutional violations and--most significantly--even if the claims are meritorious. A guilty plea ordinarily divests an appellate court of jurisdiction to adjudicate the merits of the claims sought to be raised on appeal.

1. Double jeopardy

One of the exceptions to the foregoing rule is the concept of incurable constitutional error. If the claim is meritorious, it would forever preclude the prosecution from obtaining a verdict of guilt, no matter what it did to try to correct the error. The issue is therefore cognizable.

2. Collateral estoppel (issue preclusion)

This claim may be litigated despite the plea of guilty because it is a variant of double jeopardy.

3. Admissibility of evidence

This claim is foreclosed by a plea of guilty, whether the evidence was presented at a preliminary hearing, at a grand jury proceeding or at trial.

4. Favorable evidence

This claim could not be raised as a Brady/Bagley violation because the plea of guilty constitutes an admission that no evidence would undermine the strength of the prosecution's case. However, it can be raised as a claim that the plea was not knowing and intelligent.

5. Validity of the plea

A defendant may challenge the validity of the guilty plea on the ground that it was not knowing and intelligent.

6. Sentencing

Any post-plea error ordinarily may be raised.

## B. The Merits

### 1. Double jeopardy

The double jeopardy claim would fail. Chuck was not in jeopardy when the preliminary hearing was held. A preliminary hearing is a screening procedure at which the prosecution must establish only probable cause to believe that the accused has committed an offense. It is not a trial, where the prosecution must prove guilt beyond a reasonable doubt to a jury or the court. Therefore, the grand jury procedure could not have constituted double jeopardy.

### 2. Collateral estoppel

The general rule is that the failure by the magistrate to hold the defendant to answer at a preliminary hearing, or the failure by a grand jury to indict, does not collaterally estop future efforts by the prosecution to charge the defendant. *People v. Uhlemann* (1973) 9 Cal.3d 662. The failure to charge does not constitute a specific finding of fact that forestalls future prosecutions. In that sense, it is much like a general acquittal, from which no specific factual inference can be drawn. In addition, in this case, the magistrate's refusal to hold to answer was based on a legal determination that certain evidence was inadmissible. That was not a finding of fact.

### 3. Crawford

In federal courts and "Costello" states, the admissibility and sufficiency of the evidence supporting an indictment may not be challenged. In states such as California, where the evidence must be admissible at trial, the admissibility of the evidence may be challenged. In this case, the evidence does not violate Crawford. Although it is hearsay—Ben testified about what Al said—it was not testimonial. Al was talking to someone in a bar; he was not preparing a report or giving a statement with the expectation that it would be used at trial. However, the statement was inadmissible against Chuck under state law because it was hearsay with no recognized exception, and it was also inadmissible under federal constitutional law under *Bruton v. United States*, because Chuck was unable to cross-examine the declarant (Al, not Ben) about his statement that incriminated Chuck.

### 4. Recantation

The prosecution committed error by failing to advise Chuck of the recantation for his use at trial under Brady/Bagley, but that became moot when Chuck pleaded guilty. The plea was not invalidated by the failure to advise of the recantation because the prosecution is not constitutionally required to advise the pleading defendant of any potentially exculpatory information. *United States v. Ruiz*.

## 5. Validity of guilty plea

The record does not establish that the plea was knowing and intelligent. Although a defendant may be advised of his rights by his attorney, and not the court, *Bradshaw v. Stumpf* (2005) 545 U.S. 175, Chuck's attorney did not advise him of the privilege against self-incrimination. In addition, the rights of which the defendant was admonished must be identified on the record. Here, they were not.

## 6. Sentencing

Preliminarily, Chuck did not waive the right to jury fact-finding when he pleaded guilty. Unless a defendant specifically waives that right, a plea of guilty does not forfeit the right to a jury at sentencing where otherwise applicable. Second, even though Chuck was sentenced to the “maximum term,” the fact that the sentence was not based on an enhancement, as in *Apprendi*, does not necessarily mean that a jury was not constitutionally necessary. In *Blakely*, the sentence was less than the statutorily permissible sentence; yet a jury trial was required. The question is whether state law permits the sentence imposed without additional fact-finding beyond the jury verdict (or, as here, the plea). If state law required additional facts to justify the sentence, then *Blakely* is applicable. In this case, the court was vested with discretion to impose the maximum sentence. It chose to do so, but was not required to do so, on the basis of the use of a gun. Discretionary sentencing falls outside the reach of *Blakely*.

## C. Retrial

If Chuck's conviction is reversed, he may be retried under the *Ball* rule, and may be retried on the original charge. *Burks* would preclude retrial if the reversal was based on insufficient evidence, but Chuck did not raise that claim. Additionally, even if the appellate court should find that Ben's testimony was inadmissible and could not be used at retrial, the ruling would not invoke the *Burks* principle. *Lockhart v. Nelson*.

## QUESTION NO. TWO

### 1. Shackling

A defendant may not be shackled during trial unless the state can justify it by showing that he/she is a danger to those in the courtroom or is a flight risk. Otherwise, shackling is prohibited because it undermines the presumption of innocence, impairs the defendant's ability to communicate with his attorney, and offends judicial decorum. In this case, the sole justification for the shackles was the nature and number of Ed's crimes. Such a showing, although relevant, is usually regarded as insufficient. In the absence of any reason to believe that Ed was a flight risk or would assault those in the courtroom (including law enforcement personnel), he should

not have been shackled. It is true that the jury could not see the restraints, but that circumstance is relevant only to harmless error, not whether error occurred in the first instance.

Under *Deck v. Missouri*, unjustified restraints is subject to harmless error analysis. Because harmless error inquiry requires assessment of the complete record, it cannot be determined whether the error was harmless in this case. However, the lack of visibility of the restraints and the substantial number of acquittals are relevant circumstances.

## 2. Exclusion from suppression hearing

Under *Kentucky v. Stincer*, a defendant has the right to be present if his presence would assist in the cross-examination of the witnesses or had a substantial relation to his ability to defend against the charges. If Ed had been present during the search, his presence during the suppression hearing could have assisted defense counsel during his cross-examination of the searching officer. Even if Ed had not been at his home during the search, his knowledge of its configuration could have materially assisted his attorney in his examination of the officer about his actions during the search. The court's ruling was erroneous.

Denial of the right to presence is amenable to harmless error analysis. *Rushen v. Spain*. In this case it may confidently be said that error was harmless because Ed's attorney won the motion.

## 3. Closure of the courtroom during suppression motion

A defendant's right to a public trial includes pretrial proceedings. *Waller v. Georgia*. Unless the defendant moves to close the pretrial proceeding (and Ed did not), the court may do so only if there is a substantial probability that an "overriding interest" will be prejudiced. Ed's ability to get a fair trial is such an overriding interest, but the court ordered closure on the basis of a reasonable, not a substantial, probability. The court ruled erroneously.

Denial of the right to a public trial, even at a pretrial motion, is not amenable to harmless error analysis. Denial of this right affects the rights of not only the defendant, but also the public. However, under *Waller*, only those proceedings affected by the violation--the suppression hearing--need be repeated. In this case, because Ed won the suppression motion, it would be pointless to rehear it.

## 4. Denial of peremptory challenge

Believing that the peremptory challenge by Ed's attorney was motivated by group bias, the court denied it. If the court had found a prima facie case of group bias (an inference of bias) and concluded that the proffered explanation for the strikes was not group-neutral, or if it was, was not true, then the court could have denied the peremptory challenge by the defense. *Georgia v. McCollum*. However, the court did none of those things, instead summarily denying the defense's challenge without giving it an opportunity to explain itself. This ruling was error, but it did not violate *Batson* because that case involved the grant of a peremptory challenge

motivated by group bias. Ed was erroneously denied a peremptory challenge, but there is no constitutional right to peremptory challenges. The court's ruling violated state law, but not the federal Constitution. *Rivera v. Illinois* (2009) 129 S.Ct. 1446. A trial court's good-faith error in denying a peremptory challenge does not deprive the defendant of a fair trial before an unbiased jury. *Ibid.*

Whether the denial of a peremptory challenge is subject to harmless error or is reversible per se is a matter of state law. In California, it is reversible without a showing of prejudice. *People v. Yates* (1983) 34 Cal.3d 644.

#### 5. Inconsistent verdicts

Ed's single act of detonating a bomb resulted in his conviction of 13 counts and his acquittal of the same number of counts. The jury's verdicts appear to be inconsistent, but inconsistent verdicts are not the basis for a reversal of the convictions. *United States v. Powell*.

Because there is no error, harmless error inquiry is inappropriate.

#### 6. Retrial

If the convictions are reversed, may Ed be retried? Double jeopardy does not preclude retrial under Ball, but collateral estoppel is a separate inquiry. If the jury acquitted Ed of half the counts arising out of the same transaction, it may be argued that under *Ashe v. Swenson*, the jury's acquittals preclude retrial. Such a result would be inconsistent with the inconsistent verdicts principle discussed above. Until the Supreme Court speaks to this issue, the rule of *United States v. Price*, that inconsistent verdicts do not require vacation of the guilty verdicts and do not preclude retrial if those verdicts are reversed, should be followed.

### QUESTION NO. THREE

#### 1. The IAC Claim

Federal habeas corpus review of a state prisoner's claims is available if the prisoner is in custody, raises claims cognizable under the laws, treaties or Constitution of the United States, exhausts state remedies, and did not procedurally default those claims in state court. Relief is not granted unless the state court's opinion is contrary to, or is an unreasonable application of, federal law, the case does not involve a new rule announced after the prisoner's state direct appeal was final, and the error had a substantial and injurious effect or influence in determining the jury's verdict.

Phil, a capital prisoner, was obviously in custody. His ineffective assistance claim arises under the Sixth Amendment. He exhausted his state remedies by filing a habeas corpus petition in the state's highest court. His first hurdle was his failure to timely file the state habeas petition. A

states's invocation of the timeliness rule is usually regarded as an adequate ground for the denial of relief by a state court and, consequently, a rule to which the federal court will defer absent a showing of cause and prejudice. Phil could not have shown cause in the form of ineffective assistance by his appellate attorney because there is no right to an attorney in state habeas proceedings and, therefore, no right to effective assistance. However, a federal court is required to respect a procedural default only if it is invoked by the state court. In this case, the state court waived it by considering the merits of the petition. The federal court may therefore consider Phil's IAC claim.

A meritorious ineffective assistance claim requires the prisoner to show incompetence and prejudice. It does not, as the state court ruled, require him to show innocence. The state court opinion is therefore contrary to established federal law and, as such, is not entitled to the federal court's deference. The allegation that Phil's trial attorney failed to move to suppress a confession based on a 20-year-old case raises a prima facie case of incompetence. Whether Phil suffered prejudice--a reasonable probability of a more favorable result--will be considered in connection with the Jackson claim.

## 2. Jackson claim

The state supreme court did not consider the admissibility of the statement because Phil's attorney had failed to object at trial. The state court invoked an adequate state ground for the denial of relief. *Wainright v. Sykes*. However, for the reasons stated in part 1, Phil has established cause--ineffective assistance--for the failure. The next issue is whether he can show prejudice.

During the pendency of the federal proceedings--after the state direct appeal had become final--the United States Supreme Court overruled Jackson in *Montejo v. Louisiana*. Under *Teague v. Lane*, a new rule announced after finality in the state court does not apply to federal habeas proceedings unless it decriminalizes conduct or substantially improves the reliability of the fact-finding process by altering common understanding of bedrock constitutional principles. Obviously, *Montejo* falls under neither exception. However, *Teague* is intended to promote finality of review of criminal judgments by preventing the application of right-expansive new rules to habeas review. In this case, the new rule is right-restrictive, upholding the admission of a statement that previously had been inadmissible. As such, application of *Montejo* would promote finality and should be applied on federal habeas if it would support denial of relief. This conclusion is supported by the consideration that on retrial, the evidence would be admissible anyway.

Although admission of the evidence would not have been the result if Phil's attorney had timely raised the issue at trial, prejudice is determined by the law in place at the time of review, not at the time of the act of ineffective assistance. *Lockhart v. Fretwell*. Consequently, Phil suffered no cognizable prejudice, and his Jackson claim must be denied.

### 3. Execution claim

The state supreme court rejected Phil's claim that it would violate the 8<sup>th</sup> Amendment to execute him, ruling that he should have raised the issue on direct appeal. That is a procedural default that Phil must surmount. He may do so in at least two ways.

First, he may argue that the novelty of the new rule, which did not exist at the time of his appeal, was cause for his failure to raise it. At the time of his appeal, it was well-settled that anyone over the age of 18 could be executed. *Roper v. Simmons*. Thus, Phil had no reason to raise the issue on direct appeal. *Reed v. Ross* (1984) 468 U.S. 1. Second, a procedural default may be circumvented by a showing of a miscarriage of justice, i.e., the prisoner is probably innocent. In this case, Phil was indisputably innocent of being eligible for the death penalty. For these reasons, the federal court may hear the claim.

The case that raised the age of eligibility for the death penalty announced a new rule, but it may be applied to Phil under the first *Teague* exception. The new case established constitutionally-based ineligibility, a form of innocence that would be recognized under *Teague*. Phil gets his relief.

### 4. Harmless error

Ineffective assistance of counsel is not subject to harmless error analysis because the prisoner must show prejudice to support his claim. If he has done so, no further analysis is necessary.

The claim that a statement was admitted in violation of the Sixth Amendment would be tested under *Chapman v. California* on direct review, but under the more forgiving standard of *Brecht v. Abrahamson* on federal habeas corpus.

The death eligibility claim is obviously not amenable to harmless error analysis. As such, it is "structural" and would require a grant of review with no further showing.