

**QUESTION NO. ONE**

Sitting at a bar one night, Al told Ben that he (Al) and Chuck had robbed a convenience store the previous week. Al said, "I drove the car, but Chuck went into the store and did the deed." The following day, Ben dutifully reported the conversation to the police, who could not arrest Al because he had left the state, but did arrest Chuck.

At the preliminary hearing, Ben testified about Al's statement implicating Chuck. At the end of the preliminary hearing, the court dismissed the charge against Chuck, ruling that it could not consider Ben's testimony because to do so would violate *Crawford v. Washington* (2004) 541 U.S. 36.

The following day, the state had Ben testify before a grand jury, which issued an indictment at the conclusion of the state's evidence.

Before trial began, Chuck moved to dismiss the indictment on grounds of (1) double jeopardy, (2) collateral estoppel (or issue preclusion) and (3) admission of inadmissible evidence, without which there was insufficient cause to support the indictment. The motion was denied, a jury was selected and sworn, and the state began to present its case.

After the state had presented its case, including Ben's testimony, Chuck agreed to plead guilty to the lesser offense of larceny. The state's attorney did not tell Chuck that Al had been caught and had recanted his confession implicating Chuck. When Chuck entered his guilty plea in court, the court asked if he knew what rights he was relinquishing. Chuck, who had been told by his attorney of his rights to jury trial and confrontation, said that he did. After entry of the plea, the trial court, exercising its statutory discretion, sentenced Chuck to the maximum term for larceny because the court found that he had used a gun during the commission of the offense.

Chuck appeals, renewing his challenges to the indictment on grounds of double jeopardy, collateral estoppel, and *Crawford*. He also challenges the guilty plea on the grounds that he was not informed of Al's recantation (assume that this fact became part of the appellate record) and that the court did not inform him of the rights he was waiving. He also challenges the sentence because he did not waive his right to jury trial under *Blakely v. Washington* (2004) 542 U.S. 296.

A. Which, if any, of these claims may be considered on the merits by the appellate court?

B. Please address the merits of each claim. In discussing the *Crawford* claim, does it matter if the jurisdiction is a "Costello" (*Costello v. United States* (1956) 350 U.S. 359) state? Assuming that the admissibility of the statement can be challenged, is there another argument that can be made to challenge its admissibility?

C. If Chuck wins a reversal, can he be retried? If so, for what?

**END OF QUESTION ONE**

**QUESTION NO. TWO**

Ed attempted to blow up a bus by placing a bomb on the underside of the vehicle and using a remote control to detonate the device. Fortunately, it did not detonate, no one was hurt, and Ed was immediately arrested.

Charged with 26 counts of attempted murder (for attempting to kill 25 passengers and the driver), Ed was ordered shackled for all proceedings by the court, which found that the nature of his offenses posed a threat to the security of the court personnel and spectators.

Ed's attorney moved to suppress evidence found in Ed's apartment during a warrantless search based on exigent circumstances. The court excluded Ed from the courtroom, ruling that his presence was not required for the hearing. The court also excluded members of the press and public, finding a reasonable probability of prejudice to Ed if their attendance was permitted. The motion to suppress was subsequently granted.

Ed was present for all subsequent proceedings and was restrained in such a manner that the restraints were not visible to anyone in the courtroom. During voir dire, Ed's attorney attempted to use a peremptory challenge to excuse a prospective Latino juror, but the trial court denied the challenge because the attorney previously had excused another Latino juror. The court did not ask Ed's attorney to explain the reason for either challenge. The second Latino juror remained on the jury and became its foreperson.

The jury convicted Ed of 13 counts and acquitted him of the remaining 13 counts.

On appeal, Ed challenges: (1) his shackling; (2) his exclusion during the suppression hearing; (3) the closure of the suppression hearing to the press and public; (4) the denial of his peremptory challenge; and (5) his conviction on 13 counts in light of his acquittals on the basis of the same evidence. Please discuss if any asserted errors are subject to harmless error analysis under the Federal Constitution.

If Ed secures a reversal, may he be retried on the 13 counts of which he previously had been found guilty?

**END OF QUESTION TWO**

**QUESTION NO. THREE**

Phil, age 20, was charged with capital murder committed during the course of a robbery. After he was arraigned in trial court, where he requested an attorney, he was approached by police, was advised of his constitutional rights, and agreed to talk. He then confessed, in violation of his right to counsel under *Michigan v. Jackson* (1986) 475 U.S. 625.

At trial, Phil's attorney did not object to the confession, which was admitted in evidence. Phil was convicted of murder and, after a penalty trial, was sentenced to death.

On appeal in the state supreme court, new counsel challenged the admissibility of the confession, but the court declined to consider the merits of the claim, invoking the state's well-established contemporaneous objection rule.

Three months after the affirmance of the judgment, Phil's attorney filed a petition for writ of habeas corpus in the state supreme court, claiming that trial counsel was ineffective for failing to raise the *Jackson* claim. Although noting that the claim was not timely filed under the court's rule that a habeas corpus petition be filed within 60 days after affirmance, the court considered and rejected the claim on the merits. The court ruled that Phil had not stated a prima facie case of ineffective assistance because he did not show that he was probably innocent.

Phil timely filed a petition for writ of habeas corpus in Federal District Court, raising the *Jackson* and ineffective assistance claims. During the pendency of the proceedings, the United States Supreme Court overruled *Jackson* in *Montejo v. Louisiana* (2009) 129 S.Ct. 2079, and, in another case, ruled that the Eighth Amendment forbids the execution of a person who was under 21 at the time of the commission of the capital crime. Phil wanted to amend the petition with the claim that the imposition of capital punishment in his case is unconstitutional. (Assume that the amendment is not time-barred.) The district court stayed proceedings to permit Phil to exhaust the new claim in state court. The state supreme court rejected the claim on the procedural ground that it was not raised on direct appeal.

The federal court now has three claims to adjudicate: (1) the IAC claim; (2) the *Jackson* claim; and (3) the execution claim. How should the court rule in each? (4) Are any of the claims subject to harmless error analysis and, if so, under what standard?

**END OF QUESTION THREE****END OF EXAM**