

**SUGGESTED ANSWER TO
2007 CRIMINAL PROCEDURE II
FINAL EXAMINATION**

QUESTION NO. ONE

A. Cognizability of claims.

The general rule is that a plea of guilty forecloses appellate consideration of most claims that arose before or during trial. There are certain exceptions to that rule. This question asks for application of the general rule and its exceptions.

1. Grand jury indictment.

The facts state that Sam challenged the indictment on four grounds: admissibility and legality of the evidence, withholding favorable evidence to Sam from the grand jury, and composition of the grand jury. The plea of guilty forecloses appellate review of all claims. *Tollett v. Henderson*; CB 1374. The doctrine of incurable constitutional error, advanced by some, is not available to establish cognizability because any errors could have been cured by obtaining the indictment without the use or hearsay or illegally seized evidence, by admitting the evidence favorable to Sam, or by constitutionally composing the grand jury. True, some of the errors may have been prejudicial, and necessarily so, but "prejudicial" does not mean "incurable."

2. Batson claim.

This claim is also barred by the plea of guilty. Even if it is meritorious, and requires reversal, it is not incurable for the reason stated above. The case may be tried before a jury selected in compliance with Batson.

3. Sentencing

Virtually everyone argued that it was a post-plea error that was therefore reviewable on appeal. The problem with that answer is that the sentencing arrangement, with the court exercising its discretion, was part of the agreement. Therefore, a better answer was that the court could review the sentence to determine whether Sam received what was promised in the bargain.

B. The Merits

1. Grand jury.

The use of hearsay evidence, otherwise inadmissible at trial under *Bruton v. United States* and *Crawford v. Washington*, was admissible in the grand jury proceeding under *Costello v. United States*. The use of illegally seized evidence under the Fourth Amendment was admissible under *United States v. Calandra* (which, despite what one person thought, was discussed--more than once--in class). A prosecutor is not required to present evidence favorable to the accused to a grand jury. *United States v. Williams*.

The fair cross section claim would fail. As most realized, the Supreme Court has never held that this provision of the Sixth Amendment applies to the Fifth Amendment grand jury provision. Treating it as an equal protection/due process claim, it does not identify a cognizable class--age has never been accepted as such--and the evidentiary showing is insufficient. According to the facts, Sam's claim is based solely on the lack of persons 25 or younger in the panel that indicted him. A constitutional violation on this ground is based on evidence of systematic and intentional underrepresentation over an extended period of time.

2. Batson claim

To prevail, a defendant must present a prima facie case that the prosecutor has exercised his peremptory challenges based on bias toward a cognizable group. Relief is granted if the prosecutor cannot tender a neutral explanation for the removal of each of the group. The group "non-whites," as the prosecutor argued, has never been recognized as a group for Batson purposes, and properly so. Groups share characteristics, particularly cultural heritages and experiences, that an amalgam of non-whites does not. However, the prosecutor's argument did not foreclose Batson relief. Sam should have argued, and the court should have realized, that there was a potential prima facie case that the prosecutor discriminated against three groups--Blacks, Latinos, and Chinese--and that, as to each, the use by the prosecutor of peremptory challenges as to members *of the other two groups* was evidence of group bias. In other words, the evidence was prima facie that the prosecutor was biased against all three groups, and each of them. The prosecutor's argument that each group was represented on the jury is fallacious. The fair cross section requirement does not apply to the petit jury, and the discriminatory removal of even one of the group violates the equal protection clause, as construed in Batson.

The relief: reversal and remand for a proper Batson hearing. If the prosecutor can justify the use of his peremptories, then the judgment may be reinstated. If not, the reversal must be for a new trial.

3. Sentencing.

The sentencing did not violate Blakely for several reasons. First, as part of the plea agreement, Sam agreed to the choice of sentence by the court, thus waiving any jury trial. Second, discretionary sentencing falls outside the reach of Blakely. *United States v. Booker*. Third, a court may find the existence of prior convictions to aggravate a sentence.

QUESTION NO. TWO

1. Speedy Trial:

Joe's speedy trial contention was based on the Sixth Amendment, which requires that the defendant be an "accused" during the relevant period. However, Joe cannot challenge the year's delay on speedy trial grounds because he was not an accused during that period. The probation revocation proceeding was not a formal accusation within the meaning of the Sixth Amendment. Thus, any challenge to the delay had to be based, if at all, on the due process test under *Lovasco*, which requires the defendant to show no good cause for the delay and prejudice.

On the facts, it does not appear that Joe can satisfy either prong of the test. He was not charged

because the prosecution had insufficient evidence, a deficiency shown by its failure to achieve a revocation based on his commission of the new crime. Of course, the facts state that the state did nothing for a year, but it is speculative to suggest that a more prompt resumption of the investigation would have resulted in an earlier prosecution. In any event, there is no showing of prejudice. Joe was at liberty during the year (since the revocation failed) and there is no claim that his defense was compromised.

If Joe could have established a speedy trial violation under the Sixth or Fourteenth Amendments, the judgment would have been reversed because that violation is not subject to harmless error analysis. Existence of the error means that there should not have been a trial at all.

2. Double Jeopardy:

Double jeopardy presupposes that one trial has been held and that a second has been, or is about to be, held. The probation revocation hearing, an essentially administrative proceeding, is not a trial within the meaning of the Double Jeopardy Clause. There being no former jeopardy, the trial could not be double jeopardy.

3. Collateral estoppel:

Collateral estoppel is a broader concept than double jeopardy, allowing a defendant to take advantage of a favorable factual finding in a prior criminal proceeding subject to the same standard of proof as in a criminal trial. Most who (correctly) said that the finding of insufficient evidence at the revocation hearing was not collateral estoppel argued that it was as a result of different standards of proof: preponderance of evidence (revocation hearing) v. beyond reasonable doubt (trial). That argument overlooks that the standard of proof at the revocation hearing is *less onerous* to the prosecution. Thus, if it could not establish guilt by preponderant evidence, a fortiori it could not prove guilt beyond a reasonable doubt. Most cases rejecting collateral estoppel in this context (e.g., *Lucido v. Superior Court* (1990) 51 Cal.3d 335) point out that a revocation hearing is not intended to determine guilt or innocence of a crime but whether the defendant has violated the conditions of probation imposed for a previous offense. Furthermore, the standard of proof is lower and the rules of evidence are relaxed. To apply collateral estoppel, these courts have said, would deprive the state of proving guilt at a jury trial. For these reasons, Joe's collateral estoppel argument would be rejected.

If Joe's double jeopardy or collateral estoppel argument had been meritorious, the violation would not have been amenable to harmless error analysis. In both situations, no trial should have been held at all.

4. SW's priors:

The prosecution committed two constitutional violations at trial: failure to disclose favorable evidence to Joe and permitting SW to commit perjury by testifying that he had never been convicted of a crime. As everyone realized, the prosecutor did not know of the priors but nevertheless must be held constitutionally responsible because his investigator, present during trial, was aware of the priors and the perjury. *Kyles v. Whitley*.

To make out a claim under *Brady v. Maryland*, Joe had to show that the evidence was favorable, which evidence of the star witness's priors surely was, and that it was material, i.e., it was reasonably probable that its disclosure would have resulted in a more favorable result. On

appeal, Joe's claim would have foundered on the shoals of the court's finding that the evidence was not material. Although a question of law, the court's conclusion, based as it was on its assessment of the evidence which it heard, would probably be accepted on appeal. Only one person understood this problem that Joe had.

However, knowing use of perjured testimony is also a constitutional violation, which requires reversal unless it is harmless beyond a reasonable doubt under *Chapman v. California*. Because the trial court did not consider this claim, or apply the *Chapman* standard, that is the argument Joe should make in the appellate court.

As most realized, Brady error is not amenable to harmless error analysis because the error presupposes prejudice: a reasonable probability of a more favorable result. Knowing use of perjured testimony is subject to harmless error analysis under *Chapman*.

5. Resentencing:

Double jeopardy does not preclude a harsher sentence upon retrial, but it does require the awarding of credit for time served, lest the defendant serve more time than authorized by the statute. *North Carolina v. Pearce*. Moreover, if the same judge imposed both sentences, he or she must justify the harsher sentence to overcome the presumption of vindictiveness for the defendant's successful appeal. However, the facts on which the court may properly rely need not have occurred subsequent to the first trial. To the extent *Pearce* suggested otherwise, it was overruled in *McCullough*.

QUESTION NO. THREE

1. The search:

Although Paris' plea of guilty did not forfeit her right to raise the search on state appeal by reason of the state procedural rule (cf. Cal.Pen.Code § 1538.5), *Stone v. Powell* forecloses federal habeas review of this claim.

2. The Miranda claim:

Paris failed to raise the Miranda claim in the state supreme court, a requirement for exhaustion of state remedies. *O'Sullivan v. Boerckel*. However, by the time Paris petitioned for habeas corpus, the time for petitioning for review in the state supreme court had long passed, we can assume. Therefore, being unavailable, state supreme court review was exhausted. However, failure by Paris to petition for review was a procedural default, which may be excused only by a showing of cause and prejudice or actual innocence.

Cause in the form of ineffective assistance of counsel was unavailable for the following reasons. First, she did not raise it in the state court. If it can still be raised--most states permit its litigation on habeas corpus even after an appeal--she must do so. Second, because there is no right to counsel in a discretionary application for review to the state supreme court, *Ross v. Moffit*, there is no right to effective assistance.

Furthermore, another procedural default bars federal review. Under state law, a plea of guilty forecloses review of the admissibility of a confession. Thus, even if Paris had petitioned for

review in the state supreme court, or can show cause for failing to do so, her plea of guilty erected another bar to federal review.

3. Ineffective assistance:

As explained in no. 2, Paris had not exhausted her state remedies on this claim. Therefore, the court must dismiss the entire petition or, if Paris can show good cause for failing to exhaust before filing the habeas petition, stay the proceedings and hold the matter in abeyance pending prompt resolution of the IAC claim in state court. The stay-and-abey procedure, of course, prevents loss of the federal court's jurisdiction over the claims by reason of the one-year statute of limitations.

Paris' claim fails on the merits, of course. Not only is there no right to effective counsel in a discretionary appeal, but Paris cannot show deficient performance. Because the state court cannot review the merits of the Miranda claim as a result of a plea of guilty, it would have been futile to raise the issue in the state supreme court.

5. Successive petition:

Under pre-AEDPA law, a habeas petition which raises a claim that had been previously raised and denied required a showing of factual innocence, *Kuhlmann v. Wilson*, NOT (as many thought) a showing of cause and prejudice or innocence. (Cause and prejudice really don't make sense because, having raised the claim, the petitioner has no cause to show.) Under AEDPA, it appears that a subsequent petition raising a previously rejected claim is simply forbidden with no exceptions.

If AEDPA should be construed to permit an exception in the case of a new rule, then *Teague v. Lane* would become relevant. *Teague*, of course, bars application of a new rule to a final judgment unless the new rule forbids the criminalization of the defendant's conduct on constitutional grounds (e.g., flag burning) or creates a new procedure which substantially enhances the reliability of the fact-finding process and alters our understanding of bedrock principles of criminal procedure. The overruling of *Perkins* falls within neither exception. Paris's conduct was not decriminalized, and the exclusion of what may be a reliable confession will not enhance the reliability of the fact-finding process.