

**SUGGESTED ANSWER TO
2008 CRIMINAL PROCEDURE II
FINAL EXAMINATION**

QUESTION NO. ONE

A. Cognizability of Issues 1-4

Having pleaded guilty to the charged offense, Al wanted to raise four issues on appeal. The general rule is that a plea of guilty precludes the litigation of most issues on appeal. This rule holds true even if the claims are alleged to be constitutional violations and—most importantly—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. Defects in the indictment

The general rule applies to claims that the indictment is invalid because the supporting evidence is inadmissible hearsay, illegally seized under the Fourth Amendment, or otherwise insufficient to establish probable cause. This rule applies even if the state is not a Costello state.

2. Jury selection

The validity of the guilty plea subsumes any antecedent irregularities or illegalities in the jury selection process. Even if the jury was unconstitutionally selected, the fact remains that it did not decide Al's guilt. He did that himself by pleading guilty.

The doctrine of incurable constitutional error cannot confer jurisdiction on the appellate court for the simple reason that the error was not incurable. If Al had pleaded not guilty, had gone to trial, and had been convicted by the improperly selected jury, Al could have appealed, won a reversal, and then stood trial by a properly selected jury.

3. Coerced plea

This issue is one of the exceptions to the rule because the rule presumes a valid guilty plea. If it was not, then the basis for the conviction and incarceration is illegal.

4. Sentence

Any post-plea error can ordinarily be raised. The plea may forfeit any antecedent errors, but it cannot waive errors that have not yet occurred.

B. The Merits

1. Indictment

Costello holds that an indictment cannot be challenged on the basis of the admissibility or sufficiency of the evidence presented to the grand jury. Costello does not govern the issue of illegally seized evidence under the Fourth Amendment, but Calandra holds that the exclusionary rule does not apply to grand jury proceedings.

This issue is subject to harmless error analysis. *United States v. Mechanik* holds that any irregularities in the grand jury process are cured by a fair trial. The same rule should hold for a valid guilty plea.

2. Jury selection

Al's fair cross section claim must be rejected because the fair cross section principle of the Sixth Amendment does not apply to the selection of the petit jury. *Holland v. Illinois*; CB p.1404. If it did, the peremptory challenge system could not survive. The challenge to the use of peremptories may be made under the equal protection clause. *Batson v. Kentucky*. However, the defendant must make a prima facie case of group bias. Al's showing was that the percentage of African-Americans on the jury was significantly less than in the relevant population. That is an insufficient showing. (He did not claim that the removal of the Black prospective jurors was motivated by group bias.)

This claim is not amenable to harmless error analysis. If it were, the fairness of the jury actually selected would cure the group discrimination that motivated the removal of the minority jurors, in contravention of a strong national policy.

3. Coerced plea

A threat by the prosecutor to add new charges does not invalidate a subsequent plea. That is simply part of the bargaining process. Nor does the defendant necessarily have to be represented by counsel. If he validly exercises his *Faretta* right, he is subject to the same bargaining process as an attorney.

If a plea is coerced for whatever reason, it requires reversal because it resulted in the defendant's conviction and incarceration.

4. Sentencing

The selection of a mitigated term by the trial court does not violate *Blakely*. If the middle term can be lawfully imposed by the court, then the lower term may also be imposed.

Blakely error is subject to harmless error analysis. *Recuenco v. Wahington*.

C. Refiling of the Indictment

The indictment can be refiled or reinstated on appeal without offending the Double Jeopardy Clause. If the court had ruled on Al's motion, it would have done so before jeopardy had attached. Reinstatement of the charges would not have implicated double jeopardy because Al never had been in jeopardy. *Serfass v. United States*.

D. Retrial and resentence

1. Retrial

If a defendant wins a reversal of his guilty plea, the original charges may be reinstated. Otherwise, he would get the benefit of the bargain and a reversal, unfairly setting the bar lower than the original charges. His plea was not an acquittal; thus the *Green* rule does not apply. Rather, this is an application of the *Ball* rule to guilty pleas. Al may be tried for robbery.

2. Resentence

Al may receive a harsher sentence (*Pearce v. North Carolina*), but the court does not have to justify it by referring to reasons not stated in the first sentencing for two reasons. First, the *Pearce* rule does not apply to guilty pleas in the first proceeding. *Alabama v. Smith*. Second, and more compelling, Al was convicted of a more serious crime the second time around. The sentence for robbery is usually more severe than for larceny.

QUESTION NO. TWO

A. Retrial

1. Steve

Steve requested the mistrial, which was granted. The general rule is that if a defendant requests or consents to a mistrial, the Double Jeopardy Clause does not prohibit retrial. The exception to the rule, recognized in *Oregon v. Kennedy*, is that retrial is barred if the motion for mistrial was goaded by the prosecutor. It is not sufficient to show that the prosecutor committed error or misconduct; it must have been for the purpose of inducing the defendant to move for a mistrial.

In this case, the failure to redact the officer's copy appears to have been inadvertent. Even if intentional, there is no reason to believe that the error was intentionally committed for the purpose of precipitating a mistrial. To the contrary, if the prosecutor intentionally failed to redact the statement, it was probably for the purpose of dirtying up Steve in front of the jury, which would have been more likely to convict him. Under *Kennedy*, retrial is permissible.

2. Harry

Having objected to the mistrial, Harry can be retried only if the prosecution can show evident necessity. *Illinois v. Somerville*. The statement was Harry's confession and, as such, was admissible against him. It is hard to see how the explicit reference to Steve could have prejudiced Harry. It could be argued that the mistrial was necessary to preserve the possibility of a joint trial of Harry and Steve, but that is more a matter of prosecutorial convenience, not evident necessity. The Double Jeopardy Clause bars Harry's retrial.

B. Omitted robbery charge

Under the *Blockburger/Dixon* rule, two or more offenses comprising the same elements must be charged in the same indictment or information. Some answers argued cogently that the felony murder and the robbery were not the same offenses under this test because a felony murder can be committed without committing a robbery (an arson, for example) and a robbery can be perpetrated without committing a murder. Cogent though this argument may be, the Court held to the contrary in *Harris v. Oklahoma*, cited with approval in *Dixon*. Thus, a robbery and a felony murder based on that robbery have the same elements within the meaning of the *Blockburger* rule.

However, the *Blockburger* rule does not bar the amendment to the charging document for a different reason. The rule forbids a successive prosecution only if the defendant was convicted or acquitted in the first prosecution. There is no prohibition if the first trial does not produce a verdict. This exception makes sense in light of the reason for the rule, which is to forestall needless piecemeal prosecutions. This rationale, and the rule, are simply inapplicable if the defendant must be retried

anyway. Because Steve may be retried for the murder, it places no undue burden on him to defend against the robbery charge.

C. Double jeopardy and pretrial delay

1. Cognizability

Although a guilty plea generally bars appeal of any antecedent claims, this rule is subject to the exception of incurable constitutional error. If the defendant claims that an error of constitutional magnitude has occurred that is uncorrectable, that may be considered on appeal. It is important to note that the claim must be evaluated in the abstract, without regard to the actual merits.

The double jeopardy claim, in the abstract, is incurable constitutional error because it would forever bar reprosecution. The same is true of the pretrial delay claim.

2. The merits

For reasons given in part A, Harry's double jeopardy claim is meritorious and would forever bar reprosecution. His pretrial delay claim is without merit. Under *Lovasco*, preaccusation delay violates due process if the government delays prosecution to gain an unfair advantage and the defendant has been prejudiced. The prosecution was delayed for a year because Harry fled the jurisdiction, and he has not identified any prejudice that he has suffered.

D. Steve's confrontation claim

Harry's testimony that he implicated Steve in a written statement did not violate Steve's rights under the Confrontation Clause. Such a written statement could not be introduced against the non-declarant under *Bruton*, but two facts distinguish this case from *Bruton*. First, Harry was available for cross-examination about his statement. *Nelson v. O'Neil*. Second, the statement was admitted solely to corroborate Harry's testimony, not for the truth of the matter stated. The Confrontation Clause is not implicated by statements that are not introduced for their truth. *Tennessee v. Street*.

QUESTION NO. THREE

A. Amendment to the habeas corpus petition

Fred's conviction had become final as to the state courts by reason of the affirmance of his judgment by the state supreme court. He then presented his constitutional claims to a federal court in a petition for writ of habeas corpus. While it was pending, his attorney discovered the factual basis for a new claim which could be brought in either state or federal court. When he alleged this new ground in federal court, what should the court do?

The petition is now what is called a "mixed" petition, containing both exhausted and unexhausted claims. Because Fred has an avenue of redress in state court as to the new claim, he is obliged to pursue that remedy before the federal court can proceed on any of the claims, even those which were exhausted and otherwise properly before the court. The court can do one of three things. First, it can dismiss the entire petition, not just the exhausted claims. However, dismissal of the entire petition starts the statute of limitations running on the exhausted claims, which Fred might lose forever if he is unable to exhaust the new claim and refile in federal court within a year. Second, the court can invite Fred to withdraw the unexhausted claim (in which case he can never raise it in a forbidden successive petition). Third, the court can hold the petition in abeyance while Fred exhausts the

unexhausted claim. This possibility avoids the statute of limitations and successive petition problems described above, but Fred must show good cause for the delayed filing of the new claim. *Rhines v. Weber* (2005) 544 U.S. 269. In this case, Fred can show good cause because the factual basis for the new claim had been suppressed by the prosecution.

B. Can the court reach the merits of the new claim?

The state court refused to consider the merits of the claim because Fred had not filed his petition timely in state court. The federal court is bound to respect that procedural default absent a showing of cause and prejudice. *Wainwright v. Sykes*. The reason for the failure was that Fred's attorney was ignorant of the applicable statute of limitations. However, this oversight does not constitute ineffective assistance of counsel because there is no right to counsel in state habeas proceedings and, therefore, no right to effective counsel. Even if Fred could show prejudice—a reasonable probability that the outcome of the trial would have been different—his failure to demonstrate cause forecloses relief unless he can plead and prove actual innocence, i.e., it is more likely than not that no reasonable juror would have convicted him but for the error.

C. Two claims

1. Fred's two claims are suppression of material evidence favorable to the accused and knowing use of perjured testimony. The star witness lied about his criminal record and the prosecutor must have known because he deleted the felonies from the rap sheet he gave to Fred's counsel before trial.

It was argued by some that the alternate claim was an ineffective assistance of counsel claim, but that is incorrect. That is not a claim that, if proved, would result in the granting of relief, i.e., the overturning of the conviction. Even if the IAC claim were valid—which it is not, see *supra*—it would, at most, establish cause for the procedural default.

2. The knowing use of perjured testimony claim provides a greater chance of success, at least in state court. If the petitioner establishes the elements of the claim, then the state must show that the error was harmless beyond a reasonable doubt, i.e., no reasonable possibility that the error contributed to the verdict. A suppression of evidence claim, on the other hand, requires that the petitioner show a reasonable probability that the suppressed evidence, if known by the jury, would have resulted in a more favorable verdict.

3. The benefit of a more favorable harmless error rule is lost in federal habeas review, where the Chapman rule is inapplicable. *Brecht v. Abrahamson*. Rather, the petitioner must show a substantial and injurious effect or influence on the jury's verdict, i.e., a reasonable probability that the error contributed to the verdict.