

**Final Examination
Criminal Procedure II
Professor Niver
Summer 2007**

QUESTION NO. ONE

Indictment proceedings were instituted against Sam before a federal grand jury. The prosecutor presented the signed statement of Al, who declared that he and Sam had robbed a bank and stashed the proceeds in Sam's home. The prosecutor also introduced the proceeds, which had been taken from Sam's home in violation of his Fourth Amendment rights. The prosecutor did not introduce a subsequent statement (in his possession) by Al in which he exonerated Sam of all responsibility for the robbery, and admitted that he had hidden the proceeds in Sam's house without his knowledge. The grand jury returned an indictment charging Sam with bank robbery.

At trial, Sam moved to dismiss the indictment on the following grounds: (1) Al's initial statement was inadmissible against him; (2) the search of his house was illegal (and the discovered evidence thus inadmissible); and (3) Al's exculpatory statement was not revealed to the grand jury. Additionally, he argued that (4) the composition of the grand jury violated his right under the Sixth Amendment to a fair cross-section of the community, asserting that no one under the age of 25 was on the grand jury that indicted him. The motion was denied on all grounds.

During selection of the petit jury, Sam objected to its composition on the ground that the prosecutor had used all of his peremptory challenges to exclude non-whites, having removed four African-Americans, three Latinos, and three Chinese-Americans. Asked for an explanation, the prosecutor argued that the generic class of "non-whites" was not a cognizable group. In any event, the prosecutor added, the jury contained members of each cognizable group of a number sufficient to satisfy the fair cross-section requirement. The court overruled Sam's objection.

Sam decided to plead guilty, agreeing to allow the court to choose the sentence in the exercise of its discretion. The court sentenced Sam to the maximum term, citing Sam's prior convictions as justification.

Sam appeals, raising the following claims: (1) the indictment was invalid for each of the grounds raised in the trial court; (2) the selection of the petit jury violated his constitutional rights; and (3) the sentence was invalid under *Blakely v. Washington*.

A. What issues may be raised despite the guilty plea (i.e., the merits of which issues may be addressed and decided by the appellate court)?

B. On the merits, what result as to each claim? (In other words, if Sam had gone to trial, was convicted, and raised the same claims on appeal, how should the appellate court decide them?)

QUESTION NO. TWO

The state moved to revoke Joe's probation on the ground that he had committed a subsequent crime, but at the revocation hearing the court ruled that the evidence was insufficient to establish a violation, applying a preponderance of evidence standard. About a year later, the state resumed its investigation, found more evidence of the crime, and secured an indictment against Joe. Joe moved to dismiss the indictment on grounds of a Sixth Amendment speedy trial violation, double jeopardy, and collateral estoppel. The motion was denied on all grounds.

Before trial, Joe moved for discovery pursuant to *Brady v. Maryland*, but the prosecutor did not produce the extensive rap sheet of its star witness (S.W.) because he had committed his offenses under an alias and consequently the prosecutor was unaware that S.W. had a rap sheet. At trial, the prosecutor's investigator recognized S.W. as a person whom he had helped send to prison (under his alias), but said nothing when S.W. testified that he never had been convicted of a felony.

After Joe was convicted, he moved for a new trial on the ground that S.W.'s criminal record (discovered after the trial by Joe's attorney from other sources) should have been disclosed by the prosecutor. The court denied the motion, ruling that the prosecutor had no knowledge of the priors and, in any event, the evidence was not material under the *Brady* standard in view of the evidence presented against Joe.

On appeal, Joe raises the (1) speedy trial, (2) double jeopardy, and (3) collateral estoppel claims. Additionally, he challenges the court's denial of his (4) new trial motion. As to (4), what argument(s) should he make? May the state argue that any of the errors are subject to harmless error analysis?

Assume Joe's conviction is reversed, he is retried and convicted of the same offense, but receives a more severe sentence than was imposed after the first trial. The court gave no reason for the increased sentence, and refused to grant credit for time served.

Joe appeals his sentence. What result?

QUESTION NO. THREE

Charged with various offenses in state court, Paris moved to suppress: (1) evidence on the ground that it was seized in violation of her Fourth Amendment rights; and (2) her confession on the ground that it was elicited by a secret agent in violation of *Miranda v. Arizona*. Both motions were denied, and she decided to plead guilty.

On appeal, she raised both issues. The court of appeal addressed the merits of the search claim in view of the well-established state rule that a plea of guilty does not foreclose review of a Fourth Amendment claim, and rejected the claim on the merits. However, it refused to review the merits of the *Miranda* claim, citing the equally well-established state rule that a plea of guilty precluded review of the admissibility of a confession.

Paris' attorney then petitioned the state supreme court for review, but raised only the search claim, omitting the *Miranda* contention. The state supreme court denied review.

Paris then petitioned the United States District Court for a writ of habeas corpus within the applicable time period. She raised (1) the search claim; (2) the *Miranda* claim; and (3) an ineffective assistance of counsel claim, citing her appellate attorney's failure to raise the *Miranda* issue in the state supreme court.

May the district court consider the merits of any of the claims? Why (or why not)? Assume that the merits of (3) can be considered, what should the ruling be?

Assume that the writ was denied and that five years later (while Paris was still in custody), the United States Supreme Court overruled *Illinois v. Perkins*, and held that the elicitation of a confession by an undercover agent violates *Miranda*. May Paris file a successive petition raising the issue? Please address whether *Teague v. Lane* and/or AEDPA would bar or permit relief.