

**FINAL EXAMINATION
CRIMINAL PROCEDURE II
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QUESTION NO. ONE

In a state that follows the federal rule of *Costello v. United States* (1956) 350 U.S. 359, Al was indicted for robbery on the basis of inadmissible hearsay, and evidence seized in violation of his Fourth Amendment rights. Before trial, he moved to dismiss the indictment on the grounds that the grand jury evidence was (1) inadmissible hearsay, (2) inadmissible under the Fourth Amendment, and (3) in any event, even if the evidence was otherwise admissible, insufficient to support the indictment. The motion was denied.

During jury selection, Al moved to dismiss all charges because the prosecutor had violated his right to a fair cross section of the community on the jury by using his peremptory challenges to remove all but two African-Americans, who were left on the jury. Al, who is white, argued that African-Americans constitute one-third of the relevant community, twice the percentage as on the jury. The motion was denied.

Offered a deal by the prosecution, which threatened to add new charges if Al did not accept, Al decided to plead guilty to larceny, a lesser included offense. The court then sentenced Al. There were three possible sentences for the offense of larceny: two, four, or six years. In that state, a finding of fact in aggravation is necessary to justify the upper term. Finding that Al had committed no prior felonies, the court sentenced him to two years.

Al appeals, raising the following contentions: (1) the indictment was invalid for the reasons raised in the trial court; (2) the prosecutor's use of peremptory challenges violated the Constitution; (3) the plea was coerced; and (4) the sentence was invalid under *Blakely v. Washington*.

A. What issues (of (1) – (4)) may be raised and resolved 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 (1) - (4)? If any of the claims are valid, are they subject to harmless error analysis?

C. If the trial court had dismissed the indictment, either because the evidence supporting it was inadmissible and/or insufficient, or because the prosecutor committed error during jury selection, do double jeopardy principles prohibit a government appeal or the refiling of charges against Al?

D. (1) If Al secures a reversal, may he be tried? For what?

(2) Assume he is tried for robbery, may he receive a harsher sentence than the first sentence? Must the court explain why?

QUESTION NO. TWO

The State wants to charge Harry and Steve with felony murder during the course of a robbery, but Harry has fled the State and his whereabouts are unknown. Police have investigated Steve, and are convinced he is implicated in the crimes, but no charges have been brought because prosecutors want to try the men together. About a year later, Harry is captured and extradited to the State. Soon thereafter, both men are formally charged with felony murder.

At their trial, the prosecutor seeks to introduce Harry's incriminating statement, which also implicates Steve. Upon Steve's objection, the court rules that the written statement must be redacted to say "Harry and X robbed and shot the victim." When the statement is read by the officer who elicited it, his copy has not been redacted, and he reads the name "Steve" aloud to the jury. Steve moves for a mistrial, but Harry objects. The court grants the mistrial as to both defendants.

A. May either Harry or Steve be retried?

B. If either is retried, may the State belatedly charge the robbery count that was omitted in the first trial?

Before seeking a ruling on the mistrial issue, Harry agrees to plead guilty to voluntary manslaughter in exchange for the promise of his testimony against Steve. Harry testifies that Steve helped him to rob and shoot the victim. When asked if he gave a written statement consistent with his testimony that Steve was an active participant, Harry says, "yes." Steve objects on constitutional grounds. The prosecutor replies that he is offering the prior consistent statement solely to corroborate Harry's testimony. The objection is overruled, and Steve is convicted.

C. May Harry now appeal his guilty plea on grounds of double jeopardy or pretrial delay? What result on each ground?

D. May Steve seek reversal on appeal on the basis of the introduction of Harry's testimony about the written statement?

QUESTION NO. THREE

Fred committed a serious offense, was convicted in state court, and was sentenced to a long prison term. He raised numerous claims in his state appeal, all of which were rejected by the court of appeal and state supreme court.

Upon finality of the judgment in state court, he raised all of his federal claims again in a petition for writ of habeas corpus in federal district court. While the case was pending, Fred's attorney discovered that the key witness at Fred's trial had been convicted of numerous felonies. At trial, however, the witness had testified that he had never been convicted of a felony. Fred's attorney had requested the witness' "rap sheet" from the prosecutor before trial, but the documents produced by the prosecutor showed only that the witness had been convicted of two misdemeanors. Fred amended his federal petition to allege that the prosecutor had suppressed material evidence favorable to the accused. The state in which Fred was convicted permits the filing of a petition for writ of habeas corpus based on newly discovered evidence, but requires that the petition be filed within six months of the discovery of the evidence.

A. How should the federal court proceed on the amended petition?

Mistakenly believing that he has one year in which to file a petition for writ of habeas corpus in state court, Fred's attorney files the petition more than six months after he discovered the factual basis for the claim. The claim is rejected by the state supreme court on the ground that the petition was untimely.

Fred returns to federal court with his new claim. (Assume that the claim is filed within the applicable statute of limitations.)

B. Can the federal court reach the merits of the claim? What must Fred plead and prove to allow the court to adjudicate the merits?

C. Does Fred actually have two claims?

(1) If so, what are they?

(2) Does one provide a greater chance of success than the other?

(3) Does the applicable harmless error rule on federal habeas corpus nullify that difference?