

## Criminal Procedure: Adjudication Outline

### I. Charging Decision

#### a) Prosecutorial discretion

1) *Inmates of Attica v. Rockefeller*, parties allege indiscriminate use of force against prisoners while retaking the prison. Petitioners sought a writ of mandamus to force the U.S. attorney and States to investigate and prosecute.

(A) Prosecutors can decline to charge for any nondiscriminatory reasons. They have broad, unreviewable discretion.

(i) There is a separation of powers doctrine here. The court wants to leave it to the discretion of the executive branch.

2) *US v. Batchelder*, the defendant was sentenced under a felon in possession of a gun and sentenced to five years. There was a second statute which was similar but only had a two year sentence.

(A) When an act violates one or more criminal statute, the government may prosecute under either, so long as it does not discriminate against any class of defendants.

#### b) Limits of the charging power

1) *US v. Armstrong*, defendant alleged that his prosecution was racially biased and wanted discovery of other defendants prosecuted for crack, levels of law enforcement involvement, and government's criteria for determining whom to prosecute.

(A) Selective prosecution must involve analogous claims. Similarly situated defendants who could have been prosecuted and weren't.

(B) Defendant must show:

(i) Practice had a discriminatory effect; and

(ii) The discrimination was the intent.

2) *Wayte v. US*, low level crimes require a showing by the defendant of:

(A) Passive enforcement system had a discriminatory effect; and

(B) Motivated by a discriminatory purpose.

3) *Brogan v. US*, pretextual crimes are legitimate.

4) No body of law which states what might satisfy a selective prosecution charge, but the discrimination likely needs to be against a constitutionally protected class.

### II. Grand juries and preliminary hearings

#### a) Purpose

1) Screening: voice of the community in charging decision.

2) Investigatory: creates a power to police; creates a need for secrecy; one sided, no judge or defense counsel.

b) *Costello v. US*, a defendant stood trial and was convicted after only hearsay evidence was presented to the grand jury.

1) An indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is sufficient to sustain an indictment.

(A) Not going to turn the grand jury into a trial.

(B) *US v. Williams*, the government failed to present to the grand jury substantial exculpatory evidence it had in its possession, violating a 10th Circuit rule.

(i) A court only has supervisory power over the grand jury proceedings. Its function is to ensure proper procedure is used. There is no duty to disclose exculpatory evidence at the grand jury stage.

#### c) Preliminary Hearings

- 1) Difference with grand juries
  - (A) Adversarial, allowing for defense counsel cross examination.
  - (B) Judge presides and decides
  - (C) Public
  - (D) Slightly more likely to dismiss the charges.
- d) Joinder and Severance
  - 1) 2 Ways:
    - (A) Multiple counts
    - (B) Multiple defendants
  - 2) Federal Rule of Criminal Procedure 8(a): Joinder of offenses are proper when the offenses
    - (A) Are of the same or similar character; or
    - (B) Are based on the same act or transaction; or
    - (C) Are connected with or constitute parts of a common scheme or plan.
      - (i) What matters is what the indictment says, not what happens at the trial.
  - 3) Rule 14(a) relief: A defendant can move to sever even if joinder is proper under rule 8, it should be severed due to the prejudice caused to the defendant.
    - (A) Courts have a lot of discretion.
  - 4) Rule 8(b) joinder of defendants is proper when
    - (A) Same act or transactions; or
    - (B) Series of acts or transaction, a common scheme.
  - 5) *US v. Hawkins*, Hawkins was involved in a robbery and carjacking with a firearm and was later arrested, with a different weapon in his possession. The charges were all brought together.
    - (A) In order for charges to be brought together, there must be some logical and close connection (close nexus) or they must be of the same or similar character.
    - (B) If joinder was improper, there is a harmless error analysis which requires a showing that
      - (i) The evidence was overwhelming;
      - (ii) Steps were taken to mitigate the effects of the error; and
      - (iii) The evidence of the misjoined counts would have been admissible at the other trial.
  - 6) *Zafiro v. US*, four defendants were properly joined under Rule 8(b) but claimed they should have been severed as they had mutually antagonistic defenses.
    - (A) Severance is required only when there is a serious risk that a joint trial would compromise a specific right of one of the defendants or prevent a jury from making a reliable judgment about guilt or innocence.
      - (i) Merely having a better chance to win is not sufficient.

### III. The Right to Counsel

- a) The basic right
  - 1) *Powell v. Alabama*, in a capital case, the 14th Amendment requires the defendant to have counsel.
  - 2) *Betts v. Brady*, appointment of counsel if the absence would result in a trial “offensive to the common and fundamental ideas of fairness and right.”
- b) *Gideon v. Wainwright*, Gideon was denied an attorney at trial and was convicted.

- 1) The right of the accused to counsel at trial is a fundamental principle of liberty and justice that applies to the States as well as the Federal Government.
- c) *Argersinger v. Hamlin*, actual incarceration requires appointment of counsel, no matter how short the jail term is.
- d) *Scott v. Illinois*, Scott was charged with theft and received a fine but no jail time, though the statute stated that it could be given.
  - 1) Once counsel has been denied, incarceration cannot not be given as punishment.
  - 2) Court has never actually said whether all felonies, regardless of imprisonment, requires counsel, but it is presumed so.
  - 3) Courts can use a prior uncounseled sentence to increase the sentence for a later counseled conviction.
- e) *Alabama v. Shelton*, defendant was denied counsel but given a 90 day sentence that was suspended for two years of supervised release.
  - 1) Counsel is required at the trial stage when his vulnerability to be subject to prison is determined.
- f) The Right Before and After Trial
  - 1) *Rothgery v. Gillespie*, Rothgery was arrested after an erroneous record showed he had previously been convicted of a felony. He was charged with being a felon in possession of a firearm and was denied an attorney at the preliminary hearing. After the indictment, he was given an attorney and proved he had never been convicted of a felony before.
    - (A) The defendant has a right to have counsel appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial and at trial.
- g) RTC at line-ups, show-ups, and photo arrays
  - 1) Post-indictment right to counsel once indictment is brought and it is a critical stage where an attorney should be present.
  - 2) Pre-indictment has no right to counsel because there is no prosecution, it is not a critical stage.
  - 3) Photo arrays are not a critical stage.
- h) After trial
  - 1) No right to appeal a conviction, but every jurisdiction does allow for it.
  - 2) *Griffin v. Illinois*, if providing a transcript is a prerequisite to an appeal, then state must provide it to indigent defendants.
  - 3) *Douglas v. California*, Right to Counsel for the first appeal as of right.
  - 4) *Ross v. Moffitt*, no Right to Counsel for subsequent, discretionary appeals.
  - 5) *Halbert v. Michigan*, Halbert pled nolo contendere and was given what he believed to be a faulty sentence. Michigan had made appeals to guilty pleas and nolo contendere appeals discretionary and denied him an attorney.
    - (A) A defendant making a first tier appeal must be provided with counsel.

#### IV. Ineffective Assistance of Counsel

- a) *Strickland v. Washington*, defendant confessed and was sentenced to death. He brought a habeas claim, stating his counsel was ineffective for not presenting mitigating evidence, which likely would not have been effective.
  - 1) There is a two prong test for ineffective assistance of counsel
    - (A) Defendant must show that performance was objectively unreasonable; and

- (B) No checklist
- (C) Not judged from hindsight, but from the lawyer's contemporaneous perspective.
- (D) Highly deferential
  - (i) Competence is presumed.
  - (ii) Courts won't second guess strategic decisions made within a reasonable investigation.
- (E) Easier to satisfy claims for legal, rather than factual, ignorance.
- 2) Defendant must show prejudice, such as there was a **reasonable possibility** that the results would have been different.
- 3) Prejudice
  - (A) A reasonable probability is one sufficient to undermine confidence in the outcome.
  - (B) If the government interferes, prejudice is presumed.
    - (i) Not assigning an attorney with enough time to prepare or meet.
    - (ii) Conflict of interest
    - (iii) Complete failure to act as an adversary
- b) IAC is not necessarily about accuracy.
- c) A defendant does not have a right to have his attorney allow or facilitate his perjury.
- d) *Rompilla v. Beard*, despite being told that a prosecutor intended to use a prior rape conviction, the defense attorney did not review the file, which contained possible mitigating evidence.
  - 1) A defense attorney who knows the prosecution intends to proceed with an aggravating circumstance and does not review it has acted unreasonably because they might have learned about various mitigating facts which might have influenced the jury.
- e) *Missouri v. Frye*, counsel did not tell the defendant about an initial plea deal, which expired, and the defendant took a lesser deal.
  - 1) Defendant must show for plea bargaining
    - (A) A reasonable probability that he would have accepted the earlier plea offer had he had effective counsel; And,
    - (B) A reasonable probability that the plea would have been entered without the state withdrawing it or the trial court rejecting it.
- f) *Lafler v. Cooper*, defense counsel stated that the prosecution could not prove intent to murder because the defendant shot the victim below the waistline and the defendant rejected the offer. Defense counsel's advice was based on a misunderstanding of the law.
  - 1) The defendant must show that he would have accepted the original plea bargain and the court would have accepted and imposed the recommended sentence.
- g) Multiple Representation/Conflict of Interest
  - 1) *Strickland* analysis does not work here because we presume the counsel did his best in an IAC claim. That presumption does not work here because one defendant comes at the expense of another.
  - 2) *Hollow v. Arkansas*, Attorney representing co-defendants makes a timely pre-trial motion about a potential conflict, the court must either grant the motion or determine whether the risk of a conflict is too remote to matter.
    - (A) If denied, reversal is automatic unless the trial court had conducted the proper inquiry and found that there was no actual conflict.

- 3) *Cuyler v. Sullivan*, Sullivan and two other defendants were tried separately with the same two defense attorneys. Sullivan was convicted and the other men were acquitted.
    - (A) A trial court has no duty to inquire into a potential conflict when there is no objection. Prevents a perverse incentive for a defendant not to object.
    - (B) Defendant must show that
      - (i) There is an actual conflict of interest, meaning there is something specific you can point to; And,
      - (ii) Conflict must have adversely affect counsel's behavior.
        - (a) Not required to show that the outcome would have been different.
  - 4) *Mickens v. Taylor*, Mickens's attorney represented his victim in an earlier incident.
    - (A) Court does not have to inquire into a potential conflict when it has notice but it was not raised. Defendant must still show adverse effect on representation.
  - 5) *Wheat v. US*, Trial court may disqualify an attorney over the defendant's objections (waived conflict of interest) if there is a serious possibility of a conflict of interest.
- h) Self-Representation
- 1) *Faretta v. California*, there is a right of self-representation, since the right to a defense is a personal right which the defendant has to suffer the consequences of.
    - (A) Self-representation gives a defendant more control over the strategy.
    - (B) If there is counsel, defendant has a right to
      - (i) Plead guilty
      - (ii) Waive a jury trial
      - (iii) Testify
      - (iv) Appeal.
    - (C) Stand-by counsel can be appointed. However, no right to a hybrid defense.
    - (D) No right to self-represent at appellate stage.
    - (E) Standard is whether the defendant is competent to stand trial.
- V. Bail and the Right to a Speedy Trial
- a) *Stack v. Boyle*, Bail was set for all defendants at \$50,000 and they moved to have it reduced.
    - 1) Pre-trial release is a traditional right, but a court can condition freedom on adequate assurance that the defendant will stand trial and submit to sentence if found guilty.
      - (A) Bail set higher than necessary to achieve defendant's compliance is excessive.
  - b) Bail must be based upon standards relevant to the purpose of assuring the presence of that defendant.
  - c) Bail does not need to be based off whether defendant can afford it.
  - d) *US v. Salerno*, the Bail Reform Act was amended to authorize judges to not set bail if he finds that the defendant poses a risk to the community (e.g., that he will commit further crimes).
    - 1) Given that the government must show, in a fully adversarial process, that
      - (A) There is probably cause that the defendant committed the crime AND
      - (B) By clear and convincing evidence that the defendant represents a threat and there is no other option to prevent this AND
      - (C) The judge must write an opinion as to why bail is being denied, the government's interests outweigh the defendant's.

- (i) Nothing in the Eighth Amendment requires bail, simply that it not be excessive.
    - 2) There must be a facial challenge, rather than an as applied challenged.
    - 3) Purpose of bail is more “regulative,” rather than a punishment, to ensure public safety.
  - e) Preventive detention
    - 1) In capital cases, a majority of states preclude bail.
    - 2) In non-capital cases where the penalty is great, bail is precluded. For example, in some sex and domestic violence offenses.
  - f) Speedy trial
    - 1) Applies only after defendant is arrested or subject to formal charges.
    - 2) Statute of limitations protects defendants against pre-accusation delays.
    - 3) *Barker v. Wingo*, The government, hoping to use a co-defendant’s testimony against Barker, detained him for 10 months with 16 continuance before going to trial 5 years later.
      - (A) Barker was waiting to see how case against Manning went.
      - (B) Court created a balancing test to determine if a Right to a Speedy Trial had been violated:
        - (i) The length of the delay;
        - (ii) The reason for the delay;
        - (iii) The defendant’s assertion of his right; and
        - (iv) The prejudice caused to the defendant, which includes,
          - (a) To prevent oppressive pretrial incarceration;
          - (b) To minimize anxiety and concern of the accused;
          - (c) To limit the possibility that the defense will be impaired.
    - 4) *US v. Lovasco*, 18 month delay before an arrest/indictment to gather evidence against the other defendants.
      - (A) Delay violates the Due Process Clause only if it violates those fundamental conceptions of justice which lie at the base of our civil and political institutions.
    - 5) *Doggett v. US*, the government did not really search for a defendant who left before the indictment. It was 8 ½ years later when it was brought.
      - (A) When the government’s negligence causes an extraordinary delay, prejudice is presumed unless it is rebutted. If it is not, then the defendant is entitled to relief.
  - g) Speedy Trial Statutes
    - 1) Tend to provide strict time limits
      - (A) Depends upon the nature of the offense.
      - (B) Whether the defendant is in custody.
    - 2) Defendant cannot waive the right to a speedy trial indefinitely
- VI. Plea Bargaining
- a) What is necessary to make pleas reliable
    - 1) Rights waived
      - (A) Jury trial
      - (B) Cross-examination
      - (C) Beyond a reasonable doubt.
    - 2) Defendant is properly informed.
      - (A) About the relevant law

- (i) Charges against him.
  - (ii) Rights given up.
- (B) The relevant facts
  - (i) Strength of the evidence against the defendant.
- 3) Or maybe an accurate account of what the defendant did?
  - (A) Have a defendant provide a factual basis.
- b) Fed. R. Crim. Pro. 11
  - 1) Non-constitutional law of guilty pleas in a federal system
    - (A) Focuses on disclosure.
- c) *U.S. v. Broce*, Broce and his company entered guilty pleas and alleged a violation of the double jeopardy clause.
  - 1) A guilty plea waives the right to double jeopardy when
    - (A) The government lacks the power to punish and
    - (B) Can be resolved without further factfinding.
  - 2) It distinguishes this case from other because there were other charges that were valid on their face.
  - 3) Guilty plea waives almost everything.
- d) *N.C. v. Alford*, defendant pled guilty but stated he was innocent but pled guilty to avoid the death penalty.
  - 1) The standard is whether the plea is a voluntary and intelligent choice among alternative courses of action open to the defendant.
    - (A) A judge does not have to accept a plea.
    - (B) *Henderson v. Oregon*-a judge has to inform the defendant of the elements.
  - 2) A factual basis is not the same as a reasonable doubt.
- e) *Hill v. Lockhart*, after a guilty plea, claimed ineffective assistance of counsel, when his attorney was mistaken about the length he would need to serve before parole eligibility.
  - 1) *Strickland* does apply to pleas, but not knowing the correct parole date is insufficient to show prejudice.
    - (A) Did the defective performance affect the outcome of the plea process? Would he have not pled guilty?
- f) *Williams v. Jones*, defendant was convicted of 1st degree murder after his attorney threatened to leave if he pled to 2nd degree.
  - 1) The district court must impose a remedy as close as possible to remedy the constitutional violation and not be limited to state law.
- g) Types of Pleas
  - 1) Charge bargaining: Charges get dropped or downgraded.
  - 2) Sentence bargaining: prosecutor agrees to recommend or not oppose a particular sentence.
  - 3) Fact bargaining: stipulate certain facts so that they are left out of the case.
    - (A) Relevant in jurisdictions with strict sentencing guidelines.
- h) Plea bargaining is no longer prohibited because of the complexity of trials and an increase in criminal has moved it into the open.
- i) Criticisms of plea bargaining
  - 1) Justice for sale.
  - 2) Small fish have nothing to sell
  - 3) Fails to encourage careful investigation and preparation.

- j) *Brady v. U.S.*, Brady claimed that the only reason he pled guilty was that he was afraid of receiving the death penalty.
  - 1) A plea is voluntary if it was made without threats, misrepresentations, or improper promises which the prosecutor was not authorized to make and if it was done with competent counsel.
    - (A) What might not be okay is if the defendant is isolated with police without an attorney present.
    - (B) No evidence that he was so gripped by fear that he could not weigh the pros and cons of each choice.
    - (C) But-for causation does not equal coercion.
  - 2) What would render a plea bargain involuntary
    - (A) Actual or threatened harm or mental coercion overbearing the will of the defendant.
    - (B) The threat of any legally permissible sanction does not render an otherwise voluntary plea involuntary.
    - (C) Absence of counsel.
- k) *Bordenkircher v. Hayes*, prosecutor carried out a threat to charge Hayes as a habitual offender after he refused to plea.
  - 1) So long as the decision was not based on an unjustifiable reason, such as race, religion, etc., and the prosecutor has probable cause to believe the defendant committed the crime defined by statute, it is not improper to file the heavier charges.
  - 2) Defendant argued that this is a violation of Due Process, as he is being punished for exercising his right to a trial.
- l) *Marby v. Johnson*, after a defendant tried to accept a plea, the prosecutor withdrew the original offer and gave a worse one.
  - 1) A plea bargain does not have constitutional significance alone; it is merely an executory agreement which, until it is accepted by the court, does not deprive the defendant of a constitutionally protected interest.
  - 2) A plea bargain alone has no constitutional significance. Unless there is detrimental reliance, not binding until the plea is accepted by the court.
- m) *Ricketts v. Adamson*, the prosecutor found the defendant breached when he refused to testify at retrials. He was retried, and convicted of capital murder.
  - 1) In the event of the respondent's breach, occasioned by a refusal to testify, allows the original charges to be brought without a worry of double jeopardy.
    - (A) Once he breached, the deal is off and the state can start over.
- n) *Santobello v. N.Y.*, a guilty plea in which the prosecutor agreed not to recommend a sentence. A different prosecutor appeared and recommended a 1 year sentence.
  - 1) When a plea rest in any significant degree on an agreement with the prosecutor, such that it induced the defendant to accept, that promise must be fulfilled.
  - 2) The case was remanded for a new judge to determine the remedy.
    - (A) Possible remedies
      - (i) Sentence before a new judge with no recommendation
      - (ii) Allow the defendant to vacate his plea.
- o) Fed. R. Crim. Pro. 11
  - 1) Judge not required to accept an agreement for
    - (A) Dismissal

- (B) Charge reduction
- (C) Sentencing
- p) *U.S. v. Mezzanatto*, the prosecutor asked the defendant to waive his rights that any statements not be used to impeach him, to which he agreed. The prosecutor then used his statements to impeach him at trial.
  - 1) Absence evidence that using a defendant's statements during plea bargaining was not waivable, it is.
    - (A) Generally what is said during negotiations cannot be used.
  - 2) Absent some affirmative indication that an agreement was entered into unknowingly or involuntarily, and agreement to waive exclusionary provisions of the plea-statement rules is valid.

## VII. Discovery

- a) Defendant wants access to
  - 1) Statements
  - 2) Physical evidence
  - 3) Witnesses
  - 4) Criminal records
  - 5) Scientific tests and examinations
  - 6) Exculpatory material
- b) Fed. R. Crim. Pro. 16
  - 1) Statements by the defendant
    - (A) Any written or recorded statements
    - (B) Requires disclosure of substance of the oral statements made to known government agents that will be used at trial.
  - 2) Physical evidence
    - (A) Right to inspect evidence from the defendant and material to defense or which will be used at trial.
  - 3) Witnesses
    - (A) Very little disclosure mandated.
    - (B) Summary of expert's testimony.
  - 4) Defendant's criminal record
  - 5) Scientific tests and examinations
    - (A) Results of mental and physical examinations within the government's control.
    - (B) If the government intends to use the material at trial or it is material to the defense.
  - 6) Police reports are not discoverable
- c) *Williams v. FL*, under Florida's Rules of Evidence, a defendant who is going to present an alibi witness must provide the person's name and address, which he did but stated it violated his right against self-incrimination.
  - 1) Nothing privileges a defendant to withhold information related to an alibi witness.
  - 2) 5th Amend. means the state cannot force a defendant to speak against themselves
    - (A) They can force you to turn over evidence against yourself.
    - (B) No one is forcing a defendant to present an alibi witness.
- d) *Taylor v. Illinois*, defense counsel attempted several times to amend to present more witnesses, he claimed he could not find but the witness stated he had spoken with him and gave inconsistent testimony. The judge precluded the witness.

- 1) If there is a pattern of discovery violations designed to conceal a plan to present false evidence, it is appropriate to exclude that evidence, even if other sanctions could also be used.
- 2) Defendant's counsel committed willful misconduct.
- 3) Preclusion is the severest sanction, but it is appropriate.
- e) Non-constitutional disclosure
  - 1) Defendant may need to disclose witnesses he plans on calling for affirmative defenses and/or alibi, depending on the rules.
    - (A) Defense counsel has a duty to investigate them first.
- f) *Brady v. Maryland*, Brady claimed co-defendant actually committed the murder. Defense counsel asked to examine the co-defendant's statements but the prosecutors did not turn it over.
  - 1) Was entitled to a new trial
  - 2) Was entitled to impeachment, as well as exculpatory evidence.
    - (A) Later cases held it was a prosecutor's duty to turn the evidence over.
  - 3) The suppression of evidence favorable to the accused violates Due Process when the evidence is material to either guilt or punishment.
    - (A) Bad faith of the prosecutor is irrelevant.
    - (B) Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defendant, the results of the proceedings would have been different.
      - (i) A reasonable probability is one that is sufficient to undermine the confidence in the outcome.
    - (C) Knowingly presenting false evidence is a *Brady* violation.
  - 4) Elements of a *Brady* claim:
    - (A) The evidence must be
      - (i) Favorable to the accused.
      - (ii) Suppressed by the state.
      - (iii) Material.
- g) *Kyles v. Whitley*, after a murder with inconsistent eyewitness statements, a witness came forward and gave inconsistent advice and may have committed the crime and framing the defendant. That witness was never brought into the trial nor were his statements. There was a mistrial and then the defendant was convicted and sentenced to death after the prosecution refused to hand over any exculpatory evidence.
  - 1) When the evidence is material either to guilt or punishment, it is material, regardless of the good or bad faith of the prosecutor in not presenting it.
  - 2) To not present it violates Due Process.
  - 3) Prejudice is presumed and what matters is whether the evidence as a whole would have resulted in a reasonable possibility or a different outcome.
- h) *U.S. v. Ruiz*, must the prosecution disclose *Brady* material before a guilty plea?
  - 1) Not for impeachment material.
  - 2) This is a trial right, does not hurt the "knowing and voluntariness" of the plea.
- i) *Arizona v. Youngblood*, state failed to preserve evidence.
  - 1) Court held that there must have been bad faith in failing to preserve evidence in order to constitute a deprivation of a fair trial.

## VIII. Jury

- a) *Duncan v. LA*, Due Process Clause incorporates right to trial by jury and applies it to the states.
  - 1) Applies to any offence for which the maximum sentence is more than 6 months.
- b) You can waive the right to a jury trial, but you do not have the right to waive.
- c) No maximum sentence specified?
  - 1) Look at the actual sentence imposed.
  - 2) Consider aggregation of multiple counts.
- d) *Ballew v. GA*, convicted with a 5 member jury.
  - 1) A 5 member jury violates the defendant's rights because
    - (A) Progressively smaller juries are less likely to foster effective group deliberation;
    - (B) There are doubts about the accuracy of the results achieved by smaller panels;
    - (C) The smaller jury's verdict create an imbalance detrimental to the defendant;
    - (D) The presence of minority viewpoints affects the jury's ability to represent the community;
    - (E) There are operational differences in smaller and larger juries.
  - 2) *Williams v. FL*,
    - (A) 6 person jury is constitutional
  - 3) Unanimity is required for 6 person juries. Larger (12 person) juries only require majority. Most states still require unanimity.
  - 4) Jurors that are very pro-defendant or pro-prosecution can be challenged for cause.
  - 5) Parties get a specific number of peremptory challenges.
- e) *Duren v. MO*, Duren was convicted with an all-male jury because women opportunities to opt out and it was assumed they had if they did not show up.
  - 1) The defendant must show that
    - (A) The group alleged to be excluded is a distinctive group in the community;
    - (B) That the representation of this group for jury selection was not fair and reasonable in relation to the number in the community;
    - (C) That this representation is due to systematic exclusion of the group from jury selection.
  - 2) If done, the defendant has established a prima facie case, which the state must rebut by justifying the selection with a significant state interest
    - (i) This is a Sixth Amendment Claim.
- f) Jury composition
  - 1) No right to a fair cross section on petit jury (trial jury).
  - 2) *Lockhart v. McCree*
    - (A) Skewing jury by eliminating death penalty opposed jurors
    - (B) Court said you don't have a right to a jury made up of certain attitudes opinions.
  - 3) Attorneys often rely on stereotypes for peremptory challenges.
- g) *Batson v. KY*, a prosecutor used his peremptory challenges to remove all black jurors.
  - 1) A defendant must show
    - (A) That jurors a member of a racial group and the peremptory challenge removed all members of that racial group;**
    - (B) The defendant must use facts to raise an inference that the prosecutor used the challenges to exclude jurors of his race.**
  - 2) If this is done, the state has the burden of proving that it had a race neutral reason.
    - (A) Trial court determines if the reason is reasonable or credible.

- (B) Mere assertion of good faith is not enough.
  - (C) Need not rise to the level of a challenge for cause.
    - (i) This is an Equal Protection claim.
  - h) *Miller-El v. Dretke*, prosecutor questioning was meant to elicit certain responses from black jurors and eliminated all but one.
    - 1) If a prosecutor's proffered reason for striking a black juror applies to an otherwise similar nonblack juror who is serving, that is evidence tending to prove purposeful discrimination.
    - 2) State's burden is not satisfied by thinking up any plausible seeming explanation.
- IX. Defendant's Rights
- a) *Darden v. Wainwright*, claim that the prosecutor's improper statement influenced the jury.
    - 1) In order for a prosecutor's arguments to have so infected the trial with unfairness as to make the resulting conviction a denial of due process, the prosecutor must have manipulated or misstated evidence or implicated another right of the accused.
      - (A) Prosecutor misstated the evidence; or
      - (B) Comments which punish a defendant for exercising a specific right.
- X. The Confrontation Clause
- a) Out-of-court statements being used as evidence
  - b) *Crawford v. WA*, a witness who spoke with the police but did not testify against her husband. (Overrules *Roberts'* trustworthiness standard)
    - 1) Police states are testimonials, and under the Confrontation Clause, this evidence can only be used if
      - (A) The witness is unavailable;
      - (B) The defendant had prior ability to cross-examine.
  - c) *Davis v. WA/Hammond v. IN*, two cases in which the victim was unable to testify. In *Davis*, she spoke with a 911 operator; in *Hammond*, with the police on the scene.
    - 1) Statements are nontestimonial when made under circumstances objectively indicating that the primary purpose is to enable police assistance to meet an ongoing emergency.
    - 2) Statements are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.
  - d) *Melendez-Diaz v. MA*, State analyst did not testify.
    - 1) A certificate related to tests performed, the content and quantitative analysis of a seized substance, is testimonial.
  - e) *Bullcoming v. NM*, analysts were assigned to testimony duty.
    - 1) The Confrontation Clause is not satisfied when an analyst who did not conduct or supervise the testing, testifies about the results.
  - f) *MI v. Bryant*, dying declaration.
    - 1) The statements must objectively and clearly indicate that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency and must be objectively evaluated in the circumstances, considering the statements and actions of the parties at the time.
      - (A) Test is objective.
      - (B) Forfeiture by wrongdoing applies when the defendant engaged in conduct designed to prevent the witness from testifying.

- g) *Gray v. Maryland*, the court inserted the word “delete” instead of the defendant’s name.
  - 1) The use of a replacement identifier can create an inference against the defendant to the point that it is unreliable when not accompanied by testimony available for cross-examination.
    - (A) Court found it to be facially incriminating.
- h) Statements given to a third party and not a law enforcement officer may be allowed in under the Confrontation Clause, though it may not be allowed under hearsay.

## XI. Sentencing

- a) *Williams v. NY*, a jury recommended life imprisonment but after reviewing the pre-sentence report, the judge sentenced the defendant to death.
  - 1) Consideration of out-of-court evidence at the sentencing phase without cross-examination does not violate Due Process.
  - 2) Have to consider the whole person for sentencing.
- b) Defendant’s rights at sentencing
  - 1) Definitely
    - (A) Counsel
    - (B) Present evidence
    - (C) Remain silent (or speak)
    - (D) Proceedings made public
  - 2) Sometimes
    - (A) Discovery and evidence inspection
    - (B) Timely hearing
  - 3) Usually not
    - (A) Jury trial and proof beyond a reasonable doubt.
    - (B) Confrontation
    - (C) Double jeopardy (prior convictions increasing punishment).
    - (D) Rules of evidence
  - 4) No articulated test, but trial rights which apply to ensure a fair and reliable sentence.
- c) *Apprendi v. NJ*, hate crime sentence enhancement.
  - 1) Court stated that any sentencing factor that increases the penalty for a crime beyond the statutory maximum must be found by a jury beyond a reasonable doubt.
    - (A) Aggravating factors for capital murder are considered new elements of a crime.
- d) 2 things to keep straight
  - 1) Statutory range
    - (A) Range of allowable punishment for a particular crime (or class of crimes).
  - 2) Guidelines system
    - (A) In addition to statutory range
    - (B) Rules imposed to tell the judge where within an applicable statutory range she can sentence the defendant.
    - (C) Discretion is limited by factors like defendant’s motive, criminal history, and cooperation with authorities.
- e) *Blakely v. WA*, judge found a sentence enhancer which enhanced the defendant’s sentence but not to the maximum statutory penalty.
  - 1) The relevant maximum is not the maximum that a judge may impose after finding additional facts, but the maximum he may impose without finding any additional facts.

- 2) *Apprendi* required invalidation of a state determinate sentencing system in which a judge makes the key factual findings by a preponderance of the evidence.
  - 3) Statutory maximum is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.
- f) Federal Sentencing Guidelines
- 1) Sentence Reform Act of 1984
    - (A) Response to sentencing disparities and lack of meaningful appellate review.
    - (B) Abolished parole.
    - (C) Constrained judge's discretion to considering factors set forth in the guidelines.
    - (D) Aggressive appellate review.
  - 2) Guidelines provide a 4 step instruction to use a chart
    - (A) Base level offense?
    - (B) Do any specific offense characteristics apply?
      - (i) If so, add levels to base offense.
    - (C) Do any adjustments apply?
    - (D) What is the defendant's criminal history?
  - 3) Puts more power into the U.S. Attorneys.
- g) *US v. Booker*, judge found by a preponderance of the evidence that defendants had more drugs than they were convicted of.
- 1) Any fact (other than prior criminal history) which allows a sentencing judge to exceed the maximum penalty authorized by the plea or verdict must be admitted by the defendant or proved beyond a reasonable doubt.
    - (A) The proper remedy is to remove the mandatory provisions and make the guidelines advisory.
    - (B) Excise portion of statute making appellate review de novo, now it is a reasonableness standard.
- h) *Gall v. US*, the judge deviated from the guidelines and gave probation.
- 1) A trial judge must
    - (A) Consider the guidelines.
    - (B) Allow the parties to explain the sentence they are recommending
    - (C) Consider all factors to determine the appropriate sentence;
    - (D) Adequately explain any deviation.
  - 2) If the judge follows this procedure, then the appellate court will only review for an abuse-of-discretion.
- i) *Alleyne v. US*, defendant was convicted of using a gun in a robbery but not of brandishing it, which the judge found by a preponderance of the evidence.
- 1) A fact which raises the minimum sentence, thus affecting the overall range, must be found by a jury beyond a reasonable doubt.
- XII. Double Jeopardy
- a) Protects Against
    - 1) Second prosecution for the same offense after acquittal.
    - 2) Second prosecution for the same offense after conviction.
    - 3) Multiple punishments for the same offense.
    - 4) Strategically motivated mistrial that lets the government pick a more favorable jury.
  - b) *Fong Foo v. US*, judge directed a verdict of acquittal.

- 1) The reversal of an acquittal, even when directed by a judge, directing the defendant to be tried again violates Double Jeopardy.
- c) A state rule allowing for a provisional acquittal during trial would not violate double jeopardy.
- d) *Ashe v. Swenson*, tried multiple times for the same incident.
  - 1) Forcing the defendant to run the gauntlet again after being acquitted of being the person who committed the offense violates double jeopardy.
  - 2) Test is whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.
    - (A) Collateral estoppel applies when a defendant has prevailed on a disputed factual issue in the first proceedings.
- e) *Oregon v. Kennedy*, defendant asked for a mistrial based off of a line of prosecution questions.
  - 1) Where the prosecutor's actions can be inferred to have intended to provoke the defendant to move for a mistrial, further prosecution will be barred.
  - 2) Under the "manifest necessity" doctrine, a state can retry if there is a hung jury.
- f) *Blockburger v. US*,
  - 1) Do each of the two crimes charged require proof of at least one fact that the other doesn't? If so, then they are not the same offense.
- g) *US v. Dixon*, while on bail, the defendant was arrested with cocaine and he was charged and convicted for criminal contempt, then later for the cocaine charges.
  - 1) When offenses contain elements not contained in other offense, they are not barred by the double jeopardy clause.
  - 2) Where an offense incorporates other offenses, it is a violation of the clause to charge the incorporated offenses later.
  - 3) *Harris Rule*, that where there is conviction of a greater crime, prosecution of a lesser included crime cannot be brought. Broadly read.
- h) *Heath v. Alabama*, kidnapped his wife and killed her in another state. After confessing in the state she died in, he was charged and convicted where the kidnapping occurred.
  - 1) When a defendant violates the law of two sovereigns by breaking the laws of each, he has committed two offense. Each State has the independent authority to prosecute.
- i) Civil vs. Criminal
  - 1) *US v. Ursery*, civil forfeiture proceedings following drug charges.
    - (A) Two step test
      - (i) Did the legislature, in establishing the penalizing mechanism, indicate either expressly or impliedly, a preference for a criminal or civil label?
      - (ii) If labeled civil, is the statutory scheme so punitive in purpose or effect that it transforms what was intended to be a civil remedy into a criminal penalty?
        - (a) Requires clearest proof.

### XIII. Appellate Review

- a) *Chapman v. CA*, allowed for a jury to view a defendant's silence as evidence of guilt.
  - 1) There are some constitutional errors which in a particular setting may be so unimportant and insignificant that they do not require reversal because they are harmless.

- 2) Federal constitutional errors require a belief that the error was harmless beyond a reasonable doubt established by the state. There is a presumption that the error was harmful.
  - 3) New Rules
    - (A) If your case is pending on direct appeal, new rules will apply in your case
      - (i) First appeal as a right is a direct appeal. It is about what is on the record.
    - (B) Post-conviction relief, an issue discovered off of the record (Ex. IAC).
      - (i) Does not get the benefit of new rules.
  - 4) Supreme Court said that a state must prove beyond a reasonable doubt that error was harmless
- b) Plain Error
- 1) An error but no objection
    - (A) Defendant must establish that an error occurred.
    - (B) That the error was plain, i.e. obvious and clear
    - (C) The error affect substantial rights
      - (i) Like harmless error analysis but the defendant bears the burden as to prejudice.
  - 2) Court should correct a plain, forfeited error if the error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.”
  - 3) Permissive not mandatory.
- XIV. Habeas Corpus/Collateral Review
- a) Federal habeas corpus is a statutory civil action between the criminal defendant (as the petitioner) and the prison warden.
    - 1) Not a continuation of the criminal appeal.
    - 2) Analogous to state post-conviction proceedings.
    - 3) Not to vindicate and individual right, it is a check on the states to ensure that they aren’t flouting the Constitution.
  - b) *Teague v. Lane*, A petitioner requested application of a new rule requiring a fair cross section on a jury.
    - 1) Three step inquiry
      - (A) When did the petitioner’s conviction become final?
      - (B) Would a state court considering defendant’s claim at the time his conviction became final have felt compelled by existing precedent to conclude that the rule he seeks was required by the constitution?
        - (i) If not, then the rule sought is new and there is a presumption it is not retroactive.
      - (C) If it is a new rule, is it substantive or procedural?
        - (i) If substantive, applies retroactively.
        - (ii) If procedural, there is a narrow exception for “watershed rules of criminal procedure.”
    - 2) If you are asking a habeas court to apply a new rule, they will not.
    - 3) What is a new rule?
      - (A) One that breaks new ground or imposes new obligations on the states, such as when Court overrules prior decisions.

- (i) When result was not dictated by existing precedent, the court won't disturb state court convictions unless the state court, at the time conviction was final, acted objectively unreasonably.
  - (B) Gradual developments over which reasonable minds could differ should not upset the finality of the state convictions that were valid when entered.
- 4) Generally, if it is only a violation of state law, the court is not going to fix it unless it is an egregious due process claim.
- c) *Terry Williams v. Taylor*, brought an IAC claim but the state court did not reverse.
  - 1) In order for a writ to be issued, the state court proceedings must be
    - (A) Contrary to SCOTUS, in that they arrived at the opposite conclusion or decides the case differently on a set of materially indistinguishable facts; or
    - (B) The application was unreasonable.
- d) Procedural issue in Federal Habeas
  - 1) Time limits of 1 year.
  - 2) Exhaustion
    - (A) Must give the state the chance to fix its errors.
      - (i) Includes requesting discretionary appeals.
      - (ii) Applies to guilty pleas.
    - (B) But federal habeas court may deny on the merits notwithstanding failure to exhaust.
  - 3) Procedural default
    - (A) Reason you did not get relief is because of adequate and independent procedural state law grounds.
      - (i) Not filing a timely appeal or preserving an issue.
  - 4) Time limit is tolled during a properly filed state petition.
  - 5) New law does not apply on habeas review.
- e) Procedural Default
  - 1) *Wainwright v. Sykes*, defendant failed to preserve a during the trial.
    - (A) A procedural rule which encourages the result that the trial be as free of error as possible is desirable and immune from federal habeas review.
    - (B) Absent a showing of cause for waiver and actual prejudice from an alleged constitutional violation, courts will not review assertion that a confession was improperly admitted.
- f) *Stone v. Powell*, petitioner moved to suppress improperly seized evidence.
  - 1) Where the state has provided an opportunity for full and fair litigation on the constitutional claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial.
  - 2) Applying the exclusionary rule no longer cognizable on federal habeas claims because it would not further the deterrent impact of the rule; not worth the cost.
- g) *Brecht v. Abrahamson*, state used defendant's post *Miranda* silence to impeach him.
  - 1) *Chapman* error is too stringent a standard.
  - 2) *Kotteakos* standard applies to habeas review.
    - (A) Did the error have a substantial and injurious effect on the jury's verdict?
    - (B) Not a question of whether the defendant would have been convicted anyway.

(C) If the judge is in grave doubt that the error may have had a substantial influence, then the conviction cannot stand.

XV. Habeas Petition Checklist

- a) Once properly filed before the federal court
  - 1) If petitioner is seeking application of a new rule, presumption is that it does not apply, unless
    - (A) The rule is substantive
    - (B) It falls within the narrow exception for “watershed rules of criminal procedure.”
  - 2) If not seeking application of a new rule but a preexisting, clearly established law or narrow exception, then
    - (A) Petitioner must show not only that the state court was wrong when it denied him relief in the federal constitutional claim but that
      - (i) The state court’s decision is contrary to that clearly established law, or
      - (ii) Involved an unreasonable application.

XVI. Standards of Review

- a) Prejudice inherent part of legal standard
  - 1) *Brady* (suppression of evidence)
    - (A) The evidence must be
      - (i) Favorable to the accused.
      - (ii) Suppressed by the state.
      - (iii) Material.
    - (B) Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defendant, the results of the proceedings would have been different.
      - (i) A reasonable probability is one that is sufficient to undermine the confidence in the outcome.
  - 2) *Strickland* (IAC)
    - (i) Defendant must show that performance was objectively unreasonable; and
    - (ii) Defendant must show prejudice, such as there was a **reasonable possibility** that the results would have been different.
- b) Structural Errors
  - 1) Automatic reversal-no need to show prejudice.
- c) Harmless errors
  - 1) Constitutional errors (*Chapman*)
    - (A) Burden on government to show harmless beyond a reasonable doubt.
  - 2) Non-constitutional errors (*Kotteakos*)
    - (A) Burden is on the government to show that the error did not have a substantial influence on the verdict.
  - 3) Plain Error
    - (A) Burden on the party who suffered error but failed to object to show it harmed a substantial right.
  - 4) Collateral Review (*Kotteakos*)
    - (A) Did the error have a substantial and injurious effect or influence on the jury’s verdict?