I. The Charging Decision

A. Prosecutorial Discretion

1. Before the charge gets to the GJ, the decision to charge rests with the prosecutor and no one else.
   (a) Out of 100 felony arrests, 20 never get charged at all. 20 are convicted but never serve a day. Only 1 in 100 is acquitted at trial.
   (b) A criminal D’s best shot at getting a good result is not arguing case to a judge but convincing the prosecutor not to charge or charge lightly.
   (c) The discretion of the prosecutor is hardly regulated at all.

2. Discretion Not to Charge:
   (a) \textit{Inmates of Attica Correctional Facility v. Rockefeller} (US 1973) – Prosecutor won’t charge any of the officials/cops involved in the massacre at Attica prison.
      (i) Courts will not second guess prosecutors because:
         ◊ Practical reasons, \textit{workability}, judiciary, won’t take on something where their role isn’t clear and it would be more work.
         ◊ \textit{Separation of Powers} – prosecutors are extensions of the executive (Aty. General chosen by Pres.).
         ◊ \textit{Standing} – victims do not have the standing to bring this about. Often, crimes have not identifiable victim (drug cases)
   (ii) Prosecutor discretion allows legislators to enact broad, sweeping rules b/c they expect prosecutors to only go after the right stuff.

3. Equal Protection Violation
   (a) \textit{United v. Armstrong} (US 1996) – Only blacks being prosecuted for crack/cocaine distribution.
      (i) To show an EQP violation, Ds have to show a discriminatory effect and that the decision was motivated by a discriminatory purpose. Ds would have to show that similarly situated people of another race were not prosecuted.
      (ii) In order to get discover, you have to show, at a minimum, a number of similarly situated people who were not prosecuted.
         ◊ After Armstrong, Ds have to show clear evidence that whites weren’t prosecuted.
         ◊ Have to show that federal prosecutor knew the whites were out there and still chose not to prosecute.
         ◊ You can have all the statistics you want (i.e. McKleskey v. Kemp) and you still won’t win.
   (iii) A selective prosecution claim is not a defense on the merits to the criminal charge itself” = courts are very hostile to there claims.
   (iv) Burden is on D – start out presuming that there is no EQP violation.
(b) **McKleskey v. Kemp** (US 1987) – GA putting more blacks to death than whites. D introduced a lot of statistics (Baldus Study)

(i) Court assumed the validity of the Baldus Study and assumed that the D had shown discriminatory effect.

(ii) BUT – D didn’t show the court anything about what was going on the heads of the prosecutors.

(iii) Court willing, in some cases, to infer intent/purpose from states, but it must present a ‘stark pattern’ to be accepted as the sole proof of discriminatory intent under the Constitution.

◇ Won’t infer it in this case b/c these are prosecutors and juries (need for broad discretion)

◇ With lots of people, it’s different from other cases where it’s one, identifiable decision-maker.

(iv) **Wayte v. US** (US 1985) – Prosecuted only reported non-registrants with the draft instead of prosecuting people who didn’t give the govt. notice.

◇ D didn’t show purpose – have to point to particular facts.

◇ KG – we’re left with the only to establish a purpose requirement is to get the prosecutor to say, “yup, this is why I did it.”

4. **DISCOVERY**

   (a) D has to have some showing on each of the two prongs.

   (b) Awareness of consequences is not enough to establish a violation, but it might be enough to get some discovery.

5. **REMEDY** – Court refuses to endorse a dismissal.

B. **Prosecutorial Vindictiveness**

1. **DUE PROCESS** – retaliation or punishment for exercise of a constitutional right.

   (a) Misdemeanor charges, followed by D’s exercise of some right, followed by a charge (harsher)

<table>
<thead>
<tr>
<th>Original Charge</th>
<th>Blackledge v. Perry (D WON)</th>
<th>US v. Goodwin (D LOST)</th>
</tr>
</thead>
<tbody>
<tr>
<td>D’s action (exercise of right)</td>
<td>Misdemeanor Assault with a Deadly Weapon</td>
<td>Misdemeanor Assault</td>
</tr>
<tr>
<td>New Charge</td>
<td>Felony Assault with a Deadly Weapon</td>
<td>Felony Assault</td>
</tr>
</tbody>
</table>

(b) In Blackledge, court presumed vindictiveness – made the prosecutor explain, w/o one, D wins (the only new thing that’s happened is that D has exercised a right.

(c) In Goodwin, D had never gone to trial. When it’s pre-trial and there’s a change in charge, won’t presume vindictiveness b/c
there’s too many other explanations (i.e. Prosecutors don’t have all the facts yet).

C. **Screening the Charging Decision**
   1. **THE GRAND JURY (GJ)** – function is to screen the prosecutor’s initial discretion.
      (a) Not an adversarial setting, we’d like you to vote.
      (b) GJ returns a true bill = a vote to indict
      (i) Can get GJ and a preliminary hearing (but once a GJ offers an indictment, you don’t have the right to a prelim. Hearing anymore).
      (ii) Fifth Amendment guarantee of a GJ doesn’t apply to federal crimes less than a felony and does not apply to state crimes.
      (c) The only people that see what goes on with GJ are federal prosecutors, the jurors and witnesses (do Ds, no D Atys and no spectators).
      (d) D has no basis for challenging an indictment.
      (e) If GJ returns a “no bill” = vote not to indict.
      (i) AS many bites at the GJ apple as the prosecution wants.

   2. **PRELIM HEARING** – statutorily granted, have a judge, D can put on evidence but rules don’t apply.
      (a) Ds will call if they’re in custody and they want to know what’s going on.
      (b) Proceeding is adversarial in nature
      (c) Do it to preserve testimony.

II. **JOINDER AND SEVERANCE**
A. **Federal Rule 8 – Joinder of Offenses and of Defendants**
   1. Joinder of offenses when they are the same or similar character.
   2. Joinder of Ds when they participate in the same act or transaction or in the same series of acts or transactions.
      (a) If it doesn’t fit into one of the above two, then it’s an automatic misjoinder...no prejudice is required.

B. **Rule 14 – Relief from Prejudicial Joinder**
   1. Allows the court to separate offenses if D would be prejudiced.

C. **US v. Velasquez (7th 1985)** – Govt. charging 5 Ds with cocaine trafficking, one D with heroin and three Ds retaliatory action against govt. informant.
   1. COURT – the heroin charge is a misjoinder problem under Rule 8.
   2. But, can still be regarded as harmless error (if you go through the trial, then you might have to show that it harmed you)
      (a) If you bring it up in the beginning, then you just have to show that a charge doesn’t fit under Rule 8.
      (b) If it’s a misjoinder problem, trial judge is not allowed to allow the charges to stay together (but, it might be harmless error).
   3. **PREJUDICE** – when the evidence is really strong on one charge and really weak on another, the court should grant a severance.
(a) On appeal, though, it’s abuse of discretion (very tough to prevail on appeal).

(b) If it’s prejudicial joinder, then there’s a lot of discretion and the trial judge won’t get reversed.

(c) Unless you can show that there’s some other way the evidence of the heroin would come in with the cocaine trafficking charge (other than to show that he’s a bad guy), then the conviction is bad.

**INITIAL DECISION: PROSECUTOR**

<table>
<thead>
<tr>
<th>Separate (Ds/offenses)</th>
<th>Joint (Ds/offenses)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Remain separate</td>
<td>Court consolidates</td>
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<tr>
<td></td>
<td>Ct. severs</td>
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<tr>
<td></td>
<td>severs: misjoinder</td>
</tr>
</tbody>
</table>

(most of the litigation takes place – severance on other grounds (prejudicial))

**Misjoinder = Ct. (the rules don’t authorize what happened)**

D. **Mutually Antagonistic Offenses** – if two Ds are tried together, there’s no way that the jury could believe both defenses (i.e. if both Ds lam the other and say that they were coerced).

1. **Zaffro v. US (7th 1993)** – Ds joined together and they blame the other.
   (a) Court will not adopt a bright-line rule that where there are mutually antagonistic defenses, the Ds shall be severed.
   (b) Courts should only grant severance under Rule 14 only where there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.
   (i) SO – you have to show some factual prejudice (i.e. joining Ds prevents a D from confronting and impeaching witness b/c 2nd D doesn’t have to take the stand).
   (ii) Can be solved with a jury instruction?
TRIAL:

If you’re a D – it’s much better to find a misjoinder (no discretion for the judge – if the judge goofs and you’re up on appeal, it will be reversed unless the prosecution can show that the error is harmless).

If we can’t find misjoinder, look for another ground for severance.

⇒ PREJUDICE – (antagonistic defenses, wanting to call co-defendant to testify in D’s defense but in joint trial he has fifth amendment, spill-over – if co-defendant is really slimy).

⇒ BUT – courts hate to grant severance –
   o Juries can follow limiting instructions.
   o Not entitled to severance if you have a better chance of acquittal in a separate trial.

APPEAL:

Abuse of discretion standard = very hard.


⇒ BRUTON RULE – it is unrealistic to expect a jury to disregard the confession of a nontestifying coD incriminating the nondeclarant D.
   o Cannot use the confession, redaction if it’s carefully done (Richardson), or in the rare case where D will choose to testify then you have confrontation.

Suppose – Nichols confessed and said that he did it with McVeigh.

⇒ Bruton Rule – too much to ask of jurors to disregard such statements.
   o With Nichols not testifying, limiting instructions won’t work – if you do it, it violates the constitutional rights of the person in McVeigh’s situation.
   o When you have two defendants and one confesses and names the other –
      ▪ The prosecution can try together and not use the confession.
      ▪ Try them together and use the confession if it can be redacted (use just the “I did it” part and take out “with D”; or
      ▪ If the confessing defendant would testify (would get rid of the confrontation/constitutional problem).

1) OR (very rare) – two juries for each D – bring together for a lot of the trial, but separate for parts that are admissible against only one D.

III. BAIL AND PRETRIAL DETENTION

Stack v. Boyle (9th 1951) -- Can’t set bail super high w/o even having evidence presented as to the Ds likelihood to flee. Isn’t much law on the subject.

ARGUMENTS:

1) **Substantive Due Process**
   a. Ds are being punished before trial – impermissible punishment before trial.
   b. Marshall dissent – hypothetical – what about a dusk to dawn curfew, would that survive under the majorities reasoning?
   c. Majority – it’s just a regulation, not punishment (it’s protecting society)

2) **Procedural Due Process**
   a. Detainees have the right to counsel and to testify in their own defense.
   b. So – because there are extensive procedural safeguards (it’s as accurate and reliable as it can be).

3) **Eighth Amendment provisions against excessive bail.**
   a. NO – court said weird things.
   b. 8th amendment (cruel and unusual) doesn’t say that bail has to be available at all (so can’t be excessive but you can deny all together).
      i. Congress didn’t say that pretrial detention is punishment, it’s a solution to a pressing societal problem.
   c. There are more ideas about why bail is there to begin with.

STANDARD = “government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community.”

SUPPOSE – sexual predator puts in his jail time, but can we keep them locked up b/c they’re dangerous?
⇒ KG – probably.
⇒ How accurate do our estimations of dangerous have to be?
⇒ KG – we’re way over-inclusive.

IV. **SPEEDY TRIAL GUARANTEE**

WHY WE HAVE IT? Cloud of suspicion, loss of information/evidence, incarceration.

**Barker v. Wingo** (6th A) – Against D, five years pass until D is convicted after indictment (very gruesome murder). He was free on bail from most it.

H: Barker Test – Balancing Test to be applied on an ad hoc case-by-case basis.

**FACTORS:**

1) Length of delay
   a. How long are we talking about – how long until we take a look?
b. [See Doggett (81/2 years) – if it’s a year, we should take a look at it and if it gets a lot longer than a year, then maybe the 6th Amendment is violated]

c. In practice (LG) – lower courts have developed a time frame (8 months was the norm, now it’s about a year).

d. Really hard to put a number on it (but certainly by a year, you should look at the rest of the factors).

2) Reasons for the delay

a. If it’s clearly the prosecution’s fault, then that weighs against.

3) Accused assertion of the right (was the D asking for it)

4) Prejudice to the accused

5) [Only remedy is dismissal w/ prejudice and applies to all states]

Held: A defendant’s constitutional right to a speedy trial cannot be established by any inflexible rule but can be determined only on an ad hoc balancing basis, in which the conduct of the prosecution and that of the defendant are weighed. The court should assess such factors as the length of and reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. In this case the lack of any serious prejudice to petitioner and the fact, as disclosed by the record, that he did not want a speedy trial outweigh opposing considerations and compel the conclusion that petitioner was not deprived of his due process right to a speedy trial.

US v. Lovasco (US 1977) – Pre-indictment Delay. Against D, prosecutors don’t have to file charges as soon as they have probable cause. Not a problem b/c you’re not incarcerated…serves everyone’s interest to not prosecute people until you know for sure they’re worthy of it.

Doggett v. US (US 1992) – For D (8.5 years is too long) and govt. was to blame for delay. Can presume prejudice b/c it’s been so long.

V. GUILTY PLEAS as SUBSTITUTES FOR TRIAL

A voluntary and intelligent choice among the alternative courses of action open to the D.

⇒ D must have real notice of the true nature of the charge against him (cannon of due process)

Henderson v. Morgan (US 1976) – For D, D didn’t know that his charge included intent element (intent to cause the death of the victim) b/c there wasn’t a formal charging document and b/c his attorney didn’t tell him.

⇒ In most cases, you can presume that a D’s attorney will explain the true nature of the charge.

⇒ Court doesn’t care that if D had understood the intent requirement he would have still pled guilty.

o What suffices to meet the “real notice” requirement?
  ▪ Explicit advice from the court.
  ▪ Formal charging document is enough? (we don’t have an answer).
• Strong argument to be made that if you’re not retarded and have effective counsel, the charging document might be enough to meet the notice requirement.
• We can presume that there’s notice barring an explicit finding that it never happened.
  o What about the D that straight-up admits intent, but didn’t know that was an essential element (sounds like the court is saying that that’s enough).

Constitutional validity (voluntary and intelligent):
⇒ “Intelligent” requires that the accused has real notice of the true nature of the charge.
⇒ Henderson – real notice of the true nature of the charge
  o TRUE NATURE -- at a minimum -- any element of an offense that makes the difference b/n that charge and a different charge)
  o REAL NOTICE -- allegation in a formal charging document (could be enough)
  o Presumption that lawyers talk to client.
    ▪ If we have a finding that the aty didn’t discuss it with the client, but if the D admits to the crime, that might be enough too.

A. What Happens After a Guilty Plea (we know it was voluntary and intelligent)

US v. Broce (US 1989) -- Ds charged with two conspiracies and they plead guilty. Meanwhile, another case with sidekicks wins in arguing that two counts is double jeopardy and that it was really only one conspiracy.
⇒ Once they pled guilty, they waived the right to claim a double jeopardy violation.
⇒ The exception to the rule barring collateral attack on a guilty plea established by Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628, and Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195, in cases where a conviction under a second indictment must be set aside because the defendant's right not to be haled into court was violated, has no application in this case. Here, in contrast **760 to those cases which were resolved without any need to go beyond the indictments and the original record, respondents could not prove their double jeopardy claim without introducing new evidence into the record.

B. Whether a Plea of Guilty is Intelligent?

Bousley v. US (US 1998) – On Habeas Corpus petition, D claims that his plea was unintelligent b/c he wasn’t told about the new standard set forth by a different case. If the law changes after you plead guilty, is it true that that plea wasn’t intelligently made (told the wrong thing but only with hindsight)?
⇒ If he would have argued on direct appeal, then he would have won.
If you go with a trial-like proceeding, then you have the benefit of direct review b/c D is innocent under the new meaning of “use” b/c the gun was just sitting there.

⇒ If you plea guilty, you do not get of the benefit of hindsight.
⇒ Collateral Attack – weighs against the D, but he could still get passed that and have the claim considered on the merits – has to show cause and prejudice or actual innocence.
  o If the D can show he is innocent on remand, then okay, but the govt. can introduce new evidence too.
⇒ Direct Review option -- Plea cases aren’t going to be appealed w/n 30 days b/c it’s settled (D has consented to guilt).
  o But, prosecutor is going to be worse off if it was just direct appeal b/c prosecution never prepared for trial.

C. Whether a Plea of Guilty is Voluntary?

North Carolina v. Alford (US 1970) – against D (guilty plea made to avoid the death penalty is fine so long as there is a factual basis for his guilt). Here, it was pretty clear that he did it even though he said he didn’t.

D. The Role of Defense Lawyers

Hill v. Lockhart (US 1985) – Against D, D claims that his guilty plea was not voluntary and intelligent b/c of ineffective assistance of counsel. He pled and his lawyer told him he’d be eligible for parole and he wasn’t.

⇒ Where a defendant enters a guilty plea upon counsel's advice, the voluntariness of the plea depends on whether the advice was within the range of competence demanded of attorneys in criminal cases. The two-part standard adopted in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, for evaluating claims of ineffective assistance of counsel—requiring that the defendant show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different—applies to guilty plea challenges based on ineffective assistance of counsel. In order to satisfy the second, or "prejudice," requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial
⇒ Anytime a D wants to collateral attack on ineffective assistance grounds, we’re not going to say “we’re not listening to you b/c you pled guilty” – we’ll listen, but you have to show representation below that standard and but for the professional errors, you would have gone to trial.

E. Wrap-Up
1) A D saying that his constitutional rights were violated (in the context of a case where the D pled guilty and there’s a big interest in the finality of that)
   a. Constitutional rights vs. Finality interest.
   b. A guilty plea bars a later collateral attack except:
      i. Show cause and prejudice – here’s why I didn’t raise it before or actual innocence.
         1. Actual innocence – the govt. is able to come into court with extra-record evidence.
      ii. Ineffective assistance of counsel (Hill):
         1. Performance below objective standard and reasonable probability that but for counsel’s errors, you would have gone to trial.
      iii. (Blackledge, Menna) If you’re trying to raise a constitutional claim that you could bring w/o having to look to extrinsic evidence (based on the record).

VI. PLEA BARGAINING

A. Voluntariness

Only a physical beatings or threats or undue pressure placed upon another interest (prosecuting D’s wife). Plea bargaining gets the rubber stamp in Brady.

**Brady v. US** (US 1970) – Against D. D argues that guilty plea to avoid the death penalty was not voluntary (made out of fear of worse penalty) or intelligent (a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable b/c later judicial decisions indicate that the plea rested on a faulty premise).

⇒ Doesn’t matter if, later, the state has a weaker case then the D first thought b/c of a change in case law.

⇒ D pled guilty in the face of a statutory guarantee of death sentence, plead guilty = maximum right. The statutory inducement was struck down as unconstitutional. So but for that unconstitutional inducement, I would have gone to trial. (there couldn’t be a clearer case for involuntariness)

**Bordenkircher v. Hayes** (US 1978) – Against D…prosecutor hasn’t tried anyone yet and he has sufficient facts to go with either charge.

F: D forges a check, tries to plea out, decides not to plea, then the prosecutor decides to add that he was a habitual offender and thereby eligible for life imprisonment. Prosecutor admitted that his selective prosecution was motivated by D wanting to exercise his constitutional right to go to trial.

(we have learned that prosecutor’s aren’t supposed to pick people out for prosecution on the basis of race or on the basis of their exercise of some constitutional right – see Wayte).
Why isn’t this unconstitutional selective prosecution?

H: The right is not the same in the plea bargaining process – b/c of this give and take – whereby the D and the prosecutor both benefit – discretion remains with the prosecutor to change the charge as a result of the plea process.

Does this case prohibit any claim of prosecutorial vindictiveness that arises from the plea process?
⇒ Prosecutor still has to have probable cause.
⇒ Prosecutor wouldn’t be able to black-mail D by saying that they ‘d prosecute the D’s son – b/c D doesn’t know what his son did and knows only what he has done.

B. Enforcement

Issues that come up when one party to the plea agreement asserts that the other party has failed to adhere to the bargain. This party asks the court to do something about it.

1) Was there really a bargain (if pros. says “I think things will go well for you” not a bargain)
2) Was it fulfilled? Did they do what you thought they were going to do?
3) If it wasn’t fulfilled, did something happen that justifies that or excuses it?
4) No justification or excuse – what is the remedy? See Santobello?

Santobello v. New York (US 1971) -- Prosecutor agreed to make no recommendation at the time of sentencing and didn’t. Prosecutor has to keep promise. “[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”

H: There was a breach – send it back to NY to decide what the remedy is.

Mabry v. Johnson (US 1984) – dispute over the language of the agreement, b/c that’s not what coerced his agreement, though, he’s not entitled to it (Prosecution can withdraw something if the D doesn’t detrimentally rely on it).

C. Bargaining with Cooperating Defendants

Ricketts v. Adamson (US 1987) – Against D. He agreed to testify against someone, govt. screwed up and had to call him again. D thought he shouldn’t have to since he had already done it once. Held, charges may be reinstated against D since he didn’t cooperate the second time around (D can’t claim double jeopardy). When a D doesn’t fulfill an agreement, everything is brought back to the starting point.
⇒ Dissent doesn’t think D ever breached his plea agreement.
Wilson v. Commonwealth of Kentucky (1992) – recommendation not binding on the judge for sentencing. ...agreement doesn’t mean that prosecution has to defend D if the judge wants to give a higher sentence.

VII. DISCOVERY

[We skip over arraignment where the D pleads guilty or not-guilty]

Discovery can promote plea bargaining – serves the same kinds of functions in criminal as it serves in criminal.

⇒ BUT – there are some huge difference b/n crim and civ discovery.
⇒ Criminal discovery has been broadened considerably –
  o But, it’s still very limited in criminal cases.
  o Attitudinal context – Learned Hand excerpt – the D is at a huge advantage so we shouldn’t give them access to everything the prosecution has.
  o We’re skimpy with discovery b/c Ds could misuse (i.e. harm witnesses) or tailor a defense to the prosecution’s evidence.
  o Concern over making Ds provide discovery b/c they have all these constitutional rights so we’re worried about reciprocity.
⇒ Four possible sources of discovery rights or obligations (4 different places to look to decide if there’s a duty):
  o Federal constitution –
  o State constitutions –
  o Statutes and Rules – Rule 16
  o Inherent authority of courts – courts have felt free in saying what’s right.
⇒ Only three of those and more likely 2 are sources of obligations for the defense.
  o The D has no federal constitutional obligations to give the prosecution anything.

Turns out, D can be made to disclose a lot consistent with their federal constitutional rights.


Kyles v. Whitley (US 1995) -- D claims that the prosecutor’s obligation and his right is constitutional. A long time before this case, the law was settled that the constitution imposes some obligation for the prosecutor’s to turn over evidence that is favorable to the D.

⇒ Idea comes from the Due Process Clause
⇒ Brady v. Maryland – the first big case...”if it hurts turn it over”
  o Brady Rule = the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment irrespective of the good faith or bad faith of the prosecution.”
  o If the D asks for it, you have to turn over favorable evidence.
Bagley -- Now, we no longer need a defense request and “material” means that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

O So, but for the non-disclosure, there is a reasonable probability that the result would be different.

⇒ When do you have to give evidence? When does the obligation kick in?

O Before trial…but you only catch it after the fact.

⇒ Prosecution should have disclosed if (under Brady):

O 1) A Reasonable Probability of a different result – whether the resulting verdict is one of confidence.

    ▪ So it’s closer to “possible” than “more likely than not.”

O 2) By showing that the favorable evidence to the D could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

O 3) Harmless error standard (but if there’s reasonable probability, then this doesn’t apply)

O 4) Look at evidence collectively – not item by item.

⇒ With harmless error standard, if the judge can’t make up her mind, then she has to find for D and order a new trial (pros. couldn’t carry their new burden beyond a reasonable doubt).

⇒ Under Kyles test – it’s the D’s burden to show that it hurt – judge assumes that the non-disclosure wasn’t a problem. So D bears the risk of non-persuasion.

O Much more difficult to win a new trial under Kyles than the harmless error.

O KG – she thinks these appeals should be handled under the harmless error standard (cases were handled that way before Kyles).

Under Bagley, DPC imposes on the prosecution the obligation to turn over to the D, whether they’ve requested it or not, evidence that’s in the pros’s possession that’s favorable to the accused, material as to guilt or punishment.

⇒ Materiality means that if the pros. was to fail to disclose, and the D is then convicted at a trial, there’s a reasonable probability that if the evidence had been disclosed the result would have been different.

⇒ Less than preponderance of the evidence and requires assessment of the whole trial and not a single piece of evidence.

Harmless error Standard – no harm, no foul standard (difference b/n misjoinder and prejudicial joinder – like to call things misjoinder and the review standard at the appellate court is that the burden is on the pros to show that the harm was harmless – heaviest burden – I’ll presume that it hurt, you have to show that it didn’t)

⇒ When you have errors that are violations of a constitutional magnitude.

⇒ D just has burden to show that there was an error, then burden shifts to prosecution, if they don’t show it, then you have another trial.

DUTY TO PRESERVE EVIDENCE – bad faith standard (Youngblood)
B. Defense by the Defense

**Williams v. Florida** (US 1970) – notice of alibi rule is constitutional (want to avoid an 11th hour witness)

**Taylor v. Illinois** (US 1988) – It’s okay to preclude D evidence that was not disclosed properly (a willful violation).

VIII. THE JURY AND THE CRIMINAL TRIAL

[see summary on 1183]

**Duncan v. LA** – the 6th Amendment right to a jury trial is incorporated through the 14th Amendment.

NULLIFICATION – acquitting even though application of the law to facts would be guilty.

⇒ Juries have the power but we just can’t tell them about it.
⇒ Up until the 19th century, juries were told that they had this power.
   o Still true today in three states – they’re told that they’re the judge of the law as well as the facts.

RULES:

1) No offense is petty if more than six months imprisonment is authorized as a penalty.
   a. If you can get more than 6 months, that offense is not petty.

2) If imprisonment of six months or less, the offense is presumptively petty.
   a. Presumption, theory, can be rebutted.

3) If the offense charged is presumptively petty, there may still be a federal constitutional right to jury trial but only if D can overcome the presumption.
   a. If the crime involved additional statutory penalties that indicates that the legislature viewed the crime as serious.
   b. A D has never shown (up to $10,000 is perfectly fine)

The fact that multiple offenses are charged, doesn’t change the analysis.

COMPOSITION OF JURIES, VOTES NECESSARY TO CONVICT

**Ballew v. Georgia** (US 1978) – has to have 6 people for a jury, five is too small.

⇒ Accuracy of conviction, representativeness, etc.
⇒ Court sounds like they think it should definitely be 12.
   o BUT – they stick with the Williams case (says that 6 is enough).

What are the factors that are affected by the number of jurors?

1) Effective group deliberation
a. Jurors can’t take notes, so you need a lot of people so you have good total memory.

2) Accuracy of results.

3) Probability theory –
   a. More minority representation.

Why didn’t the court overrule Williams b/c all the studies suggested that there are problems with having only 6 jurors?
   ⇒ Small juries are cheaper.

Q – would you rather have 12 or 6?
   ⇒ Pros wants 6.
      o More likely to convict an innocent person.
   ⇒ Defense wants 12.

Votes needed to convict:

   ⇒ 10 to 2 = ok. 9 to 3 = ok
   ⇒ If it was six 5 to 1 is not okay.
   ⇒ Unanimity business is like number of jurors:
      o Just like holding that 6 is okay – is this right?
      o Unanimity still required in federal cases.

Does a D have a constitutional right to waive jury trial?
   ⇒ Not a constitutional right – if a jurisdiction wants to grant to the prosecution the right to insist on a jury when the accused wants to waive, then that’s okay.
   ⇒ So pros. can insist that we’re going to the jury.

* * *

REVIEW – CONSTITUTIONAL MINIMUM

1) Need at least 6 in state and federal prosecutions.
   a. By rule, in federal courts, they have 12. But constitutionally, they could have less if they wanted.

2) Vote necessary to convict rules –
   a. States can allows less than unanimous verdicts but with 6, you need unanimity.
   b. In federal cases, unanimity is still constitutionally required.

A. Jury Composition

If they’re summoned for grand jury service, then that’s it – you have to do it if you’re not excused.
TRIAL JURORS:
⇒ Those that remain after excusing, get subject to challenges.
⇒ Really hard to persuade a judge to uphold a challenge for cause.
  o Require court approval and are rare.
⇒ Peremptory Challenges – limited in number, but can be exercised w/o any explanation.

VOIR DIRE – serves several purposes:
1) information that allows exclusion by challenging for cause (rare)
2) information that can be used in peremptory challenges
3) provide the lawyers with the opportunity to sensitize juries to their cause.

Impartiality

1) 6th Amendment < Fair Cross Section < “Distinctive group”

2) Equal Protection

Lockhart v. McCree (US 1986) – it’s fine to exclude people who oppose the death penalty.

Voir Dire Spectrum

<table>
<thead>
<tr>
<th>Extremely pro-defense</th>
<th>Moderately pro-defense</th>
<th>Neutral</th>
<th>Moderately pro pros</th>
<th>Extremely pro pros</th>
</tr>
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<tbody>
<tr>
<td>Chall for cause</td>
<td>Peremptory</td>
<td>Peremptory</td>
<td>Chall for cause</td>
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Duren v. MO (US 1979) – can’t exclude women. There has to be a fair chance that you get a woman (jury pool), but you have no right to have them there.

Prima Facie Case (What do you have to Prove?)
⇒ Exclusion
  o Systematic exclusion – not zero percent, can have one w/o getting rid of the entire group (15% vs. 54% in the population)
    ▪ Not by random, something is making it happen and it doesn’t have to be complete.
    ▪ Doesn’t require discriminatory intent.
⇒ The excluded group is:
  o A “distinctive group” in the community:
    ▪ Numerosity
- Distinctiveness – women bring a different flavor (something about perspective)
- People that oppose the death penalty are not a distinctive group (so it can’t be beliefs) – maybe immutable characteristics. Just b/c you believe a certain way, that doesn’t make your group distinctive.
  - No need to show that the D was prejudiced (Rehnquist has a big problem with this).
  ⇒ Representation not fair and reasonable in relation to their proportion in the community
  ⇒ Under representation is due to systematic exclusion.

State’s Justification:
  ⇒ Government’s interest is legitimate in having women at home caring for children, but the statute is not tailored to that end.
  ⇒ State could just exempt housewives and not women generally.

Question of standing?
  ⇒ He’s not a member of that community – but it doesn’t matter.
  ⇒ Not that people like you are on the jury, just people from your community.
  ⇒ Any defendant can bring this kind of claim.

Dissent (Rehnquist) – majority has, maybe, brought the curtain down on other exclusions. Slippery slope – could apply now to doctors and lawyers.

**Batson v. Kentucky** (US 1986) – EQP claim for D (not 6th A) – state cannot exclude jurors, by means of peremptory challenges, solely on the basis of race – their race being the same as D’s.

Whose equal protection rights are being infringed upon?
  ⇒ Primarily – the Defendants
  ⇒ Secondarily – the excluded jurors.

Establishing a violation:
  1) D has to establish a prima facie case:
     b. [don’t need it in Sixth Amendment cases]
     c. [court wouldn’t draw them in McKlesky though]
  2) Burden shifts to the state:
     a. Have to give a neutral explanation.
     b. What happens if the explanation is neutral, but the court still finds discrimination?
     c. Remedies:
        i. Start over
        ii. Reject peremptory challenge.
Court didn’t go with the Sixth Amendment issue b/c then they’d be guaranteeing a mirroring right.

⇒ That a D has a right to have a jury that looks like them.
⇒ **Sixth Amendment claim is not viable any more.**
  o Holland v. Illinois -- only has to do with the venire and not the petit jury.
  o Powell case – white guy’s equal protection rights have not been violated, but he has standing to challenge the practice in the name of those black jurors who aren’t included.
  o JEB – all lawyers represent state action and you can make an EQP challenge if it’s about the exclusion of women or blacks.

**STEPS:**
1) See if the D has a prima facie case
2) Call for a neutral explanation
3) If the explanation is not neutral D wins. Judge decides based on everything (all of the circumstances) if there is purposeful discrimination.

Doesn’t matter if the individual is white, black, man or woman.
Can you succeed on only one peremptory challenge?
⇒ YES – if the juror wasn’t asked any questions.

Court will look at voir dire – but if D has other evidence (i.e. a witness that will testify that pros. tells racist jokes at cocktail parties).
⇒ D can show it any way they want – they have a burden and they will want to draw on things that aren’t in the courtroom right now.

**NEUTRAL EXPLANATIONS – KG** – usually won’t find an explanation that admits the discrimination.
⇒ See Hernandez case – bilingual is a race-neutral explanation.
⇒ Granted a very disproportionate effect on minorities, but it’s neutral.
⇒ In step three, you can say it’s a pre-text.

**B. Influences Upon the Jury**

**Mu’Min v. VA** (US 1991) – Pre-Trial Publicity. Only prejudicial when particular jurors can’t put aside the information when reaching their decision. We must rely on voir dire to figure out who knows what.

**Darden v. Wainwright** (US 1986) – Against D prosecutor made inflammatory closing. Only unconstitutional if the prosecutor’s argument so infected the trial with unfairness as to make the resulting conviction a denial of due process.
⇒ ABA Standards: “The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.”

**IX. The D’s Rights to Confront His Accusers and to Present a Defense at Trial**
Purposes of Confrontation:

1) The environment of the court room and oath = truthfulness
2) Can’t lie face-to-face – glare in a person’s eyes.
3) The trier of fact able to observe W’s demeanor
4) Cross Exam

Maryland v. Craig (US 1990) – Against D. Child witness allowed to testify outside the D’s presence in certain circumstances (i.e. closed circuit t.v.).

TEST: Necessary to further an important public interest; or reliability can be assured in some way.

Idaho v. Wright (US 1990) – Dr. testifying for the child.
⇒ Is it clearly rooted in the hearsay rules?
⇒ Particular guarantees of trustworthiness shown from the circumstances around when the statement originally.
  o K’s statement was an excited utterance – adversarial testimony would add little to its reliability.

ROBERTS TEST:
1) Hearsay declarant unavailable
2) Reliability:
   a. Firmly rooted exception
   b. Particularized guarantees of trustworthiness

Davis v. Alaska (US 1974) – D has right to cross examine key prosecution witness (AL had a confidentiality agreement – D’s rights trump)

Delaware v. Van Arsdale (US 1986) – The right of confrontation can be violated and still the conviction obtained at trial can be affirmed on appeal (harmless error). D has burden of proving.
⇒ FACTORS:
⇒ n
  o Importance of W’s testimony in D’s case
  o Whether it was cumulative
    ▪ No harm if the evidence came out someplace else.
  o Corroborating evidence (or contradictory)
  o Extent of cross exam otherwise permitted
  o Overall strength of prosecution’s case.

Chambers v. Mississippi (US 1973) – For D, D accused of killing a police officer. Another guy did it – McDonald. D wanted to call him as a witness b/c he had confessed.
⇒ Right to confront witnesses in order to defend oneself is important
⇒ Hearsay statements should have been admitted b/c:
  o Made spontaneously
  o Corroborated by other evidence
Against the person’s own interest.
- The Declarant Unavailable.
- “The hearsay rule may not be applied mechanistically to defeat the ends of justice.”

**Rock v. Arkansas** (US 1987) -- per se rule against admitting hypnosis testimony – have to look at the facts of the individual case.

**Washington v. TX** – held, a TX § that prohibited the D but not the prosecution from calling an alleged accomplice as a witness violated the D’s right to compulsory process.

**Gray v. Maryland** (US) – redacted confession inadmissible. Bruton applies – the space and deletions are bad.

A. **Proof and Verdict Issues**

**Mullaney v. Wilbur** (US 1975) – Court struck down state statutory scheme that conclusively implied malice aforethought.

⇒ Prohibits a legislature from placing on the D in a homicide case the burden of proving by a preponderance of the evidence, or order to reduce the crim from murder to manslaughter.

⇒ There are 4 parts to murder – Maine found that if the prosecution proved the first three, then that’s that and burden shifts to D.

**Patterson v. New York** (US 1977) – state scheme is constitutional b/c it’s not an element, it’s an affirmative defense.

X. **SENTENCING**