

**UNIVERSITY OF CINCINNATI COLLEGE OF LAW**  
**CRIMINAL PROCEDURE II    WINTER/SPRING 2008**

Professor: Christo Lassiter    Office: Rm 408    Tel: 556-0096    Hours: Afternoons

Secretary: Toni McGuire    Office: Rm 400    Tel: 556-0090

Primary Reading Materials: (Copies of all reading assignments are placed on reserve).

Required:

1. Frank W. Miller et. al., CRIMINAL JUSTICE ADMINISTRATION (5th ed. 2000 Foundation Press) [hereinafter CB], pp. 1-12 and 603-1142.
2. 2007 Supplement pp. 183-334.
3. Selected cases as indicated in the syllabus
4. Various Rules of the Federal Rules of Criminal Procedure as indicated in the syllabus
5. Other materials may be assigned, time permitting.

Recommended:

1. LaFave, Israel and King, HORNBOOK ON CRIMINAL PROCEDURE (4TH ED. 2000).
2. Other materials may be assigned, time permitting.

Course Objective: In this course students are expected to develop an understanding of the constitutional and statutory rules governing the administration of criminal justice from bail to jail.

Teaching Methodology: The teaching methodology for this course is the discussion method. The discussion methodology helps the student learn to articulate legal reasoning in a relaxed format. Legal analysis means the ability to recognize legal questions and to construct answers. The background of legal analysis in criminal procedure spans broad themes involving notions of liberty, authority, community values, individual rights, and government structure. The purpose of developing critical skills is to take students beyond the black letter law by teaching students how to think about law in ways that will empower young lawyers to respond to a changing world.

Place: Rm 302    Time: MW at 0930-1045

Class Attendance: Prompt class attendance is mandatory. Students seeking an excused absence must do so by submitting a signed, typewritten/e-mail (to preserve anonymity for exam grading) request to me in advance of class, circumstances permitting, or after class otherwise. The sanction for absences range from grade reduction to exam disqualification resulting in a grade of “UWF.” Tardiness will be dealt with in a similar fashion.

Class Participation: Reading assignments will average 25 pages per class period. Students who are unable to participate in class discussion on any given day may so inform me with a signed typewritten/e-mail statement to that effect prior to class, but you still must attend class, unless separately excused. Class discussion will revolve around recurring themes throughout the semester. Students who enter the discussion at one juncture should anticipate occasional re-entry as old themes re-surface. As with absenteeism and tardiness, lack of preparedness may result in sanctions.

Exam: Closed book. The date and time is set by the administration.

Grades: Grades will be based upon the final examination. Outstanding class participation and attendance may be taken into account to raise scores falling significantly below demonstrated performance in class. Conversely poor class participation and lack of attendance may be taken into account to reduce the final grade. I expect to submit grades to the Registrar by 31 May 2008, depending on deferrals or other unusual circumstances causing delay. I will prepare a comprehensive diagnostic analysis of the exam, which will be available at Toni's desk at the time I submit grades. The exam memorandum will contain a statistical analysis of the class scoring and a discussion of general flaws in examsmanship. A model answer and the best student answers will be included in appendices.

## CLASS ASSIGNMENTS

1. 15 Jan **Initial Appearance**
  - I. Post Arrest: The Requirement of a Probable Cause Determination by an Independent Judicial Officer
    - A. When Must the Post Arrest Hearing be Held.
    - B. Consequences for Delay in Post Arrest Hearing.

CB at 605-615 (*Gerstein v. Pugh*, 420 U.S. 103 (1975), *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), and *Powell v. Nevada*, 511 U.S. 79 (1994).
2. 17 Jan **Bail and Pretrial Detention**
  - I. The Money Bail System
    - A. Excessive Bail.
    - B. Due Process and Equal Protection Considerations.

CB at 616-630 (*Stack v. Boyle*, 342 U.S. 1 (1951) and (*Schilb v. Kuebel*, 404 U.S. 357 (1971).
  - II. The Movement Towards Preventive Pretrial Detention and the Bail Reform Act of 1984
    - A. Detention Hearings.
    - B. Remedies for Delay in Detention Hearing.
    - C. Standard of Review and Presumptions at Detention Hearing.
    - D. Post Conviction Detention Hearing.

CB at 630-660 (*United States v. Salerno*, 481 U.S. 739 (1987), *U.S. v. Montalvo-Murillo*, 495 U.S. 711 (1990), *United States v. Jessup*, 757 F.2d 378 (1985), and *Hilton v. Braunskill*, 481 U.S. 770 (1987).

3. 22 Jan III. Due Process Rights of Pretrial Detainees  
*Bell v. Wolfish*, 441 U.S. 520 (1979).
- IV. Due Process Rights of Posttrial Detainees  
Fed R. Crim. P. 46(e)(1)-(2) (forfeitures for breach of conditions of bond).
4. 24 Jan **The Decision to Prosecute**
- I. Judicial Review of Prosecutorial Discretion
- A. Racial Discrimination.
- B. Forestalling Civil Prosecution.
- C. Prosecutorial Estoppel.
- D. Felony Versus Misdemeanor.
- E. Pretrial Diversion.
- Yick Wo v. Hopkins*, 118 U.S. 356 (1886).  
CB at 661-678 (*Wayte v. United States*, 470 U.S. 598 (1985).  
*United States v. Armstrong*, 517 U.S. 456 (1996).  
SUPP at 190-97 (*Bradshaw v. Stumpf*, 545 U.S. 175 (2005),  
(*United States v. Bass*, 536 U.S. 862 (2002), and *United States v. Resendiz-Ponce*, \_\_\_ U.S. \_\_\_ (2007)).
5. 29 Jan **Pretrial Screening**
- I. Preliminary Examination
- CB at 679-693 n1-7 (*Coleman v. Alabama*, 399 U.S. 1 (1970) and  
*Myers v. Commonwealth*, 363 Mass. 843 (1973).  
Fed.R.Crim P. 5(a).
6. 31 Jan II. Grand Jury Investigation and Indictment

- A. Grand Jury Investigative and Indictment Functions.
  - B. Rules Controlling Grand Jury Operation: Fed. R. Crim. P. 6
  - C. Investigative Function.
  - D. Judicial Policing and Prosecutorial Misconduct.
7. 4 Feb
- E. Challenges to Indictment.
    - CB 695-99 (*Costello v. United States*, 350 U.S. 359 (1956) Fed.Crim R. P 6, 7 & 48.
    - Rose v. Mitchell*, 443 U.S. 545 (1979)(racial discrimination in selection of jury is grounds for reversal). *Hobby v. United States*, (1984)(racial discrimination in selection of jury foreman is not grounds for reversal).
  - F. Amending an Indictment.
    - United States v. Miller*, 471 U.S. 130 (1985).
8. 6 Feb
- G. Error Analysis.
    - CB at 699-705 Notes 1-8.
    - Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988)
    - United States v. Mechanik*, 475 U.S. 66 (1986); *United States v. Williams*, 504 U.S. 36 (1992).
9. 11 Feb **Speedy Trial**
- I. Sixth Amendment Right to a Speedy Trial
    - CB at 706-721 (*Barker v. Wingo*, 407 U.S. 514 (1972)).
  - II. Federal Speedy Trial Act of 1974
    - A. Triggers.
    - B. Continuances.
      - CB at 721-31 (*United States v. Taylor*, 487 U.S. 326 (1988)); Supp

at 198-200 (*Zedner v. United States*, \_\_U.S.\_\_ (2006)).

III. Interstate Detainers Act

SUPP 189-91.

10. 13 Feb **Competency to Stand Trial**

I. Burden of Proof for Incompetency to Stand Trial

*Cooper v. Oklahoma*, 517 U.S. 348 (1995).

II. The Duty to Inquire

CB at 735-743 (*Pate v. Robinson*, 383 U.S. 375 (1966)).

III. Processing Incompetent Defendants

CB at 743-752 (*Jackson v. Indiana*, 406 U.S. 715 (1972)).

SUPP at 201-205 (*Sell v. United States*, 539 U.S. 166 (2003)).

11. 18 Feb **Discovery on the Government**

I. Prosecutorial Discretion to Prosecute

Review *United States v. Armstrong*, 517 U.S. 456 (1996).

II. Constitutional Obligation by Government to Disclose Case-in-Chief

*Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *United States v. Agurs*, 427 U.S. 97, 104 (1976).

CB 753-775 (*United States v. Bagley*, 473 U.S. 667 (1985)).

*Kyles v. Whitley*, 514 U.S. 419 (1995). Supp 206-211 (*Illinois v. Fisher*, 540 U.S. 544 (2004) and *United States v. Ruiz*, 536 U.S. 622 (2002)).

III. Non-Constitutional Provisions

Fed.R.Crim.P. 16(a) (Discovery).

CB at 775-779 (*People v. Bassett*, 56 Ill.2d 285 (1974))

IV. What is Discoverable and How is it Discovered?

12. 20 Feb

**Discovery on Defense**

I. Non-constitutional Provisions

Fed.Crim.Pro.R. 16(b)(1).

CB at 780-787 (*United States v. Nobles*, 422 U.S. 225 (1975)).

II. Obligation by Defense to Disclose

A. Alibi.

B. Insanity.

C. Defense Based Upon Public Authority.

Fed.Crim.Pro.R. 12.1, 12.2, and 12.3.

13. 25 Feb

**Right to an Impartial Trial**

I. Venue

A. Due Process.

B. Pretrial Publicity.

CB at 788-804 n1-10 (*Murphy v. Florida*, 421 U.S. 794 (1975)).

II. Change of Judge

CB at 804-07 n11-14.

14. 27 Feb

**Joinder and Severance of Charges and Defendants**

I. Joinder and Severance of Charges

CB 808-815 (*United States v. Foutz*, 540 F.2d 733).

II. Joinder and Severance of Defendants

CB at 816-824 (*Schaffer v. United States*, 362 U.S. 511 (1960)).

15. 4 Mar

**Double Jeopardy**

I. Fundamental Tenets of Double Jeopardy Law

A. Raising the Issue.

B. When Jeopardy Attaches.

C. “Separate Sovereignities” Exception.

D. Government Appeals.

CB at 824-834.

II. Former Acquittal

CB at 834-855.

SUPP at 212-214 (*Smith v. Massachusetts*, 543 U.S. 462 (2005) and *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003)).

16. 6 Mar

III. Multiple Convictions

IV. Termination Without Acquittal or Conviction

A. Expanding Double Jeopardy to Aborted Prosecutions.

B. Mistrials.

CB at 855-897.

17. 11 Mar

V. Punishment Enhancement

A. Recidivism Statutes.

CB at 1247-1256 (*Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

SUPP 298-307 (*INS v. St Cyr*, 533 U.S. 289 (2001)).

B. Aggravation Provisions.

*Jones v. United States*, 526 U.S. 227 (1999). SUPP at 209-236 (*Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

C. Prior Conviction.

*Witte v. United States*, 515 U.S. 389 (1995).

D. Retrial on Prior Conviction.

*Monge v. California*, 524 U.S. 721 (1998).

18. 13 Mar VI. Civil Remedies and Double Jeopardy

A. Fines.

*Montana Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994) and *Hudson v. United States*, 522 U.S. 93 (1997).

B. Forfeitures.

1. Personal forfeitures. *Bennis v. Michigan*, 116 S. Ct. 994 (1996)

2. In rem forfeitures. CB at 897-914 (*United States v. Ursery*, 518 U.S. 267 (1996)).

C. Civil Confinement.

CB at 1233-1247 (*Hendricks v. Kansas*, 521 U.S. 346, (1997)); SUPP 307-310 (*Kansas v. Crane*, 534 U.S. 407 (2002) and *McKune, Warden v. Lile*, 536 U.S. 24 (2002), and *Shepard v. United States*, 544 U.S. 13 (2005)).

D. Removal of a Resident Alien From the United States.

Supp at 310-319 (*INS v. St. Cyr*, 533 U.S. 289 (2001)).

E. Sex Offender Registration.

Supp at 319-324 (*Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003)).

19. 18 Mar

**Pretrial Hearings**

I. Procedural Context of Pretrial Hearings.

A. Timeliness of Pretrial Motions.

Fed.Crim.Pro.R. 12.

*Davis v. United States*, 411 U.S. 233 (1973).

B. Bill of Particulars.

Fed.Crim.Pro.R. 7.

C. Motions to Suppress Evidence.

Fed.Crim.Pro.R. 41.

II. Rules of Evidence and Procedure at Pretrial Hearings

CB 915-928 (*Watkins v. Sowders*, 449 U.S. 341 (1981)).

III. Pretrial Conferences

Fed.Crim.Pro.R. 17.1.

20. 20 Mar

**Evidence**

I. Polygraph Examinations

*United States v. Scheffer*, 118 S. Ct. 1261 (1998).

II. Scientific Evidence

*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

III. Confessions by Co-Defendants

*Gray v. Maryland*, 118 S. Ct. 1151 (1998).

24-28 Mar

**SPRING BREAK**

21. 1 Apr

**Guilty Pleas**

I. Plea Process and Procedure

A. Rule 11 of the Fed.R.Crim.P.

B. Providence of Plea.

C. Effect of Guilty Plea on Later Assertion of Rights.

CB at 930-950. SUPP 215-218.

22. 3 Apr

II. Plea Bargaining

A. Voluntariness of Plea.

1. Collateral attacks.

2. Limitations of collateral attacks.

SUPP at 216-218 (*Bradshaw v. Stumpf*, 545 U.S. 175 (2005)).

B. Evidentiary Considerations.

1. Admissibility of plea negotiations. Read: *United States v. Mezzanatto*, 513 U.S. 196 (1995).  
CB at 938.

2. Effect of stipulations during plea negotiation.  
*United States v. Libretti*, 516 U.S. 29 (1995).  
CB at 939.

III. Withdrawal of Guilty Plea

CB at 951-1001.

23. 8 Apr

**Adjudication of Guilt or Innocence by Trial**

I. Proof Beyond a Reasonable Doubt

- A. Proof Beyond a Reasonable Doubt.
- B. Statutory Definition of Crimes.
- C. Punishment Enhancement.

CB at 1003-1018.

SUPP at 219-244 (Review *Apprendi* and n1-3).

24. 10 Apr

II. Trial by Jury

- A. Right to Jury Determination of Facts.

CB at 1018-26 n1-12 (*Duncan v. Louisiana*, 391 U.S. 145 (1968)).

- B. Composition of Jury.

CB at 1026-43 (*Powers v. Ohio*, 499 U.S. 400 (1991))  
SUPP. at 247-251 (*Johnson v. California*, 545 U.S. 162 (2005), *Miller-El v. Dretke*, 545 U.S. 231 (2005), and *United States v. Martinez-Salazar*, 528 U.S. 304 (2000)).  
Fed.Crim.Pro.R 23 (jury) and 24 (voir dire).

- C. Jury Size and Agreement Requirement.

CB 1043-52 (*Oregon v. Apodaca*, 406 U.S. 404 (1972))

25. 15 Apr

III. Confrontation, Cross-Examination, and Compulsory Process

- A. Confrontation.

CB at 1053-1077 (*Coy v. Iowa*, 487 U.S. 1012 (1988) and *Maryland v. Craig*, 497 U.S. 836 (1990)).

- B. Cross-Examination and Compulsory Process.

CB at 1078-86 (*Chambers v. Mississippi*, 410 U.S. 284 (1973)).

Fed.Crim.Pro.R. 26.2 (Production of witness statements).

Fed.Crim.Pro.R. 26.3 (Mistrial).

26. 17 Apr SUPP at. 251-70 *Crawford v. United States*, 541U.S.36 (2004) and *Davis v. Washington*, \_\_\_ U.S. \_\_\_ (2006).
27. 22 Apr **Effective Assistance of Counsel**
- I. The Right to Effective Assistance of Counsel
- A. Interference With Right to Counsel.
- CB at 1101-1110 (*United States v. Cronin*, 466 U.S. 648 (1984))  
SUPP at 272-74 (*Alabama v. Shelton*, 535 U.S. 654 (2002))
28. 24 Apr B. Actual Ineffectiveness
- CB at 1111-1130 (*Strickland v. Washington*, 466 U.S. 668 (1984)).  
SUPP 274-81 ns 1-5; (*Wiggins v. Smith, Warden*, 539 U.S. 510 (2003)).
29. 29 Apr II. Self-Representation and Waiver of Sixth Amendment Rights
- CB at 1132-42 (*Faretta v. California*, 422 U.S. 806 (1975)).  
SUPP at 266-271 n1a, 2a, 3a,,5a Editor's Note and waiver counsel to plead guilty.