

**CRIMINAL PROSECUTION AND
DEFENSE LAWYERING WORKSHOP:
Zealous Advocacy and Situational Ethics
in the Adversarial System of Justice**

Syllabus, Spring 2020 (updated January 7, 2020)

For law students passionate about prosecuting or defending criminal cases, this workshop focuses on legal theory and practical application, with an emphasis on ethical constraints. Students study the leading cases, listen to oral arguments, and read the briefs in cases pending before the Supreme Court of the United States so they can present arguments in a moot court format. Guest speakers – including judges, prosecutors and defense counsel – will help foster vigorous classroom debates and provide a “fair and balanced” presentation of the cutting edge legal issues of the day. Class participation is mandatory and comprises one-half of the final grade. A writing assignment will comprise the other half of the final grade, format to be decided later, but likely either a draft brief or an open book, take-home, final exam that will challenge the student to spot legal issues covered during the semester and brief the arguments for both sides.

1. **The Adversarial System of Justice**

What are the advantages and disadvantages of the adversarial system of justice?

- Friedman and Smith, *Understanding Lawyers Ethics*, Chapters 2-4.
- *Calhoun v. United States*, 133 S. Ct. 1136 (2013) (Sotomayor, J., respecting the denial of the petition for writ of certiorari) (“I write to dispel any doubt whether the Court's denial of certiorari should be understood to signal our tolerance of a federal prosecutor's racially charged remark. It should not.”).
- *Numerous red flags arose in months leading to Fort Lauderdale airport shooting*, Los Angeles Times, Jan. 8, 2017 (<http://www.latimes.com/nation/la-na-fort-lauderdale-shooter-20170108-story.html>) .
- *Life After Death Row*, CBS News 60 Minutes, Jan. 10, 2016 (<http://www.cbsnews.com/news/60-minutes-life-after-death-row-exoneration/>).

- *Trial and Error: Report Says Prosecutors Rarely Pay Price for Mistakes and Misconduct*, Apr. 2, 2016 (<http://www.truth-out.org/news/item/35439-trial-and-error-report-says-prosecutors-rarely-p>).
- *FBI Admits Flaws in Hair Analysis over Decades*, Wash. Post, Apr. 18, 2015.
- *Report: Prosecutors Hid Evidence In Ted Stevens Case* (2012) (<https://www.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in-ted-stevens-case>).
- *He's not a 'Serial Cat Killer' After All*, Courthouse News Service (2012) (<https://www.courhousenews.com/hes-not-a-serial-cat-killer-after-all>)

2. **The Role of the Grand Jury**

How does a prosecutor decide who to investigate, which crimes to prosecute, and what evidence to present to a grand jury? Who instructs the grand jurors as to the elements of the offense? If the government fails to present substantial exculpatory evidence to the grand jury, or worse, presents false testimony to the grand jury, can the court dismiss the indictment pre-trial? What role does the judiciary play in the prosecution function?

- *United States v. Avenatti*, Case No.19-cr-00373-PGG (S.D.N.Y.) (superseding indictment and pretrial motions, docket entries #29, #35, #57, #64, #72, #75, #79, #80, available on PACER or from professor).
- *Wayte v. United States*, 105 S.Ct. 1524 (1985).
- *United States v. Williams*, 112 S.Ct. 1735 (1992) (http://www.oyez.org/cases/1990-1999/1991/1991_90_1972).
- *United States v. Jacobo-Zavala*, 241 F.3d 1009 (8th Cir. 2001).
- *In re United States*, 345 F.3d 450 (7th Cir. 2003).
- *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016).
- *United States v. Takhalov*, Case No. 11-cr-20279-RNS (S.D. FL) (DE#645, 663, 665) (available on PACER or from professor).
- Rules 5, 5.1, 6, 7 and 48, Fed.R.Crim.P.

3. **The Role of the Prosecutor**

Does a prosecutor have a legal/ethical duty to disclose favorable evidence to the accused and/or the jury? Does a prosecutor have any obligation to inform the defendant of exculpatory evidence before taking a plea? Can the government take a factual or legal position that is inconsistent with its position in a prior proceeding?

- Rule 16, Fed.R.Crim.P.
- *Turner v. United States*, 137 S.Ct. 1885 (2017).
- *Smith v. Cain*, 132 S.Ct. 627 (2012)
(http://www.oyez.org/cases/2010-2019/2011/2011_10_8145).
- *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995).
- *United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001).
- *United States v. Ruiz*, 122 S.Ct. 2450 (2002).
- *United States v. Nelson*, 979 F.Supp.2d 123 (D.D.C. 2013).
- *Smith v. Goose*, 205 F.3d 1045 (8th Cir. 2000).
- *Connick v. Thompson*, 131 S.Ct. 1350 (2011) (optional reading).

4. **The Role of the Judiciary**

Given the judiciary's limited jurisdiction to resolve "cases or controversies" under Article III of the Constitution, can a judge reject a tendered plea agreement or impose a sentence higher than the prosecutor is seeking? Can a judge penalize a citizen for exercising his right to a jury trial or appeal? Can a judge penalize a defendant for refusing to cooperate with law enforcement? How does the Constitution protect an accused from a "vindictive" judge?

- *United States v. Davila*, 133 S.Ct. 2139 (2013)
(<https://www.oyez.org/cases/2012/12-167>)
- *Corbitt v. New Jersey*, 99 S.Ct. 492 (1978).
- *Alabama v. Smith*, 490 U.S. 794 (1989).
- *United States v. Goodwin*, 102 S.Ct. 2485 (1982).
- *United States v. O'Neill*, 437 F.3d 634 (7th Cir. 2006).
- *In re Vasquez-Ramirez*, 443 F.3d 692 (9th Cir. 2006).
- *Wilson v. State*, 845 So.2d 142 (Fla. 2003).

5. **Plea Bargaining**

Does the Constitution protect an accused from prosecutors who are vindictive? Can the executive, legislative branch penalize a citizen for exercising his right to a jury trial? What is a lawyer's duty of candor during the plea bargaining process?

- Rules 11, 32, 35, Fed.R.Crim.P.
- Plea Agreement of Defendant "F" (to be provided by professor).
- Jed S. Rakoff, *Why Innocent People Plead Guilty* (<http://www.nybooks.com/articles/2014/11/20/>).
- *Class v. United States*, 138 S. Ct. 798 (2018).
- *Lee v. United States*, 137 S.Ct. 1958 (2017) (listen to oral argument) (<https://www.oyez.org/cases/2016/16-327>).
- *North Carolina v. Alford*, 400 U.S. 25 (1970).
- *Santobello v. New York*, 404 U.S. 257 (1971).
- *Lafleur v. Cooper*, 132 S.Ct. 1376 (2012).
- *Missouri v. Frye*, 132 S.Ct. 1399 (2012).
- *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996).

6. **The Right to Present a Defense, Immunity and Compulsory Process**

In its "search for the truth," does the criminal trial provide a level playing field to present the facts and arguments to the jury? While a prosecutor can compel a witness to testify, grant immunity and pay for testimony, how does the defense obtain the exculpatory testimony of a witness who invokes his Fifth Amendment right and refuses to testify? Can the prosecutor take inconsistent positions in court?

- 18 U.S.C. § 6001, et seq.
- *United States v. Hubbell*, 120 S.Ct. 2037 (2000).
- *Kastigar* Letter for Defendant "F" (to be provided by professor)
- Second Circuit Clarifies Scope of Proffer Agreement Waivers, Harry Sandick and Helen P. O'Reilly, *New York Law Journal* (November 29, 2016).
- *In re Grand Jury Subpoena*, 670 F.3d 1335 (11th Cir. 2012).
- *Davis v. United States*, 16-1190 (S.Ct. cert. denied 10/2/17). (<http://www.scotusblog.com/case-files/cases/davis-v-united-states-3/>).
- *United States v. Straub*, 538 F.3d 1147 (9th Cir. 2008).
- *United States v. D'Apice*, 664 F.2d 75 (5th Cir. 1981).

- Compare *Glebe v. Frost*, 135 S. Ct. 429 (2014) (Defendant precluded from simultaneously contesting reasonable doubt and claiming duress) with *Lopez v. Smith*, 135 S. Ct. 1 (2014) (Prosecutor permitted to advance theory at trial different from earlier notice of another theory of liability).

7. **The Role of Defense Counsel**

Advisor, gladiator, dealmaker or none/all of the above? What obligation does defense counsel have in advising his client whether to plead or go to trial? What does an attorney do if a guilty client insists on going to trial or an innocent client insists on taking a deal? Who decides trial strategy, the attorney or the client? Does an attorney provide “effective assistance of counsel” if he overrides the client’s proposed theory of defense?

- *Garza v. Idaho*, 139 S.Ct. 738 (2019).
- *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).
- *Indiana v. Edwards*, 554 U.S. 164 (2008).
- *Florida v. Nixon*, 125 S.Ct. 551 (2004) (listen to oral argument: http://www.oyez.org/cases/2000-2009/2004/2004_03_931).
- *Kansas v. Carter*, 14 P.3d 1138 (Kansas S. Ct. 2000).
- *Ryan v. Rivera*, 2001 WL 1203391 (2d Cir. 2001).

8. **The Right to Testify and Confront Witnesses**

What defense may an attorney pursue for a client whom the attorney “knows” is guilty? During cross-examination, can the attorney attempt to discredit a government witness whom he knows is truthful? Can the attorney permit a witness to testify in court in favor of his case if the attorney does not believe the witness? Can the attorney permit his client to testify if the attorney has “reason to believe” that the client will falsely exculpate himself? When is “preparing” a witness to testify witness tampering?

- Friedman and Smith, Chapters 5, 6 & 7.
- *Nix v. Whiteside*, 106 S.Ct. 988 (1986).
- *Casiano-Jimenez v. United States*, 2016 WL 1211859 (1st Cir. 2016).
- *State v. McDowell*, 681 N.W.2d 500 (Wisconsin S. Ct. 2004).

9. **The Right to Conflict-Free Counsel v. Counsel of Choice**

What are the potential conflicts of interest that may disqualify a defendant's counsel of choice? Can co-defendants enter into "Joint Defense Agreements?"

- *Gonzalez-Lopez v. United States*, 548 U.S. 140 (2006).
- *Mickens v. Taylor*, 122 S.Ct. 1237 (2002)
(http://www.oyez.org/cases/2000-2009/2001/2001_00_9285).
- *Wheat v. United States*, 108 S.Ct. 1692 (1988).
- *United States v. Almeida*, 341 F.3d 1318 (11th Cir. 2003).
- David Orentlicher, *Fee Payments to Criminal Defense Lawyers From Third Parties: Revisiting United States v. Hodge and Zweig*, 69 Fordham L. Rev. 1083.

10. **Getting Paid Without Getting Indicted**

Before accepting a fee, do money laundering and criminal forfeiture statutes require that defense counsel investigate whether his client is paying him with the proceeds of a crime?

- IRS Form 8300, 18 U.S.C. §§ 982, 1345, 1956, 1957 & 1963.
- *Caplin & Drysdale v. United States*, 109 S.Ct. 2646 & 2667 (1989) (majority and dissenting opinions).
- *United States v. Monsanto*, 109 S.Ct. 2657 (1989).
- *Kaley v. United States*, 134 S.Ct. 1090 (2014)
(<https://www.oyez.org/cases/2013/12-464>).
- *Luis v. United States*, 136 S.Ct. 1083 (2016)
(<https://www.oyez.org/cases/2015/14-419>)
- *United States v. Velez (Kuehne)*, 586 F.3d 875 (11th Cir. 2009).

11. **Zealous Advocate or Criminal Conspirator?**

How vigorous can a defense attorney represent the interests of his criminal client without “crossing the line” from criminal lawyer to lawyer criminal acting as “house counsel” or consigliere in furtherance of a criminal conspiracy?

- Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 Harv. L. Rev. 670 (1992).
- *United States v. Llanez-Garcia*, 735 F.3d 483 (6th Cir. 2013) (vacating two district-court orders strongly, publicly, and erroneously reprimanding defense counsel).
- *United States v. Agosto-Vega*, 731 F.3d 62 (1st Cir. 2013) (reversing sanctions imposed against defense attorney for alleged late filing of motions).
- *United States v. Elso*, 422 F.3d 1305 (11th Cir. 2008).
- *United States v. Abbell*, 271 F.3d 1286, 1298 (11th Cir. 2001).
- *United States v. Knowles*, 66 F.3d 1146 (11th Cir. 1995).

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