

**CRIMINAL PROSECUTION AND
DEFENSE LAWYERING WORKSHOP**

**Zealous Advocacy and Situational Ethics
in the Adversarial System of Justice**

Syllabus, Spring 2025

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.

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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 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.”).
- *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-pay-price-for-mistakes-and-misconduct/>).
- *FBI Admits Flaws in Hair Analysis over Decades*, Wash. Post, April 18, 2015 (www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310_story.html).
- *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.courthousenews.com/hes-not-a-serial-cat-killer-after-all>).
- *Prospect of Pardons in Final Days Fuels Market to Buy Access to Trump*, The New York Times, Jan. 25, 2021 (<https://www.nytimes.com/2021/01/17/us/politics/trump-pardons.html>).

- Must-see Movies

- *The Mauritanian, The Star Chamber, A Few Good Men*

- Optional Movie

- *My Cousin Vinny*

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 crime? 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?

- ***United States v. Williams***, 504 U.S. 36 (1992) (denying motion to dismiss alleging that government withheld substantial exculpatory testimony to the grand jury) (oral argument: http://www.oyez.org/cases/1990-1999/1991/1991_90_1972).
- ***Wayte v. United States***, 470 U.S. 598 (1985)
- ***United States v. Avenatti***, 433 F. Supp. 3d 552 (S.D.N.Y. Jan. 15, 2020) (denying motion to dismiss alleging selective and vindictive prosecution).
- ***United States v. Takhalov***, 827 F.3d 1307 (11th Cir. 2016) (reversing convictions where trial court refused to give defense-requested jury instructions on elements of the offense).
- ***United States v. Takhalov***, Case No. 11-CR-20279-RNS (S.D. Fla.) (DE# 663-4, 665) (orders rejecting challenges to grand jury proceedings).
- **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.
- **Smith v. Cain**, 132 S. Ct. 627 (2012)
(http://www.oyez.org/cases/2010-2019/2011/2011_10_8145).
- **Turner v. United States**, 137 S. Ct. 1885 (2017).
- **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).
- **United States v. Esformes**, No. 19-13838 (11th Cir. Jan. 6, 2023),
(<https://media.ca11.uscourts.gov/opinions/pub/files/201913838.pdf>).
- **United States v. Pisoni**, No. 15-CR-20339-Gayles, Order Granting New Trial, ECF#767 November 18, 2022 (to be provided by professors).

4. **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 professors).
- 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).
- ***Lafler v. Cooper***, 566 U.S. 156 (2012).
- ***Missouri v. Frye***, 566 U.S. 134 (2012).
- ***Boria v. Keane***, 99 F.3d 492 (2d Cir. 1996).
- Petition for Writ of Certiorari in ***Turner v. United States***, S. Ct. No. 18-106 (www.scotusblog.com/case-files/cases/turner-v-united-states-3/).
- Petition for Writ of Certiorari (denied) in ***Mansfield v. Williamson County, Texas***, S. Ct. No. 22-186 (www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-186.html).

5. 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?

- **Rules 11 and 48**, Fed. R. Crim. Pro.
- *In re Flynn*, 973 F.3d 74 (D.C. Cir. 2020).
- Petition for a Writ of Certiorari in **Garrott v. United States**, No. 20-423, 2021 WL 78116, at *1 (Jan. 11, 2021) (denying petition)
(www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-423.html).
- **United States v. Davila**, 569 U.S. 597 (2013)
(www.oyez.org/cases/2012/12-167).
- **Wilson v. State**, 845 So.2d 142 (Fla. 2003).
- "Feds charge NYC mayor with selling his influence to foreign nationals. He says he won't resign," <https://tinyurl.com/4hess8ed> (September 2024).
- "Top Justice Department official orders prosecutors to drop charges against New York Mayor Eric Adams," <https://tinyurl.com/yk7337tw> (February 2025).

Extra Credit Reading for Week 5

- **Corbitt v. New Jersey**, 439 U.S. 212 (1978).
- **Alabama v. Smith**, 490 U.S. 794 (1989).

- ***United States v. Goodwin***, 457 U.S. 368 (1982).
- ***United States v. Campbell***, 26 F.4th 860 (11th Cir. 2022) (sua sponte ruling in favor of government based on good-faith exception even though not raised by the government).
- ***United States v. O'Neill***, 437 F.3d 634 (7th Cir. 2006).
- ***In re Vasquez-Ramirez***, 443 F.3d 692 (9th Cir. 2006) (writ of mandamus was appropriate remedy for district court's refusal to accept defendant's guilty plea).
- ***In re United States***, 345 F.3d 450 (7th Cir. 2003) (District Court exceeded its authority in denying government's motion to dismiss and appointing special prosecutor warranting mandamus relief).
- ***United States v. Jacobo-Zavala***, 241 F.3d 1009 (8th Cir. 2001) (2-1 decision holding that district court abused its discretion when it withheld "leave of court" to file dismissal of indictment by prosecutor; Beam, J., dissenting).
- <https://amp.cnn.com/cnn/2022/08/16/politics/judge-rejects-plea-agreements-classified-information-case/index.html>
- <https://www.politico.com/news/2022/01/31/judge-rejects-plea-deal-man-killed-ahmaud-arbery-00003880>
- <https://www.heritage.org/crime-and-justice/commentary/why-judge-refused-rubber-stamp-the-shady-hunter-biden-plea-deal>

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.
- ***Murphy v. Waterfront Comm'n***, 378 U.S. 52 (1964).
- ***United States v. Hubbell***, 530 U.S. 27 (2000).
- *Kastigar* Letter for Defendant “F” (to be provided by professors).
- Second Circuit Clarifies Scope of Proffer Agreement Waivers, Harry Sandick and Helen P. O'Reilly, New York Law Journal (November 29, 2016) (<https://pbwt2.gjassets.com/content/uploads/2016/02/NYLJ-Second-Circuit-Clarifies-Scope-Of-Proffer-Agreement-Waivers-Nov.-2016.pdf>).
- ***In re Grand Jury Subpoena***, 670 F.3d 1335 (11th Cir. 2012).
- ***Davis v. United States***, No. 16-1190 (S. Ct. cert. denied 10/2/17) (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***, 574 U.S. 21 (2014) (Defendant precluded from simultaneously contesting reasonable doubt and claiming duress) *with* ***Lopez v. Smith***, 574 U.S. 1 (2014) (Prosecutor permitted to advance theory at trial different from earlier notice of another theory of liability).

7. The Role of Defense Counsel: Zealous Advocate or Criminal Conspirator?

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? 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?

- **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**, 543 U.S. 175 (2004) (listen to oral argument: 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).
- **United States v. Kallen-Zury**, No. 20-12385 (11th Cir. Jan. 12, 2023) (<https://media.ca11.uscourts.gov/opinions/unpub/files/202012385.pdf>).
- 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 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 (11th 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***, 475 U.S. 157 (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 vs. 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***, 535 U.S. 162 (2002)
(http://www.oyez.org/cases/2000-2009/2001/2001_00_9285).
- ***Wheat v. United States***, 486 U.S. 153 (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 (2000).

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***, 491 U.S. 617 (1989) (read the majority and the dissenting opinions).
- ***United States v. Monsanto***, 491 U.S. 600 (1989).
- ***Kaley v. United States***, 571 U.S. 320 (2014)
(<https://www.oyez.org/cases/2013/12-464>).
- ***Luis v. United States***, 578 U.S. 5 (2016)
(www.oyez.org/cases/2015/14-419).
- ***United States v. Velez (Kuehne)***, 586 F.3d 875 (11th Cir. 2009).