Criminal Pretrial and Trial Procedure

CASES AND MATERIALS

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Preface

The purpose of this collection of cases and materials is to examine those aspects of criminal procedure that receive little, if any, attention in most first-level criminal procedure courses. Such courses usually emphasize the constitutional doctrines and concepts associated with the fourth amendment, the privilege against self-incrimination, the right to counsel, and the guilty plea process. They may also consider the doctrine of selective incorporation and the nature of and problems associated with police and prosecutorial discretion.

By contrast, this book is for a second-level course, and I assume that the student is already acquainted with basic constitutional doctrines. My purpose is to examine in detail each of the steps involved in a litigated felony prosecution and the particular legal issues that commonly arise at each of those steps. Furthermore, I attempt to examine those issues and the legal doctrines that courts employ when resolving them from the perspective of the prosecutor and defense attorney. Consequently, questions of strategy and tactics — and, sometimes, questions of legal ethics — acquire substantial importance.

This orientation towards the criminal process dictates the basic organization of the book as well as much of its content. For example, the section on the preliminary hearing examines the legal functions of such hearings and the various rights that defendants enjoy when such hearings occur. It also, however, raises such tactical questions as whether prosecutors should avoid such hearings by securing indictments or filing informations or whether defendants should waive such hearings in certain cases. The section also gives particular attention to *Ohio v. Roberts* and confrontation clause questions because of their pertinence to the use of preliminary hearing testimony at trial.

Similarly, the book includes a section considering the rights and privileges of witnesses summoned before a grand jury. Rather than simply approaching those rights and privileges in terms of substantive constitutional doctrines, I have included several grand jury witness problems. One can ask the students to read the cases with reference to those problems and then to use the doctrines discussed in those cases and in the notes as a basis for either advancing or opposing claims of privilege in the context of the problems. In this fashion the students become familiar with some of the Supreme Court's most recent rulings involving the fourth, fifth, and sixth amendments, and they do so from the perspective of the prosecutor or defense counsel.

Of course, many of the issues examined involve important constitutional questions, and to the extent those questions do not fall within the standard first-level syllabus they receive thorough consideration. Thus I have devoted substantial attention to the double jeopardy clause, to the right to a speedy trial, and to the various constitutional rights to which defendants are entitled in connection with jury trials. Furthermore, the portion of the book examining the constitutional protections available to grand jury witnesses provides a useful means of refreshing the student's recollection concerning the basic fourth, fifth, and sixth amendment doctrines previously covered in the first-level course.

Instructors who are so minded can use the book to teach a second-level criminal procedure course oriented primarily to constitutional doctrine. Indeed, to facilitate such an approach, I have attempted to edit the court opinions in a manner that permits close examination of the evolving constitutional doctrines involved. On the other hand, to a greater degree than in most available casebooks, I give substantial emphasis to various technical questions and matters of

procedure, which, although not of constitutional stature, are of great importance in the litigation of felony cases. The book examines such topics as joinder and severance, multiplicity and duplicity, and techniques of jury selection. In order to facilitate this examination of the nonconstitutional aspects of criminal pretrial and trial procedure, I have devoted primary attention to the rules and statutes governing federal criminal cases, although, when appropriate, I have included a few state court rules or decisions for comparative purposes. Individual instructors may wish to expand this comparative approach by providing their students with duplicated provisions of the rules, statutes, and court decisions applicable in the particular jurisdiction in which those students are likely to practice.

I also wish to emphasize my belief that there is a real need for a second-level criminal procedure course of the sort that this book contemplates. Anyone who is reasonably familiar with the manner in which the criminal process actually functions knows that many criminal defendants have suffered at the hands of ignorant or incompetent defense attorneys. Furthermore, poorly trained, overburdened prosecutors sometimes fail to represent adequately the public's interest in criminal cases. First-level law school courses that focus on the constitutional law of criminal procedure do not serve to remedy such deficiencies: They simply do not address many of the procedural questions that prosecutors and defense attorneys customarily encounter.

Of course, if the doctrines and procedures associated with criminal prosecutions were relatively simply and straightforward, the absence of law school training in such matters would be of little concern; but, given the enormous quantity of court decisions involving criminal procedure and the relatively high frequency of legislative action, simplicity and straightforwardness do not exist. An attorney representing the state or an individual defendant confronts an enormously complicated and not necessarily well-defined body of law. Furthermore, as in civil procedure, one must have an overview of the whole process in order to exercise sound judgment at each step. Thus it seems to me there is a real need in the law school curriculum for a criminal procedure analogue to civil procedure courses. This need is particularly acute because the Supreme Court has placed enormous responsibilities upon the criminal defense attorney. His presence makes the otherwise coercive effects of plea negotiations constitutionally tolerable. His advice, unless violative of vague and generally forgiving standards of incompetency, seals the defendant's guilty plea and the resulting loss of most legal defenses or objections. Indeed, errors and omissions of the defense attorney can operate in numerous situations to deprive his client of procedural rights and even constitutional claims of which the client may not even be aware. Yet, the courts seem to tolerate such consequences by presuming defense lawyers to be competent unless their clients can prove them to be otherwise. Consequently, without denigrating in any way the need for courses in the constitutional aspects of criminal procedure, I suggest even more is required in order to give students the type of education the courts presume they have received.

I hope these materials can fill that need. One can work one's way through the entire casebook in a four credit course. If only three credit hours are available, as is frequently the case, some selectivity in coverage may be required. In three-credit courses, I usually omit altogether Chapter 7 on extradition and Chapter 11 on competency to stand trial, as well as Section E of Chapter 10 on change of judge. On occasion, depending upon how briskly the course isn't progressing and upon the coverage emphasized in other available courses, I have also omitted Section C of Chapter 10, Sections A, B, and D of Chapter 17, and

portions of Section B of Chapter 22. However, every instructor will have individual preferences, and I offer these suggestions only by way of example.

In editing the court opinions reproduced in these materials, I have omitted many of the original footnotes; those which appear are indicated in brackets and retain their original numbers. Editor's footnotes are indicated by asterisks. In the Notes and Questions I have employed the masculine form of the third-person singular throughout. This choice is purely stylistic, and I intend no offense to anyone.

I wish to express my gratitude to the authors, publishers, and copyright holders of the secondary materials reprinted in this book, and also to acknowledge my indebtedness to those many individuals at the University of Iowa College of Law and at the Arizona State University College of Law whose support and assistance made this book possible. They include half a generation of research assistants, including Henry Nathanson, C. Howard Danielson, Sheila Harmer, and Cathy Joseph; and four patient and hardworking secretaries, Betty Andre, Gail Brummel, Joan Mahoney, and Sandra Mitchell. I am also indebted to several of my present and former colleagues, especially Professor Gary Lowenthal, for their careful examination and helpful comments concerning portions of these materials. I am especially grateful to my wife, Linda, for her support and encouragement and for her patience with all the demands that the completion of this book has imposed on her. Last, I want to acknowledge a longstanding debt to Judge Robert C. Zampano, Jr., who first kindled my interest in criminal procedure and who, during my term as his law clerk, conducted a one-man seminar in trial practice and the judicial process for which I have always been grateful.

Charles A. Pulaski, Jr.
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January, 1982

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