

Law 594: Criminal Procedure Post-Investigations
Course Memorandum
Spring 2023

Professor Chris Behan
Tuesday & Thursday, 3:00-4:15
Room 102

Course Overview

At both the state and federal levels, the American criminal justice system contains procedural rules based on Constitutional and statutory provisions that are ostensibly designed to ensure fair and just trials for criminal defendants. In this class, we explore the rules of criminal procedure in the light of their underlying values and aspirational goals, always asking ourselves whether the rules achieve their objectives.

This class is important for any student who plans to practice criminal law. It covers the key elements of the criminal trial—from pretrial procedures through the trial itself, then post-conviction remedies—in a thorough and comprehensive manner. In addition, this course covers material that is tested on the bar exam. According to the National Council of Bar Examiners, the following topics in this course are testable subjects for the MBE: right to counsel; fair trial and guilty pleas; double jeopardy; cruel and unusual punishment; burdens of proof and persuasion; appeal and error.

Learning Objectives

At the end of this course, students will be able to:

- Understand the constitutional basis for the rules of criminal procedure followed in American courtrooms at both the state and federal levels and use that knowledge to frame arguments for the application, interpretation, extension, and modification of the Rules.
- Correctly identify and be able to orally explain adjudicative criminal procedure issues, in the context of appellate cases and hypothetical problems presented in the classroom.
- Critique the American criminal justice system for its ability to provide equitable treatment of accused persons based on race, ethnicity, gender, economic status, and other factors affecting access to justice.
- Engage and consider non-dominant perspectives on criminal justice with respect and empathy.
- Answer bar-style multiple-choice questions and write bar-style essay answers on criminal law topics covered on the Multistate Bar Exam including “right to counsel; fair trial and guilty pleas; double jeopardy; cruel and unusual punishment; burdens of proof and persuasion; appeal and error.”

Class Meetings

This is a live class, not a hybrid class. This class meets Tuesday and Thursday from 3:00-4:15 PM, starting Tuesday, January 17 and ending Thursday, April 27, 2023. Most class meetings will occur live in Room 102. Some meetings may occur via Zoom if (1) the University requires Zoom meetings; or (2) I am out of town. If I am going to be out of town and must hold a class session via Zoom, I will give you ample advance notice.

The final examination schedule has not yet been released. I will provide information about the final examination when it is available.

Course Materials.

The textbook for the course is Jens Ohlin, *Criminal Procedure: Doctrine, Application, and Practice* (Wolters Kluwer 2020), ISBN 978-1-4548-9385-1. You may use either a hard copy or electronic copy of the text.

You are also required to have access to the Federal Rules of Criminal Procedure with Advisory Committee Notes. I have provided a link to them on the D2L page.

Contact Information

- a. *General.* My office is in Room 254. Telephone number is 453-8722. E-mail address is cbehan@siu.edu. If you need to reach me and I am not in the building, leave a text at 618-521-1849. I prefer text messages to calls. If you text, identify yourself in the text. I likely won't know who you are if you don't!
- b. *Office Hours.* My office hours are M-W from 3:00-4:30. You may also drop in without an appointment if my office door is open, or you can schedule an appointment for an in-person or Zoom meeting. I try to be responsive to student requests for meetings.
- c. *Teaching Assistant.* My teaching assistant is Alexis Barnes. She will post her availability and contact information on the D2L page.
- d. *Electronic Communication.* Check your e-mail regularly. I will use D2L to send messages pertaining to class. Make sure you check the actual email address you used to register for D2L. The School of Law has adopted a rule requiring students to use their assigned siu.edu email address for law school-related business. Thus, excuses such as, "well, I use my gmail account and that's why I never got your email," are unacceptable.
- e. *Problems and Issues.* Despite the best efforts of professors and students, class is not always perfect. Sometimes a lecture or concept is unclear. Sometimes a fellow student will do or say something insensitive or inappropriate that is not fully resolved by the professor in the classroom. You may experience personal frustration with something I do or say in the classroom. If you experience a problem or identify an issue in the class, please come see me so we can discuss it and

resolve it. Some of my best growth and development as a professor has come from students taking the time to alert me to issues or problems of which I had not previously been aware.

Workload, Class Structure and Class Rhythm

The American Bar Association standards for accrediting law schools contain a formula for calculating the amount of work that constitutes one credit hour. According to ABA Standard 310(b)(1), “a “credit hour” is an amount of work that reasonably approximates: (1) not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time.” This is a 3-credit hour class, meaning that we will spend two 75-minute blocks of time together each week (a 100-minute block each Monday and Wednesday). The amount of assigned reading and out of class preparation should take you about 3 hours for each class session and 6 hours for the week, averaged out over the full semester, and including studying for and taking the final examination. All told, applying the ABA standard to the number of credits offered for this class, you should plan on spending a total of 9 hours per week (3 in class and 6 preparing for class) on course-related work.

The class follows a predictable structure and rhythm:

- (1) *Before Class.* There is a reading assignment for each class session. The reading assignments will typically include cases, notes following the cases, and problems and hypotheticals in the textbook. You are expected to read the assignment, brief and understand the cases, and work out proposed solutions to any of the problem cases on your own prior to class.
- (2) *During Class.* We will discuss the cases, note cases, discussions, questions, and problem cases from the book in class. I cold-call on students to discuss cases and problems. When I call on a student, anything in the assigned reading is fair game for questioning, including the primary case, note cases, discussion materials, and problem cases.

Attendance, Class Preparation and Participation

Attendance is required. In accordance with law school rules, you may miss no more than four (4) class sessions during the semester without having to withdraw from the class or face the grade penalty under the School of Law rules. You are responsible to manage your own absences and, as an adult and a professional, should realize that if you take all absences early in the semester and run into a problem later in the semester, you will have created a problem for yourself from which no one else is obligated to rescue you. Also, if you are assessed an absence for inadequate preparation, that absence counts towards your total. If you exceed the number of absences (including absences assessed for inadequate preparation), you are subject to penalties in School of Law Rule 5(g). These include involuntary withdrawal from the course, a grade reduction, or failing the class.

I will pass an attendance sheet at the beginning of each class period. When you initial the sheet, you certify three things: **(1) you were present for class on time; (2) you are prepared for class; and (3) you are participating in class by listening, taking notes, and responding appropriately when called on.** If any of these things prove untrue during class, you will be assessed an absence.

Class preparation and participation are not only keys to successful learning, but they are also an integral part of this course. I believe class participation is critical to a successful learning experience. From a pedagogical perspective, nothing is better than a classroom in which students have read the material and are engaged in the classroom experience; conversely, few things are worse than the reverse.

I cold-call on students, using a spreadsheet that randomly generates an order for cold-calling. It is possible to be called on multiple sessions in a row. I expect you to be prepared for class. **I will assign a grade on a scale of 0 to 10 for every time I cold-call on you in class.** If it becomes evident during our discussion that you are not prepared or have not been paying attention to class, I will announce that you have been assessed an absence for the day. You will also be assigned a grade of 0 for class participation for the day.

I expect you to listen and be mentally engaged in class. Active, sustained listening is a critical skill for lawyers. I use a minimal number of slides in the class; they do not substitute for good note-taking practices by students.

In addition to participating in class when called on, I expect you to listen respectfully to others. Attempts to dominate classroom discussions, interruptions of myself or others, eye-rolling or disruptive body language and behavior, or other unprofessional classroom behaviors will result in class participation grade reductions and/or assessed absences.

When I call on a student in class, I am focused on that student and the dialogue we are having. I will entertain questions from other class members after those discussions but not during them. Furthermore, I do not call on every student who raises their hands, every time. Frequently, you may hear me say something such as, “We are moving on. I am not calling on you at this time.” This is not personal, but rather a reflection of my judgment that it is time to move to another topic. If questions remain about a subject after I have moved on, you may approach me after class or during office hours to discuss.

Zoom Protocol

If we hold any class session via Zoom, the entire class will participate via Zoom. I expect the following if and when we hold a class via Zoom:

- Make sure you have a good, high-speed internet connection. If you are attending from home, ensure that no one else is using Zoom or streaming movies or video at that time. If you can plug your computer directly into a router with an ethernet cable or USB connection, you’ll find your Zoom connection will be much better than simply using wifi.
- Attempting to attend class while driving somewhere else does not count as class attendance. Should it become apparent that is what you’re doing, I’ll assess an absence for the day.

- Turn off all programs on your computer except Zoom and a word-processing program if you are using one to take notes. Do not use chat services or instant-messaging services on your computer during class.
- Do not use your cellphone during this class, or any class, unless it is to participate in an online survey or quiz as directed by me.
- If you are speaking, your video camera must be on. When your camera is on please ensure the area around you is free from distractions, including pets and people. Remember, your Zoom presence is intended to substitute for your personal presence in the classroom as much as possible.
- To help with bandwidth issues, you are permitted to turn your camera off when you are not speaking.
- When your camera is off, you are still part of the class. This means you are required to listen and to participate when called on, without me having to repeat the question or summarize the classroom discussion up to that point because you were not listening. If I call on you and you are not available to respond, ask me to repeat the question, or indicate in any way that you were checked out of class with your camera off, you'll be assessed an absence for the day.
- A few things to consider when your camera is on.
 - You are free to use a virtual background if you'd like, provided it is not overly distracting.
 - If you're attending class from a bedroom or other room in your home, take the time to make your bed, pick up any dirty clothes or dishes that might be lying around, and, in general, straighten the area up to look as uncluttered and professional as possible.
 - The camera should be focused on your face and not on other parts of your body such as up your nostrils, your forehead, your neck, your chest, your midsection, any other non-face part of your body, or the wall behind you.
 - The light source in the room should be in front of you, not behind you.
 - Wear acceptable clothing, such as you would wear to class. Ensure that other people in your home who might pass through camera range are also wearing acceptable clothing. Acceptable clothing does not include pajamas and/or underwear as primary attire.

- (This section is derived entirely from experience; my other students and I have, unfortunately, seen far more than we would like to see in classes or meetings in which the participants haven't complied with these recommendations.)
- Unless you are being called on, keep your microphone muted. If you would like to participate, use the Raise Hand function on Zoom to indicate this.
- If something happens to your internet connection during class, turn Zoom off and on and log back on as soon as you can. There is no need to apologize for this; it happens to everyone. It may happen to me while I'm teaching (has happened before).
- I likely will not activate the Zoom chat feature for our classes. I've found it to be more distracting than helpful during class.

Be courteous to the others in the classroom by keeping distractions to a minimum and giving the class your full attention. Do not text, send instant messages, or hold conversations with others during class.

Policy on Recording Class

You are not authorized to make your own audio or video recordings of my classes. The class will be recorded by the School of Law IT department. Generally, I do not make recordings available unless necessary to accommodate a disability or unless you request and receive my approval.

Grading and Evaluation

I will evaluate and assess your work in several ways:

- a. **Midterm (20% of your final grade)**. The midterm will be administered on D2L using Respondus Lockdown Browser. More information on the midterm, including format, will be provided closer in time to the midterm.
- b. **Classroom Preparation and Performance (10% of final grade)**. When I cold-call on you in class, I assess your performance on a scale of 0-10. You will have multiple opportunities to participate in class via cold-calling during the semester. **Note:** If you violate classroom norms for professional behavior or attempt to improperly dominate classroom discussions, for every instance of such behavior, you will receive a raw point penalty of 10 points subtracted from your overall classroom preparation and performance score (this could invalidate a prior score of 10 points or even result in negative points). Here are the performance standards for classroom participation that I will use to assess you:
 - **8-10 points.** (I am willing to give this grade to everyone, every time, but it must be earned; experience tells me relatively few students typically achieve this level.) Highest level of preparation. Student understands not only the basic facts and holding of the case, but also the Court's reasoning, including its treatment of precedent as cited in the case. Student is well familiar with notes cases, discussion materials, and problems.

Student answers questions accurately and concisely. **Student's performance enhances the understanding of the overall class and demonstrates the highest standards of preparation, engagement, and performance.**

- **5-7 points.** (The typical classroom participation grade will likely be in the 5-7 point range but see comment in parentheses above.) Acceptable level of preparation. Student understands the basic facts and holding of the case. Understands the Court's reasoning in the case, including treatment of precedent, but may require extra direction from the professor in class to get there. Student is familiar with notes cases, discussion materials, and problems but may require extra guidance and direction from professor to meaningfully contribute to the class discussion. Student demonstrates some difficulty answering questions accurately or concisely. **Student's preparation and performance makes a positive contribution to overall class discussion and the understanding of classmates.**
- **2-4 points.** Some preparation, but no real contribution to overall classroom discussion. Student may have read case but did not adequately understand it and did not spend the extra time required to do so. May be able to state the holding of the case but shows inadequate understanding of the Court's reasoning in the case. Evident struggle to connect notes cases and discussion materials with the primary case. Professor may need to call on another student to complete the discussion or assist the cold-called student. **Student demonstrates effort and some preparation, but falls short of making a positive contribution to the classroom discussion.**
- **0.** Manifestly inadequate preparation. Student cannot answer basic questions about the case. Student wastes classroom time searching for information that a prepared student would have readily at hand. Student is unfamiliar with notes cases, discussion materials, and problems. **Student's lack of performance and preparation detracts from the classroom experience for others and falls short of minimum standards of classroom professionalism.**

b. MEE-Style Essay (10%). This is an anonymously graded bar-style essay on a course topic. It will be administered via D2L on 9-10 February. The assessment rubric will be provided in advance. You will receive a grade and feedback on your submission. If the essay does not meet standards, you will be required to rewrite it. Your final grade for the essay will be an average of your first submission and your rewritten submission. More details on the assignment to follow. This assignment satisfies the bar-assignment requirement for this course, as well as the Writing Across the Curriculum requirement.

c. Final examination (60%). Comprehensive, covering the entire semester. More details about format and administration of the examination will be provided later in the semester.

Other Important Information on Support and Resources

Please see the Law School and Provost Syllabus attachments, available on the D2L page

Reading & Assignment Schedule

The reading schedule for the semester is below. There may be times when reading that is assigned for a class spills over to the next class. This does not change your obligation to be prepared for the material that is listed for the next day and class. Think of the reading schedule as akin to an airline schedule: you are required to be at the airport on time, even if the flight might be delayed a bit. **The acronym CPDAP refers to the Ohlin *Criminal Procedure: Doctrine, Application, and Practice* textbook.**

Week	Class	Date	In-Class Topics	Reading Assignment
1	1	17 Jan	Introduction	CPDAP --Pages 1-15 and 38-49. <u>Understand and be able to discuss</u> Packer's Crime Control and Due Process models of the criminal process on pages 38-49. Come prepared with an example from contemporary news of representative cases or situations from each of the two models
	2	19 Jan	Incorporation Doctrine	-- <u>Read in detail and be prepared to discuss</u> the primary cases and notes on pages 16-37. Primary cases include: <i>Palko v. Connecticut</i> <i>Adamson v. California</i> <i>Duncan v. Louisiana</i>
2	3	24 Jan	Prosecution & Discretion	CPDAP 739-768 Primary Cases: <i>Costello, Williams, Wayte, Armstrong</i>
	4	26 Jan	Prosecution & Discretion	CPDAP 769-796 Principal cases: <i>Blackledge, Zafiro, Bruton, Richardson</i>
3	5	31 Jan	Bail & Pretrial Detention; Mental Illness	CPDAP 797-813 Primary Cases: <i>Salerno, Foucha</i>
	6	2 Feb	Sexual Offenders; Immigration Detention; Material Witness Practice and Policy	CPDAP 815-852 (skip 840-848) Primary Cases: <i>Hendricks, Zadvydas, al-Kidd</i>
4	7	7 Feb	Discovery	CPDAP 853-879 Primary Cases: <i>Brady, Giglio, Smith, Bagley, Kyles</i>
	8	9 Feb	Discovery	CPDAP 879-906 Primary Cases: <i>Strickler, Williams, Youngblood</i>

Week	Class	Date	In-Class Topics	Reading Assignment
		9-10 Feb	MEE Essay Assignment. D2L. Available after class on 9 February, due by 5:00 PM on Friday, 10 February.	
5	9	14 Feb	Negotiated Justice: Plea Bargains	CPDAP 907-938 Primary Cases: <i>Jackson, Brady, Bordenkircher, Alford, Henderson</i>
	10	16 Feb	Negotiated Justice: Plea Bargains	CPDAP 939-974 Primary Cases: <i>Hill, Padilla, Frye, Lafler, Santobello, Ricketts</i>
6	11	21 Feb	Speedy Trial	CPDAP 977-1005 Primary Cases: <i>Marion, Lovasco, Barker, Doggett</i>
	12	23 Feb	Speedy Trial Right to Counsel	CPDAP 1005-1036 Primary Cases: <i>Zedner, Gideon, Scott, Rothgerry</i> Assignment to watch <i>Just Mercy</i> over weekend
7	13	28 Feb	Just Mercy Classroom Discussion	Discussion in class. Note: there will be questions on the midterm based on the movie AND the classroom discussion.
	14	2 March	Right to Counsel	CPDAP 1037-1063 Primary Cases: <i>Strickland, Holloway, McCoy</i>
8	15	7 March	Right to Counsel	CPDAP 1064-1090 Primary Cases: <i>Faretta, Edwards, Ake</i>
	16	9 March	Midterm	Administered in class via D2L. Closed-book, closed-note. Respondus LockDown Browser required.
Spring Break 11-19 March				
9	17	21 March	The Jury	CPDAP 1091-1118 Primary Cases: <i>Duncan, Williams, Ballew, Apodaca, In re Winship</i>
	18	23 March	The Jury	CPDAP 1119-1146 Primary Cases: <i>Batson, J.E.B., Rivera</i>
10	19	28 March	Fair Trial Rights	CPDAP: 1147-1175 Primary Cases: <i>Irvin, Skilling, DePasquale, Presley</i>

Week	Class	Date	In-Class Topics	Reading Assignment
				Note: we will not cover the remainder of Chapter 17, Confrontation, because this topic is covered in Evidence
	20	30 March	Fair Trial Rights	CPDAP: 1173-1183 (skip 1183-1194), 1194-1211 Primary Cases: <i>Craig, Griffin, Chambers</i>
11	21	4 April	Sentencing	CPDAP: 1215-1245. Primary Cases: <i>Ewing, Graham, Miller, Atkins</i> . Also be prepared to discuss the Problem Case just before Section 2, Juvenile Death Penalty.
	22	6 April	Sentencing	CPDAP: 1245-1269 Primary Cases: <i>Roper, Kennedy, McCleskey, Glossip</i>
12	23	11 April	Sentencing	CPDAP: 1269-1298 Primary Cases: <i>Apprendi, Ring, Blakely, Payne</i>
	24	13 April	Double Jeopardy	CPDAP: 1299-1324 Primary Cases: <i>Blockburger, Brown, Serfass, Burks</i> .
13	25	18 April	Double Jeopardy	CPDAP: 1324-1350 Primary Cases: <i>Sanford, Dinitz, Kennedy, Heath,</i>
	26	20 April	Appeals and Habeas Corpus	CPDAP: 1351-1369 Primary Cases: <i>Jackson, Fulminante, Griffith</i>
14	27	25 April	Appeals and Habeas Corpus	CPDAP: 1370-1388 Primary Cases: <i>Teague, Williams, Holland, Rose, Patterson</i>
	28	21 April	Reading TBD. Finish Appeals and Habeas Final Review	