

Cases & Problems in Criminal
Procedure: The Courtroom
Sixth Edition

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Cases & Problems in Criminal Procedure: The Courtroom

Sixth Edition

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MATTHEW  BENDER

Preface

This book is the second part of *Cases & Problems in Criminal Procedure*. The first book, subtitled *The Police*, focuses on Fourth, Fifth, and Sixth Amendment issues, which tend to arise in relations between the police and the community. The stories involved in the problems are inherently interesting, as they involve the cops and robbers scenarios students (and others) tend to enjoy.

The cases in this book are a bit more prosaic. Nevertheless, they have their own charm, following the criminal case as it proceeds through the court system. They deal with the fairness of each procedural mechanism and, on a practical level, these issues may be more important to the student who ends up practicing some criminal law.

Like the first book, this book is based on the problem method. Each chapter opens with a problem, with the cases in the chapter to be read with an eye towards “solving” the problem. This approach is designed to help law professors teach students to do what lawyers do: analyze problems. When a client comes to a lawyer with a difficult legal problem, the lawyer usually researches the legal issues, finding a cluster of authorities. In order to advise the client (and — if necessary — litigate the case), the lawyer must analyze, distinguish, reconcile, and interrelate the authorities in the cluster, seeing them as a group indicating the direction of the law as well as seeing them separately.

This book is an attempt to recreate that experience for the law student and to help the student learn how to handle it. To learn to do something practical requires three things: a task, the appropriate tools, and a teacher. This book supplies the task and the tools. The task is the problem at the outset of each chapter. The tools are the statutes and cases that follow. Following many cases are note giving the student hints as to how the cases might be used to help analyze the problems.

Analyzing problems is useful in itself — this is what lawyers do. But equally important, problem analysis can encourage the student to understand each case on a deeper level. One cannot apply a principle to a new set of facts unless one truly understands the principle and its underlying rationale.

Because the book focuses on how the United States Constitution affects criminal procedure, most of the cases are from the United States Supreme Court. However, on many issues, statutes and rules are intertwined with the constitutional issues, so I have included them too. I tried to select cases that deal with issues which criminal attorneys are likely to see fairly often, rather than esoteric issues which appellate judges sometimes find attractive. For this reason, I included some lower court cases that cover issues which arise in practice with some frequency, but which have thus far escaped the attention of the United States Supreme Court.

Keeping reading assignments for students to a reasonable length forced me to restrict the number of issues and cases I was able to include. I tried, however, to select fairly recent and well-written cases that address fundamental issues in each area. (My editing of the cases often omits the usual asterisks, brackets, and the like. My object was to make the cases as readable as possible for weary law students, and I hope the authors of those opinions will forgive the minor liberties I have taken.)

When I attended Boalt Hall in the early 1960’s, I took a one-semester, 3-unit course called “Criminal Law & Procedure.” This short course gave us ample time to cover all

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the major issues in both fields. Within a few years thereafter, however, the Warren Court — and the subsequent reactions of the Burger and Rehnquist courts — expanded the law of criminal procedure exponentially. The size of this book reflects that explosion.

While I believe that the approach taken by this book is pedagogically sound, I have another, more selfish reason for using this approach in my teaching: It is fun to play lawyer. Students usually agree, and I think this in itself enhances their learning. This approach does demand more work from them. Not only must they read the cases, but they must try to apply them to the problem. It helps if they prepare an outline of an analysis of the problem, based on the authorities in the chapter. All this takes more time and effort, but they do it and seem to enjoy doing it. They know that they are reading the cases as a lawyer would, for a specific purpose: to “solve” the problem.¹

I hope you enjoy it too.

Myron Moskowitz

¹ A more complete presentation of my views on the problem method appears in M. Moskowitz, *Beyond the Case Method: It's Time to Teach With Problems*, 42 JOURNAL OF LEGAL EDUCATION 241 (1992).

Preface to Fifth Edition

Things move fast in Criminal Procedure. New cases come down every day, and some make pretty big changes in the law. This edition includes several important cases that have been issued since the earlier editions of this book.

Since one of the virtues of the last edition was its relatively manageable length (compared to some other casebooks in this field), I tried to keep the overall length of this edition about the same length.

The Problems are the essence of this Book, and they have retained their prominence at the outset of each Chapter. I have modified a few of the Problems, however, to take into account some new cases, or to make the Problems a bit “closer.”

M.M.

Introduction

An Overview of the Criminal Courtroom Process

Each chapter in this book deals with only a part of the criminal courtroom process. Sometimes, it might be hard to see how each part fits into the whole. So here is a brief overview of the whole process in felony cases, as it usually operates in federal courts and most state courts.

Suppose the police believe that Dan has committed a series of four bank robberies. They arrest Dan and “book” him (write the charges and biographical data about Dan in a book), and they send a report of the case to the prosecutor’s office (“United States Attorney” in the federal system, “District Attorney” in most states). The prosecutor considers the strength of the evidence against Dan and other factors in determining what charges to file, and then files a complaint against Dan in court. The complaint is similar to a complaint in a civil case. Each count (*i.e.*, each separate charge) in the complaint states that on a certain date, Dan committed certain acts which violated a specified penal statute, at a location within the jurisdiction of the court.

Within a few days, Dan will be arraigned before a magistrate of the court (who does not have as much authority as the judge who will later preside at the trial of the case). At the arraignment, the magistrate will read the charges to Dan and ask him to enter a plea of guilty, not guilty, not guilty by reason of insanity, or “*nolo contendere*” (*i.e.*, a default), to each charge. If Dan does not have a lawyer with him to advise him on what plea to enter, the magistrate will usually give Dan some time to hire one, or, if Dan is indigent, time to arrange for the services of a public defender. If Dan pleads guilty to any charge, the magistrate will sentence him or refer him to a judge for sentencing.

Suppose that, after consulting with counsel, Dan pleads not guilty to all charges. The magistrate will then set a date for a preliminary hearing (sometimes called a preliminary examination), to be held before the magistrate, unless Dan waives his right to a preliminary hearing. The magistrate will also consider whether Dan should be released on bail (or on his “own recognizance”), pending the preliminary hearing.

The preliminary hearing is intended to permit the magistrate to decide whether there is “probable cause” to hold Dan for trial on each count. This is a screening device, meant to save Dan the expense and anxiety of a trial on a weak case, and meant to save the courts the expense of a trial which is unlikely to lead to a conviction. At the preliminary hearing, the prosecutor will put on a somewhat skeletal case, with a minimum of witnesses — enough to show probable cause but not enough to let defense counsel see the whole prosecution case. The defense will seldom put on witnesses of its own, but will cross-examine prosecution witnesses in an effort to undermine probable cause and to try to “discover” as much of the prosecutor’s case as possible, in preparation for trial.

The magistrate’s decision may take several forms. She may dismiss some or all charges against Dan. She may also reduce some or all charges to “lesser-included” crimes. (For example, she may find probable cause to believe that Dan stole the money, but no probable cause to believe that he used force or threats — so a robbery charge should be reduced to larceny.) If the magistrate finds probable cause as to any charge

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which is a felony, she will “hold the defendant to answer” the charges at trial, and she will order the defendant “bound over” to the court for trial on these charges. The prosecutor will then file an information in the trial court. The information is similar to the complaint, setting out the remaining charges.

In federal court and in a few states, the prosecutor must obtain an indictment from a grand jury (unless Dan waives indictment, in which case an information may be filed). The grand jury may indict only if it finds probable cause to believe that Dan committed the crimes, based on evidence presented in secret by the prosecutor to the grand jury. (Defense counsel is not present before the grand jury, and no cross-examination of witnesses occurs.) Usually, if the prosecutor obtains the indictment before the date set for the preliminary hearing, the preliminary hearing will not be held, as the purpose of the preliminary hearing — to determine “probable cause” — will already have been served.

After the indictment or information is filed, Dan will be arraigned before a trial court judge, and Dan will enter a plea of guilty or not guilty to the remaining charges. If Dan pleads not guilty, the judge will set a date for the trial. The judge may also decide whether Dan should be released on bail pending trial. Before trial, both the prosecutor and defense counsel may be given certain rights to discover each other’s case — although these rights are much more limited than discovery rights in civil cases.

Before trial, defense counsel may file certain pretrial motions, such as motions for discovery and motions to suppress evidence which is the result of an illegal search or interrogation.

At any point in this process, but usually before the trial begins, the parties may engage in plea bargaining. Each defendant has a right to a speedy trial (i.e., a trial which begins fairly soon after the arrest or indictment), but the prosecutor and the court do not have the resources to give a speedy trial to every defendant. So the prosecutor must induce most defendants to plead guilty. This is done by offering to dismiss or reduce some charges or to recommend certain sentences. Before accepting a guilty plea, the judge will make sure that the defendant knows what he has been promised and not promised, and that he is giving up the right to trial by jury on the charges.

At trial, if both parties agree, the case may be tried by the judge. Usually, however, the defendant demands a jury trial, as it is generally assumed that a group of lay people is less likely to convict than a “case-hardened” judge. In most cases, the jury’s verdict must be unanimous, which makes it less likely that the prosecutor will obtain a guilty verdict from a jury.

The case begins with voir dire, the questioning of prospective jurors by the two lawyers and/or the judge. If any prospective juror displays improper bias, a lawyer may challenge that person “for cause,” and if the judge finds improper bias, that person will be dismissed. Each lawyer also has a limited number of peremptory challenges, allowing the dismissal of several prospective jurors for any (almost) or no reason.

After the jury is selected and sworn, each lawyer may make an opening statement to the jury, summarizing the evidence to be presented. Then the prosecution puts on its witnesses, who are subject to cross-examination by the defense. When the prosecution rests its case, defense counsel may move for a directed verdict of acquittal, on the ground that the prosecution evidence, even if believed by the jury, does not show all of the elements of the crime(s) charged in the information or indictment. If such a motion is

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denied or not made, the defense then puts on its case, and its witnesses are subject to cross-examination by the prosecutor. The defendant has a constitutional right not to testify, but if he does testify, he too is subject to cross-examination by the prosecutor. When the defense rests, the prosecutor may introduce rebuttal evidence, and sometimes the defense may introduce surrebuttal evidence.

After each side rests its case, each attorney submits to the judge proposed jury instructions, containing the rules of law which apply to the case. Some of these instructions will be standard instructions taken from appellate court opinions and form books, and others will be devised by the lawyers. After hearing and ruling on any objections to proposed instructions, the judge will inform the lawyers as to which instructions will be given. Each lawyer then delivers a summation (sometimes called closing argument) to the jury. Because the prosecutor has the burden of proof (beyond a reasonable doubt), she will go first, then the defense lawyer will argue, and then the prosecutor is allowed a final rebuttal. Since each lawyer then knows what instructions the judge will give the jury, the lawyers will usually argue that the law contained in the instructions, when applied to the evidence heard by the jury, dictates a result favorable to that side.

After the summations, the judge reads the jury instructions to the jury. The jury then deliberates and returns with its verdict. If the jury is unable to decide any of the charges by the required majority (usually unanimity), the judge will declare a mistrial as to those charges and, if the prosecutor so requests, set the case for re-trial before a new jury. If the jury acquits the defendant, the defendant will be released and case is over — the prosecutor has no right to appeal an acquittal. If the jury convicts the defendant on any charge, the jury is then discharged, in most cases. Usually, the jury plays no role in the next phase — sentencing — unless the jury convicted the defendant of a capital crime and the prosecutor is seeking the death penalty.

Statutes control what the judge may consider in sentencing the defendant. Some statutes set low and high limits on the sentence, but allow the judge wide discretion as to any sentence within these limits (e.g., “two to 10 years”). Such statutes often allow the judge to consider just about any factor in choosing the sentence. Other statutes confer the authority to select the actual sentence on some other board or agency. Some statutes set the sentence at specific terms of years, depending on certain factors the judge must find (e.g., two years for a robber with no criminal record and who injured no one, six years for a robber with a record who injured someone, and four years for an in-between robber). Before sentencing the defendant, the judge will usually request a pre-sentence report from the court’s probation department or similar agency. These officials will investigate the defendant’s background and recommend a sentence to the judge. At the sentencing hearing, defense counsel may object to all or parts of the presentence report, and may present evidence on the appropriate sentence. The sentence may also include a fine. In some cases, the judge may grant probation to the defendant, perhaps on condition that the defendant serve a few months in a local jail.

After selecting the appropriate sentence for the defendant, the judge will enter a judgment, which states both the conviction and the sentence. From this judgment, defendant may file a notice of appeal to the appellate court which oversees the trial court. Filing this notice does not stay the sentence, and the defendant will have to seek a stay of the sentence and bail on appeal in order to avoid incarceration during the appeal.

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A defendant will often obtain a new attorney on appeal, one who specializes in appellate work. The prosecutor often does the same. Copies of the pleadings and other documents are compiled (usually into a volume called the “clerk’s transcript”). A court reporter’s transcript of all of the oral testimony and argument is also prepared. Using these transcripts and any exhibits submitted as evidence at trial, the defendant’s lawyer writes and files an “Appellant’s Opening Brief,” the prosecutor’s attorney writes and files a “Respondent’s Brief,” and the defendant’s lawyer then writes and files an “Appellant’s Reply Brief.” The appellate court then sets the case for oral argument, the case is argued, and it is submitted for decision. The appellate court then decides the case, usually issuing a written opinion, which may or may not be published in the official reports. The court may affirm the trial court judgment, reverse it (usually for retrial, but sometimes with instructions to dismiss certain charges), or modify it (e.g., by reducing the sentence). If either side is unhappy with the appellate court’s ruling, that party may seek review from the next highest court (usually the state supreme court or United States Supreme Court), but that court usually has discretion to grant or deny a hearing in the case.

An appeal must be based on the record — the transcripts and exhibits from the trial court — and no other evidence will be considered by the appellate court. If a defendant claims that evidence outside of these transcripts and exhibits warrants relief, he must file a petition for a writ of habeas corpus. For example, if Dan claims that one of the jurors who convicted him was threatened during jury deliberations, evidence of this claim is unlikely to appear in the trial transcripts, and Dan must prove it by submitting affidavits attached to his petition for writ of habeas corpus. If Dan claims that a state court denied him his constitutional rights, he may sometimes seek habeas corpus relief in federal court.

If all else fails, Dan must pay his debt to society.

ON PROBLEM ANALYSIS

Each chapter of this book begins with a Problem, which simulates a case a lawyer might be called on to analyze, in order to advise a client or to prepare some litigation document.

Analyzing these Problems is not easy, even if you think you know “the law” in the chapter. Just as cases in real life are seldom simple, one-issue cases, each Problem raises several issues. The key to analyzing these Problems is good organization of the issues. Once you arrange the issues into a proper framework for analysis, the rest is — well, not easy, but manageable.

Organization of the issues is done by preparation of an outline. A typical outline will break down something like this:

- I.
 - A.
 - 1.
 - 2.
 - B.
- II.

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- A.
 - 1.
 - a.
 - b.
 - 2.
- B.

What goes into these blank spaces? The following principles usually work pretty well:

- The issues in the “first level” of the outline (i.e., the roman numerals I, II, etc.) come from the question raised by the Problem. You need not know any law to write in these issues — just read the Problem, find the question, and read it carefully.²
- The issues in the lower levels of the outline (the A’s and B’s, 1’s and 2’s, etc.) come from the rules of law which appear in the cases in the chapter. To write in these issues properly, you will have to learn the rules of law — in some detail.

Let’s apply these principles to a sample Problem.

Problem X

To: My law clerk

From: Dee Fence, Esq.

Re: State v. Blemish

A jury just convicted my client, Bill Blemish, of forcible rape.

The key prosecution witness was Gail Wind, an 18-year old woman. Before the trial began, the prosecutor moved for an order excluding from the courtroom the defendant and every spectator except members of Wind’s family (four of them), while Wind testified. He presented an affidavit from a doctor who treated Wind, stating that she “could be psychologically damaged” if she ever saw her assailant again, and that “she became very upset when she thought she might have to talk about the rape in front of strangers.” I objected, but the court granted the motion.

The judge allowed me to remain while Wind testified, and to cross-examine her. She identified Blemish as the rapist during her direct examination, but in my cross-examination, I got her to admit that she didn’t get a very good look at her assailant and couldn’t be positive that it was Blemish. So I decided not to put Blemish on the witness stand, and I rested. During closing argument, the prosecutor said to the jury, “I think Wind told the truth when she identified Blemish. Her admitting that she wasn’t positive just shows that she is careful and honest. Besides, if Blemish didn’t do it, he must have been somewhere else. But where? The defense hasn’t told us.” I objected and asked the judge to declare a mistrial and start over, but he denied my motion.

Tomorrow, I plan to move for a new trial on the grounds that the judge erred in granting the prosecutor’s pretrial motion and in denying my motion for mistrial. Please read the

² You might try this out by turning to any Problem in the book — now, before you have even read any of the chapters. Knowing no law, you should nevertheless be able to write out the major issues for an outline of a memo on the Problem — simply by finding the question in the Problem.

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attached authorities and write a memo advising me of what reasonable arguments I can make and how the judge is likely to rule on them.

United States Constitution, Fifth Amendment

No person . . . shall be compelled in any criminal case to be a witness against himself.
. . .

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall have the right to a speedy and public trial.
. . . [and] to be confronted with the witnesses against him. . . .

United States v. Drek

[This case holds that, during closing arguments to the jury, a prosecutor may not comment on the defendant’s failure to testify, for this would indirectly compel the defendant to testify. The prosecutor may, however, argue that the defendant failed to produce evidence rebutting the prosecution case.]

United States v. Disgusto

[This case holds that the right to public trial is intended to restrain courts from abusing defendants’ rights, by exposing their proceedings to review by the public. Therefore, “every court proceeding which might significantly affect a defendant’s rights” — including a motion to suppress evidence — must be held in public. However, “the public” does not mean everyone; so long as a reasonable number of spectators is allowed, the trial is considered “public.”]

State v. Rifiuti

[This case holds that a prosecutor’s closing argument was improper where she said, “In my 20 years as a prosecutor, I’ve never seen a stronger case for conviction than this one.” The court stated that, while an attorney may characterize the evidence, she may not state a personal belief or experience during argument, because an attorney is not a sworn witness subject to cross-examination, and the defendant has a Sixth Amendment right to confront all witnesses against him.]

People v. Schmutz

[This case holds that the right to be confronted with witnesses includes the right to cross-examine all prosecution witnesses in court in front of the jury, and that taped police interviews with such witnesses may not be admitted in lieu of live testimony.]

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State v. Blech

[This case holds that the right to public trial is not absolute, and must be balanced against other interests, such as the need to protect the privacy of certain witnesses where the need for privacy is high, to ensure the emotional health of the witness and to enable the witness to testify freely. But the judge must consider and adopt reasonable alternatives to excluding the public, and the exclusion must be no broader than necessary. In *Blech*, the court upheld a trial court ruling clearing the courtroom of spectators and reporters while a 5-year old girl testified that she was sexually molested.]

United States v. Merde

[This case holds that the right to confront includes not just the right to cross-examine, but also the right of the defendant to be present and “confront” a witness while she testifies, because an accuser is less likely to lie if the lie must be stated in the presence of the person who will suffer from the lie. The court also created an exception to this rule, in a sex abuse trial, where the judge allowed a child witness to testify by one-way closed circuit television, because the judge found that this child would suffer extreme emotional trauma if faced with the defendant.]

After reading the above material, you have probably spotted some issues which should be discussed in your draft brief. Did the prosecutor’s argument infringe on Blemish’s right to remain silent? Was he denied his right to a public trial? Was he denied his right to confront a witness against him?

Good issues, but how do you present them? As they occur to you? In the order in which they appear in the testimony? Case by case? Unless you find some coherent way to organize your issues, your presentation will be less effective and persuasive than it should be, and it might even descend into an incoherent mess.

Preparing an outline pursuant to the two principles mentioned above may help you write a good memo. Also, it should help you to find all of the relevant issues.

Let’s begin our outline. First, specify the major issues — the roman numerals. These come directly from the question, which appears somewhere in the problem. In this one, you’ll find it in the last paragraph, where lawyer Fence directs you to write a memo advising her of reasonable arguments supporting her motion for a new trial based on two grounds — and your prediction of how the court will rule on these. Our major issues, then, should reflect this direction:

- I. Did the judge err by granting the prosecutor’s pretrial motion?
- II. Did the judge err by denying the motion for a mistrial?

Usually, the major issues should appear in the same order that they arose in the facts, chronologically. This will minimize the need for repetition and allow you to refer back

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(rather than ahead) to facts or issues discussed elsewhere, producing a more readable memo.

Next, fill in the “submajor” issues, where they belong. This requires you to learn, understand, and organize the correct rules of law, and then fit these rules into the outline in their proper places. Often, a rule of law consists of several elements, each of which must be satisfied, and each of which should be a submajor issue in your outline.

I. Did judge err by granting prosecutor’s pretrial motion?

A. Denial of right to public trial, under Sixth Amendment?

1. Was Wind’s testimony “a proceeding which might significantly affect a defendant’s rights?” *See* *United States v. Disgusto*.
2. Did allowing Wind’s family to stay make the trial sufficiently “public”? *See* *United States v. Disgusto*.
3. If trial not “public, was order nevertheless justified by need to protect Wind’s privacy?
 - a. Was need high enough? *See* *State v. Blech*.
 - b. Did judge consider alternatives or narrower order? *See* *State v. Blech*.

B. Denial of right to confront witness, under Sixth Amendment?

1. Generally, is right to have defense attorney cross-examine enough, or must defendant be present? *See* *People v. Schmutz* and *United States v. Merde*.
2. Does exception apply? Compare *United States v. Merde*.

II. Did judge err by denying motion for mistrial?

A. Violation of privilege against self-incrimination, under Fifth Amendment? *See* *United States v. Drek*: Was this comment on defendant’s failure to testify, or just on his failure to produce evidence?

B. Improper statement of personal belief, under Sixth Amendment? *See* *State v. Rifiuti*: Was this a statement of personal belief or just characterization of the evidence?

Now our outline is about as good as we can make it. Our assignment is not done yet — we still have to write the memo. Our memo will carefully apply each of the above issues to the facts. But we have laid the groundwork for a well-organized memo which covers all of the relevant issues.

When you come to each new chapter of this book, try to write an outline for the Problem in that chapter. This might seem difficult at first, but it should become easier as you gain some experience with it. The skills you learn from doing this may prove useful to you when taking exams — and when practicing law.

After writing the outline, you might wish to finish the job and write the memo. In writing the memo, try to follow the following principles: (1) focus on the question posed by the Problem; (2) stay organized, following your outline; (3) for each issue, briefly state

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the correct rule of law³ and then apply that rule to the facts, discussing the facts in some depth; (4) spend more time on issues on which reasonable people might disagree, presenting the best arguments on both sides before reaching a conclusion; and (5) end the discussion of each issue with a conclusion — a prediction of what the court will rule and why — before moving on to the next issue.

For Problem X, the final memo might look something like this:

To: Dee Fence, Esq.

From: Your faithful law clerk

Re: State v. Blemish

I. The Judge's Order Granting the Prosecutor's Pretrial Motion.

There are two reasonable arguments we should make in urging that the judge erred in granting that motion:

A. First, we should argue that the order denied Blemish his Sixth Amendment right to a public trial.

This right applies to any court proceeding which might significantly affect the defendant's rights. *United States v. Disgusto*. This clearly includes Wind's testimony, as she was the key witness against Blemish.

The trial is considered "public" if a reasonable number of spectators is allowed. *United States v. Disgusto*. Here, only four spectators were allowed, a fairly small number. Also, they were all members of the alleged victim's family, presumably hostile to Blemish, so they were unlikely to fulfill the purpose of the public trial requirement: to restrain courts from abusing defendants' rights. *United States v. Disgusto*. So I predict that the court will find that the trial was not "public."

Even if this part of the trial was not "public" the order would be justified if needed to protect Wind's privacy. This exception is satisfied only if (1) the need was high, and (2) the judge considered alternative remedies or a narrower order, but these would not do the job. *State v. Blech*.

Was the need high enough here? On the one hand, Wind's doctor said that she thought she would become upset if she had to talk about the rape in front of strangers, which seems to justify excluding all but family members from the courtroom. On the other hand, the doctor did not give his expert opinion as to whether this was true, or whether this could have any lasting effects on Wind. In addition, note that *Blech* involved a 5-year old girl, who was probably much more vulnerable than 18-year old Wind. This is a very close issue, and it is hard to predict what the court will do. I conclude, however, that the court will probably hold that the need was not high enough, because of the weakness of the doctor's affidavit and Wind's age.

From what you told me, I can't tell whether the judge considered alternatives or a narrower order. If he didn't, then his order was erroneous under *State v. Blech*. If he did, then his order was still erroneous if the possibilities he rejected were reasonable. Here, the

³ For some Problems in this book, your explanation of the correct rule of law will have to be more lengthy, because the holdings of some of the cases in these chapters might be a bit murky.

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judge might have satisfied Wind's need to avoid talking in front of strangers by asking if she knew anyone in the courtroom in addition to her relatives, and allowing only people she knew to stay.

In sum, I think the court will grant your motion on the public trial issue, because Wind's need for privacy was not shown to be high enough to justify excluding the public.

B. Second, we should argue that Blemish was denied his Sixth Amendment right to confront witnesses against him.

The right to confront includes the right to cross-examine (*People v. Schmutz*), which was not denied here. The right also includes the right to have the defendant himself present in front of the witness while she testifies. *United States v. Merde*. But *Merde* also allowed an exception to this rule where a child witness in a sex abuse case was allowed to testify without seeing the defendant. This too is a sex case, and here too we have some evidence that Wind might suffer psychological harm from seeing Blemish. On the other hand, however, *Merde* is probably distinguishable, as Wind was not a child, and her doctor's affidavit did not go so far as to state the doctor's opinion that she would suffer "extreme emotional trauma" if she saw him. The circumstances here are probably not strong enough to outweigh the policy underlying the constitutional right to confront: to ensure that the witness tells the truth. For this reason, I think the judge will buy our argument.

II. The Judge's Denial of Your Motion for Mistrial

There are also two reasonable arguments we should make in urging that the judge erred in denying this motion.

First, we should argue that the prosecutor's closing argument was a comment on Blemish's failure to take the witness stand, which violated his 5th Amendment privilege against self-incrimination. *United States v. Drek* holds that the prosecutor may comment on the defendant's failure to produce evidence, but not on his failure to testify. The prosecutor's statement that "The defense hasn't told us" where Blemish was at the time of the rape doesn't clearly say whether he means "Blemish hasn't testified" or "Defense attorney hasn't put on any alibi witnesses." The first would be improper, and the second would be OK. We should argue that since the person most likely to know where Blemish was would be Blemish himself, the first meaning is the one probably inferred by the jury. This is a very close issue, however, and it is tough to predict how the court will rule. Because the prosecutor used the word "defense" instead of "Blemish," I think the court will probably rule against us.

Second, we should argue that the prosecutor improperly stated his personal belief when he said, "I think Wind told the truth. . . ." *State v. Rifiuti* holds that while an attorney may characterize the evidence, he may not tell the jury about his own personal belief. This too is a close issue. "I think" literally sounds like a statement of personal belief, but in this context it might instead be construed as "I think you should find that. . . .," which is just argument that her testimony is believable. Since the prosecutor did not mention his experience or elaborate on "I think" — as the prosecutor in *Rifiuti* did — I predict that the court will probably rule against us on this issue.

In sum, I think the judge will probably rule against us on the mistrial issue.

. . . .

Introduction

In reading over this memo, note that “easy” issues are dealt with only briefly, while “hard” issues take more care. An “easy” issue is one on which reasonable people cannot really disagree — there is only one reasonable answer. A “hard” issue has two reasonable sides. Your job as a law student taking an exam, a law clerk working for a lawyer, or a lawyer working for a client, is pretty much the same: distinguish the easy issues from the hard issues, and construct arguments on both sides of the hard issues (“on the other hand, . . .”) before coming to a conclusion.

Note also that this memo spends a lot of time carefully examining the facts of the case, and explains how the rules of law apply to them. This too is one of the main jobs of a good law student taking an exam and of a good lawyer representing a client.

One final suggestion: when you work on these Problems, try not to get emotionally involved with the characters, the events, or the charges. While working on Problem X, for example, if you have strong feelings regarding rape cases or the privilege against self-incrimination, you should look to see if your concerns are reflected in some way in the policies underlying the applicable rules of law (as explained in the cases). If they are, you might mention these concerns as a way of strengthening your legal arguments. But do not let your concerns dictate the result you want to reach before you do your legal analysis. Such “result-oriented prejudging usually leads to weak analysis and poor representation for your client.

When you begin practicing law, you might decide not to take such cases. Many clients in criminal cases (and some civil cases) have done things which are not very nice. But once you take a case, you have an ethical duty to do your best for your client — no matter how you feel about him or her.

While you are doing these Problems, pretend that you have taken the case, and then do your best for the client. This will help you to develop the skills you will need to help the clients you want to represent. (It might help to remind yourself that none of these characters, events, or ridiculous names is real. They are all figments of the author’s rather bizarre imagination.)

The Bill of Rights

THE FIRST TEN AMENDMENTS TO THE UNITED STATES CONSTITUTION

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

SECOND AMENDMENT

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

THIRD AMENDMENT

No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in the manner to be prescribed by law.

FOURTH AMENDMENT

Introduction

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.

SEVENTH AMENDMENT

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

EIGHT AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

NINTH AMENDMENT

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

TENTH AMENDMENT

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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