CONSTITUTIONAL CRIMINAL PROCEDURE II
Professor Byron L. Warnken

COURSE MANUAL & SYLLABUS – SPRING 2015

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Introduction

This course is Constitutional Criminal Procedure II. I call it CCPII. The rules of the course are set forth in this Course Manual. If you ask me a question, my response will likely be: “It is in the Course Manual.” You are responsible to know the content of this Course Manual or, at least, go to the Course Manual and look it up, if you do not know, before asking me.

Constitutional Underpinnings of This Course

For 16 years (1953-69), the “Warren Court” created a “revolution” of rights for criminal Defendants by limiting the power of the government. This “constitutionalization” of criminal procedure began in 1961 when the Court “incorporated” the Fourth Amendment’s limitations against state and local governments. By 1970, almost all constitutional protections of the Fourth, Fifth, Sixth, and Eighth Amendments had been incorporated against the states.

In the 45 years since the end of the Warren Court, there has been a counter-revolution by the “Burger Court” (1969-86), the “Rehnquist Court” (1986-2005), and the “Roberts Court” (since 2005). Since the start of the Warren Court 61 years ago, no area of the law has grown as rapidly as constitutional criminal procedure, evolving from a small portion of the Criminal Law course or the Constitutional Law course to its own three-credit course. Today, constitutional criminal procedure can barely be covered in six credits (three credits each in CCPI and CCPII).

Professor’s Perspective on Course Coverage

Unlike most academics, I practice the subjects that I teach. Twenty-three years ago, after I had been a law professor for 15 years, my wife and I started Warnken, LLC, Attorneys-at-Law. In November 2013, I semi-retired from the practice of law by officially reducing my private practice time to 12 hours per week. My schedule is a little complicated right now because, on January 20, 2015, I will file a Petition for a Writ of Certiorari in the Supreme Court of the United States, in
Raynor v. Maryland, a DNA case of first impression that I lost 4-to-3 in the Court of Appeals of Maryland.

In this course, my goal is to make use of my experience by providing you with a litigation perspective. In particular, I want to demonstrate trial strategies and practical considerations for both prosecutors and defense counsel. This course is the “bail to jail” course. It is a “how to” course, advising tomorrow’s assistant state’s attorneys, assistant public defenders, and private defense counsel what to do, when to do it, and why to do it.

Why Should Law Students Take This Course?

For students with no interest in criminal litigation, there is one reason to take this course. In the last decade, both the multistate and Maryland bar examiners have increased their testing of constitutional criminal procedure. These “not interested in criminal law” students should take this course as late as possible (third year day or fourth year evening).

For students who are interested in criminal litigation, CCPI, CCPII, Evidence, Trial Advocacy, a Judicial Internship, and the Criminal Practice Clinic are essential. CCPI is “constitutional law for criminal law majors,” and CCPII is “civil procedure for criminal law majors.” Thus, CCPI is more fun than CCPII, but CCPII is more important, on a day-to-day basis, than CCPI. These “interested in criminal law” students should take this course as early as possible (second year day or second of third year evening). Moreover, just as Constitutional Law and Civil Procedure could be taken in any order, CCPI and CCPII can be taken in any order.

Course Materials

After many years in the making, in October 2013, I published a three-volume treatise, titled Maryland Criminal Procedure. The three-volume set, which I use for both CCPI and CCPII, is published by 27Legal, LLC. My son, Byron B. Warnken, Esq., is President of 27Legal, LLC. The treatise may be purchased hard bound or on Kindle. Both versions may only be purchased through Amazon.com. The hardbound treatise sells for $289, plus shipping. Students enrolled in CCPII for spring 2015 and who purchase the hardbound version will ultimately pay $199, plus shipping. Students should email their Amazon.com receipt to my son at byron@27legal.com, between February 1, 2015, and February 15, 2015. $90 refunds will be processed in early March. The Kindle version sells for $149, and there is no discount. The 2014 50-page supplement is free, and it can be downloaded at www.warnkenlaw.com/book.

Course Logistics

The first class in both the day division and the evening division meets on Tuesday, January 13. The first class – and every class – starts with a seven-minute, seven-question, multiple-choice Daily Quiz. Thus, it is essential that you obtain and prepare the materials for the first class as soon as possible. Every student will take the Daily Quiz, regardless of whether that student is prepared for class. Students enrolled in the day class may only attend the day class and may only take the Daily Quiz in the day class. Students enrolled in the evening class may only attend the evening class and may only take the Daily Quiz in the evening class.

I have been a law professor since 1977. The spring 2015 semester is my 38th year on the law faculty and my 112th semester in the classroom. I have taught CCPII since 1982. In 1986, I began using a hornbook for “the law,” accompanied by my own selected cases, analysis questions, and
hypothetical problems. In 2007, I replaced the hornbook with my own written materials, geared to the practice of criminal law and procedure in Maryland, with an emphasis on passing the Maryland and multistate bar exams. Since 2013, I have used my treatise.

There is one disadvantage for a professor to create his or her own teaching materials, instead of using a standard casebook. The disadvantage is that it is incredibly time consuming. I read every criminal law and procedure case (that’s more than one-third of all appellate opinions) filed by the Supreme Court of the United States, by the Court of Appeals of Maryland, and by the Court of Special Appeals of Maryland. There are two advantages when creating one’s own course materials, and they outweigh the disadvantage. First, I know why the next case and next hypothetical problem are in the materials. Second, I am able to – and do – update the materials for each course. Keeping course materials current is essential because the case law, statutes, and court rules constantly change the law and our understanding of it.

The course materials include the following for each of 28 classes: (1) my chart that provides an overview of that class; (2) my treatise; (3) my pre-class review and exam review outline; (4) two heavily edited appellate opinions; (5) analysis questions for each opinion, which are designed to guide your analysis and understanding and to assist you in preparing for class; (6) a hypothetical problem that provides the basis for discussion and application of the law for that class; and (7) a pre-class review.

Course Coverage

This course uses primarily Supreme Court and Maryland authority. First, Maryland is a typical jurisdiction. Thus, the use of Supreme Court cases and Maryland law produces essentially the same coverage as any traditional casebook. Second, about 90% of UofB graduates practice law in Maryland, about 10% of UofB graduates join a State’s Attorney’s office or the Public Defender’s office, and about 25% of UofB graduates practice some criminal law.

Class #1 – Initial appearance before a District Court Commissioner & preliminary hearing before a District Court Judge
Class #2 – Personal jurisdiction, subject matter jurisdiction (criminal courts & juvenile courts), & venue
Class #3 – Grand jury & charging documents
Class #4 – Circuit Court proceedings & the right to counsel
Class #5 – Timing issues
Class #6 – Discovery
Class #7 – Pre-trial motions
Class #8 – Double jeopardy
Class #9 – Incompetency to stand trial & not criminally responsible by reason of insanity
Class #10 – Right to speedy trial
Class #11 – Defendant’s right to a public trial & the public’s right to a public trial
Class #12 & #13 – Plea bargaining & guilty pleas
Class #14 – Right to trial by jury
Class #15 – Jury composition, selection, voir dire, & challenges
Class #16 – Prosecution’s burden of production, MJOA, & Defendant’s burden of production
Class #17 & #18 – Right to a fair trial
Class #19 & #20 – Right to confrontation & right to compulsory process
Class #21 – Burden of persuasion, jury instructions, deliberations & questions, & verdicts
Class #22 & #23 – Sentencing
Class #24 – Post-verdict motions
Class #25 – Post-sentencing motions
Class #26 – Appeals
Class #27 & #28 – Collateral review (post conviction, coram nobis, actual innocence, & habeas corpus)

I constantly update my course materials. Because new cases may be integrated into the course, I reserve the right to amend the class assignment until seven days before class. You are responsible for all assigned material. You are provided, but are not responsible to read, and will not be tested on, (1) Steps in the Criminal Justice System, (2) About Professor Byron L. Warnken, (3) Curriculum Vitae of Professor Byron L. Warnken, and (4) Writings of Professor Byron L. Warnken.

Class Attendance & Seating

This three-credit course has 28 classes (two classes per week). Each class is 75 minutes. The class meets on Tuesday and Thursday from 1:30 to 2:45 p.m. in the day division in room 802, and from 7:45 to 9:00 p.m. in the evening division in room 803. Under both the ABA policy and the UofB policy, attendance is required. Each class begins with a seven-minute, seven-question, multiple-choice Daily Quiz, which students take online, and which also serves as the attendance roster. If, for any reason, you arrive after the Daily Quiz is concluded, you are absent. The reason for your absence or your lateness is immaterial because, in this course, there are no excused absences or unexcused absences – only absences. Moreover, there is no make-up for a Daily Quiz that is missed. Additionally, if you miss more than five classes, I have the right to preclude you from taking the Final Exam. Students may bring a tape recorder to audiotape the class.

I am interested in you and in your success, both during law school and beyond. That process starts with me knowing who you are. In the 1973 movie, “The Paper Chase,” Mr. Hart, the protagonist, was a first-year law student at Harvard Law School. His toughest professor was Professor Kingsfield (that’s me), and the goal of Mr. Hart (that’s you) was to earn an “A” in Professor Kingfield’s Contracts class. The sad moment for Mr. Hart came at the end of the movie. He earned an “A” from Professor Kingsfield and encountered the professor on the elevator, only to realize that Professor Kingsfield had no idea who Mr. Hart was. That will not happen with you and me. I will know you now, and I will know you 12 years from now when I retire after 50 years of
teaching.

You must help me in my quest to know you. First, you must sit in the same seat each class. During the first class, I will distribute a seating chart. In the box that corresponds with your seat, print -- in large, clear block capped letters -- the name by which you wish to be called in class. The vast majority of students use their first name or a nickname, e.g., BILL SMITH, MARY JONES. A few students prefer an honorarium, e.g., MR. SMITH, MS. JONES, MISS JONES, MRS. JONES. In addition, I do not permit vacant seats. Therefore, on the first day of class, as necessary, some of you will be required to move forward to fill in vacant seats.

Second, identify yourself in class. If “I call on you,” by name, I know your name – at least at that moment. I am old (69 next month), and it takes me a while to learn all of the names. Thus, if “you call on me,” e.g., I seek a volunteer, you offer a comment, or you ask a question, I will not know who you are. You must begin by identifying yourself in the same manner as indicated on the seating chart. If you do not identify yourself, “the floor” will be given to another student. The requirement for you to identify yourself by name is waived only when you are certain that I know your name. I may have called on you earlier in that same class, but that does not mean that I know your name – yet. Third, please introduce yourself if we meet in the hall, and please feel free to – but not obligated to – come to my office during office hours and introduce yourself.

Class Format & Preparation

This course does not use “the hidden ball trick.” For each class, the course materials contain (1) the law in charts; (2) the law in the treatise; (3) the law in the pre-class review; (4) two heavily edited judicial opinions; (5) analysis questions to accompany the cases; and (6) a hypothetical problem. Class assignments vary greatly in length, and you should plan accordingly.

When you prepare for class, I recommend the following: (1) examine the chart for an overview; (2) read the text to learn the law; (3) for each of two assigned cases, (a) read the analysis questions for a perspective on the issues, (b) make a written case brief, and (c) create an outline for discussion of the analysis questions; (4) create an outline for discussion of the hypothetical problem (some analysis questions and problems tie in the current material with previously assigned material); and (5) prior to class, review (a) the chart, (b) your case briefs, (c) your written answers to analysis questions, (d) your outline of the analysis for the hypothetical problem, and (e) my pre-class review outline.

I assume that you are prepared for class, meaning that you understand the principles of law in the materials, and you are ready to refine the law’s philosophy, policy considerations, analytical framework, subtle nuances, and practical considerations. The class structure is more like a “workshop” than a lecture. Consequently, class time is spent more “at work” than in note taking, which is why you are permitted – even encouraged – to audiotape the classes.

Phase one of each class consists of a seven-minute, seven-question, multiple-choice Daily Quiz. You take the Daily Quiz online. This is a closed book quiz, and it is an Honor Code violation to access any material. Three of the seven questions on the Daily Quiz test your understanding of “the law” assigned for that class. Two of the seven questions test your understanding of the two assigned cases, with one question based on each case. Two of the seven questions test your understanding of the hypothetical problem for that class. The Daily Quiz and a copy of the Problem for that class are online, which you can access, with the password that I provide when I instruct you
to start the Daily Quiz. Seven minutes after the start of the Daily Quiz, I will instruct you to stop the Daily Quiz. I will give a different Daily Quiz in the day division and the evening division.

It is an Honor Code violation to look at another student’s Daily Quiz answers or to fail to stop when instructed. In light of a bad experience that I had with a student in summer 2011, if I see anything that makes me believe that there “might” be an Honor Code violation, I will not deal with it. Instead, I will submit the student’s name to the Honor Board and let the Honor Board personnel sort it out. If you wish to keep track of your Daily Quiz scores, write down your seven answers because, once you close your computer, you will not see the Daily Quiz again. Do not come to me after class, asking what was the answer to this question or that question?

The seven questions on the Daily Quiz are designed to (1) ensure that you are prepared for class, (2) test your knowledge of the material, and (3) prepare you for the 200 multiple-choice questions on the Multistate Bar Exam, which includes 33 questions on Criminal Law and Procedure. Like the Multistate Bar Exam, the Daily Quiz seeks the “best answer” among four answers, recognizing that there may be no correct answer, four correct answers, or somewhere in between.

Phase two of each class takes about ten to 15 minutes. It includes my answers to all seven questions on the Daily Quiz and any general discussion or lecture that I choose to offer. For the first five of the seven questions on the Daily Quiz, I provide the analysis that supports the answer, meaning why the correct answer is the “best answer.” The analysis for Daily Quiz question #6 and question #7 will wait until we discuss the hypothetical problem for that class, from which those two questions arise.

If you would like to challenge my answer to a Daily Quiz question, send me an email, NO LATER THAN 24 hours after the Daily Quiz, explaining why you believe that another answer is the best answer. If I agree with you, all students who had my answer or who had your answer will receive credit. However, if I disagree, you will have “spent” your one unaccepted Daily Quiz challenge for the semester. If you later challenge a question, when you have no challenge remaining, your semester Daily Quiz grade will be reduced by one answer.

I will not entertain any question about the Daily Quiz at the time that I provide the answers and the analysis, because I do not want to compromise any Daily Quiz question, in the event that one or more students wish to challenge that answer. If you wish to discuss, but not challenge, a Daily Quiz question and/or answer, make notes and raise that question during the next class, after the time to challenge the question on the Daily Quiz has expired.

Phase three of each class takes at least 50 minutes. It is a Socratic dialogue, covering the analysis and arguments relating to (1) the cases, and (2) the hypothetical problem. I will call on individual students to discuss (1) their analysis for the questions relating to the assigned cases, and (2) their analysis and arguments for the hypothetical problem, making appropriate arguments on behalf of the State and/or the Defendant.

The Socratic dialogue is designed to assist you in mastering essential “lawyering” skills. First, a Socratic dialogue teaches you how to handle the integration of law and fact. Second, a Socratic dialogue teaches you to recognize how the analysis may change with even a minor change in the facts. Third, a Socratic dialogue teaches you to appreciate when your position is legally and/or factually sound and/or when your position is legally and/or factually weak. Fourth, a Socratic dialogue teaches the attorney (that’s you) to handle himself or herself under the pressure that is
inherent when appearing before a judge (that’s me).

I do not expect your analysis to be at my level. As a law student, there are many ways for you to be incorrect. You may not know the law, may not understand the facts, may draw irrational inferences from the facts, or may not be answering the question that I have asked. I will challenge you. If you have “screwed up,” I will call on other students to show how you “screwed up.” Please do not take it personally. At that point, I will use you as a teaching tool. If you have a “thin skin,” you are going to have a problem with me and a problem with the practice of law. When my children were growing up, there were times when I wanted to hug them and tell them it would be OK, but, at that moment, “tough love” was the appropriate approach. I would be delighted if you loved me, but, if you cannot, I would rather you hate me today, and love me five years from now, than vice versa. We are all in this together so that you can succeed over students from other law schools.

If I call on you, please do not read your answer or your analysis to the class. Instead, you must understand your answer and your analysis well enough that you and I can have a dialogue. If I call on you, and you are not prepared, you will lose one-third of a letter grade for the course.

Students Contacting the Professor

I am willing to discuss with you any academic or non-academic topic, except that I will not discuss course material that we have not yet covered in class, because that might place other students at a disadvantage. I recognize “professor-student” confidentiality. (1) If you would like to meet with me, sign up for a 20-minute appointment, using the office hour sign-up sheet on my office door (room 1109). Office hours are conducted on Tuesday and Thursday from 3:00 to 6:30 p.m. My law school administrative assistant is Shavaun O’Brien (room 1112; 410-837-4635; sobrien@ubalt.edu). (2) Call me to ask me a question (410-837-4640 (UofB) or 410-868-2935 (cell)). (3) Identifying yourself by name, email me at bwarnken@ubalt.edu to ask a personal question or a course-related question.

Course Grade

Five years ago, the law faculty approved a mandatory grade range for law students at UofB. For upper-class courses (including CCPII), the mandatory grade range is a section-wide average of 3.00 to 3.50.

Counting the Daily Quizzes, the Midterm Exam, and the Final Exam, there are 266 multiple-choice questions (196 on the 28 Daily Quizzes, 14 on the Midterm Exam, and 56 on the Final Exam). Shavaun O’Brien handles the multiple-choice grading. Counting the Midterm Exam and the Final Exam, there are seven 25-minute essays, which I grade (two essays on the Midterm Exam and the five essays on the Final Exam). I will not know which student goes with which exam number on the Midterm Exam or the Final Exam until I have completed the grading. When I grade the two essays on the Midterm Exam and the five essays on the Final Exam, I grade the day and evening classes together, as if they were one class. I grade the entire combined class on the first essay, then the entire combined class on the second essay, and so on. The course grade breaks down as follows:

(1) The Daily Quizzes count 25% of the course grade, counting the highest 25 quizzes.

(2) A one-hour, closed-book Midterm Exam will be administered by me on Sunday, March 8, from 9:00 to 10:00 a.m. The Midterm Exam, which counts 15% of the course grade, consists of two 25-minute essays and 14 multiple-choice questions, and it covers the first 14 classes.
You do not need to know individual cases, because the Midterm Exam will not test the 28 cases assigned for class #1 through class #14. To assist you in preparing for the Midterm Exam, I will offer an optional Midterm Exam Review Session on Friday, March 6, from 6:00 to 7:30 p.m. in room 802. If you are unable to attend the Review Session, it will available on Panopto.

(3) A three-hour, closed-book Final Exam will be administered by the Law School during the period of May 4 through May 14. The Final Exam, which counts 60% of the course grade, consists of five 25-minute essays and 56 multiple-choice questions (two questions from each of the 28 classes). You do not need to know individual cases, because the Final Exam will not test the 56 cases assigned throughout the course. One of the five essays on the Final Exam will be an actual or modified essay from the Practice Final Exam, which is online. I will not provide answers or analysis for the Practice Final Exam, which I encourage you to take under exam conditions, and then critique among yourselves. One essay on the Final Exam is an actual or modified hypothetical problem from the 28 classes. To assist you in preparing for the Final Exam, I will offer a Final Exam Review Session on Thursday, April 30, from 6:00 to 9:00 p.m.

(4) There is a potential for a one-third letter grade decrease based on lack of class preparation.

**Students Interested in Criminal Law as a Potential Career**

If you have interest in criminal law, I suggest the following: (1) Satisfy the requirements for a UoF B Criminal Law Concentration (I serve as Faculty Co-Adviser). (2) Become a member of the UoB Criminal Law Association (I serve as Faculty Adviser). (3) Become a student member of the Maryland State Bar Association (MSBA) Criminal Law & Practice Section (I am a former Vice-Chair of the 21-member elected Section Council). (4) Become a student member of the Criminal Law Committee of either the Bar Association of Baltimore City (I am a member and past Chair) or the Baltimore County Bar Association (free dues) (I am a member).

(5) Become a student member of the Maryland Criminal Defense Attorneys Association (MCDAA), which will entitle you to (a) continuing legal education programs, (b) access to an active and helpful ListServe, and (c) attendance at four annual dinner meetings, with a speaker, where you can meet some of the “players” in the criminal defense bar in Maryland (I serve on MCDAA Board of Governors). (6) Attend free continuing legal education programs sponsored by the MSBA and by local bar associations (I conduct the Veterans Day program, which you may attend for free.) (7) Intern for a judge, a prosecutor, and/or a defense attorney.

**Syllabus**

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<th>Date</th>
<th>Class</th>
<th>Topic</th>
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<tr>
<td>01/13</td>
<td>#1</td>
<td>Initial Appearance before a District Court Commissioner &amp; Preliminary Hearing Before a District Court Judge</td>
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Mandatory reading: Course Manual
Optional reading: Steps in the Criminal Justice System
About Professor Byron L. Warnken
Curriculum Vitae of Professor Byron L. Warnken
Writings of Professor Byron L. Warnken

Chart 1-1
Warnken pages 19-813 to 19-844 (32 pages) & Supp. 16-18 (3 pages)
DeWolfe v. Richmond, 434 Md. 444 (2013) (1-2 to 1-9)
Class preparation (1-12 to 1-13)
Pre-Class Review 1-12

01/15 #2 Personal Jurisdiction, Subject Matter Jurisdiction (Criminal Courts & Juvenile Courts), & Venue

Chart 2-1
Warnken pages 17-759 to 17-779 (21 pages)
Whaley v. State, 186 Md. 429 (2009) (2-5 to 2-8)
Class preparation (2-8 to 2-9)
Pre-Class Reviews 12-22