

CRIMINAL PROCEDURE

Sixth Edition

Wayne R. LaFare
Jerold H. Israel
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CRIMINAL PROCEDURE

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Sixth Edition

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Preface

This pocket part covers the United States Supreme Court cases decided since publication of the Main Volume through the end of the October 2017 Term (i.e., June 2018).

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Part 2

DETECTION AND INVESTIGATION OF CRIME

Chapter 3

ARREST, SEARCH AND SEIZURE

§ 3.1 The Exclusionary Rule and Other Remedies

(New footnote 101.1, p. 163, line 5, between “rights” and “It”)

^{101.1} In *Manuel v. City of Joliet*, ___ U.S. ___, 137 S.Ct. 911, 197 L.Ed.2d 312 (2017), the Court concluded: “The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge’s probable-cause determination is predicated solely on a police officer’s false statements. Then, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment’s probable-cause requirement. And for that reason, it cannot extinguish the detainee’s Fourth Amendment claim—or somehow, as the Seventh Circuit has held, convert that claim into one founded on the Due Process Clause.”

(New text, p. 164, line 3, after “liability”)

In a § 1983 suit against a municipality for an alleged “retaliatory” arrest in response to plaintiff’s exercise of his First Amendment rights, the plaintiff may prevail, at least in some circumstances, without also establishing an absence of probable cause as well.^{109.1}

^{109.1} *Lozman v. City of Riviera Beach*, ___ U.S. ___, 138 S.Ct. 1945, ___ L.Ed.2d ___ (2018), emphasizing that Lozman did not sue the individual officer but only the city, that the suit alleged a “premeditated plan,” which “can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer,” and that Lozman’s speech, grounded in the right to petition, ranked “high in the hierarchy of First Amendment values.”

(New text, p. 164, line 12, between “possessed” and “Though”)

However, today “expanding the *Bivens* remedy is a ‘disfavored’ judicial activity,” inappropriate when there are “special factors counseling hesitation.”^{111.1} Moreover, it is possible that an alternative federal remedy will foreclose recovery under *Bivens*; as the Supreme Court explained in *Minneci v. Pollard*,^{111.2} where an “‘alternative, existing process’ [is] capable of protecting the constitutional interests at stake,” the courts should refrain from augmenting the process with an implied damages remedy.

^{111.1} *Ziglar v. Abbasi*, ___ U.S. ___, 137 S.Ct. 1843, 98 L.Ed.2d 290 (2017). *Ziglar* was an action by illegal aliens seeking damages from various federal officials for their roundup, detention and purported mistreatment in the immediate aftermath of 9/11 (including claimed Fourth Amendment violations for punitive strip searches during their detention), where the Court in a 4–2 decision (with 3 Justices not participating) declined to extend *Bivens* to the instant case, reasoning there were sufficient “special factors counseling hesitation” in the instant case regarding the “detention policy claims,” for they involve conditions “imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil” and thus require “inquiry into national-security issues” properly “the prerogative of Congress.”

^{111.2} *Minneci v. Pollard*, 565 U.S. 118, 132 S.Ct. 617, 181 L.Ed.2d 606 (2012).

§ 3.2 Protected Areas and Interests

(New text, p. 184, line 15, after “investigations”)

Whether, after *Jones*, police acquisition from a cell phone service provider of historical cell-site location information (CSLI) for a suspect’s phone constitutes a Fourth Amendment search, so as to generally require a search warrant (rather than merely a court order based on “specific and articulable facts showing that there are reasonable grounds to believe” that the records sought “are relevant and material to an ongoing criminal investigation,” as permitted under the Stored Communications Act), reached the Supreme Court in *Carpenter v. United States*.^{215.1} The FBI suspected Carpenter of being involved in a string of robberies, so prosecutors obtained court orders to acquire his cell phone records, which revealed 12,898 location points cataloging Carpenter’s movements over 127 days and established that he was near four of the robbery locations at the time they occurred. In a 5–4 decision, the Court held that the acquisition of Carpenter’s cell-site records was a Fourth Amendment search. In reaching that conclusion, the majority found it necessary to assess “two lines of cases,” one being those decisions addressing “a person’s expectation of privacy in his physical location and movements,” and the other being the cases holding that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”

As to the first group, the *Carpenter* majority gave particular attention to *Jones*, as there a “majority of this Court * * * recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements.” The Court readily concluded that the cell-phone records in the instant case, just as with the GPS information in *Jones*, provided “an intimate window into a person’s life” and was “remarkably easy, cheap, and efficient compared to traditional investigative tools.” Indeed, the *Carpenter* majority added, for two reasons the “historical cell-site records present even greater privacy concerns than the GPS monitoring * * * considered in *Jones*”: (i) people “compulsively carry cell phones with them all the time,” so that “when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone’s user”; and (ii) “the retrospective quality of the data here” allows the Government to “travel back in time to retrace a persons’ whereabouts * * * for up to five years,” the time wireless carriers maintain these records, so “police need not even know in advance whether they want to follow a particular individual, or when.” As for the contention that CSLI data “is less precise than GPS information,” the majority noted that the information in the instant case played a major role in establishing when the defendant “was at the site of the robberies,” and that since the 2011 facts of the instant case “the accuracy of CSLI is rapidly approaching GPS-level precision.”

^{215.1} ___ U.S. ___, 138 S.Ct. 2206, ___ L.Ed.2d ___ (2018).

As for the second line of cases, concerning the third-party doctrine, the relevant precedents are *Smith v. Maryland*^{215.2} and *United States v. Miller*.^{215.3} In *Miller*, where the government via subpoena obtained from defendant's banks his canceled checks, deposit slips, and monthly statements, the Court ruled defendant lacked a valid Fourth Amendment objection, as he could "assert neither ownership nor possession" of those documents, which were "business records of the banks." Similarly, in *Smith* the Court held defendant lacked a Fourth Amendment interest in his phone company's records regarding the numbers defendant had dialed on his phone, as in "voluntarily convey[ing]" those numbers to the company he "assumed the risk" those records might be "divulged to police." The *Carpenter* majority, however, rejected the claim "that the third-party doctrine governs this case," for there "is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today." Moreover, "the second rationale underlying the third-party doctrine—voluntary exposure—" is inapplicable in this setting, as "a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up."

The *Carpenter* majority emphasized the limits of its decision: it did not reach arguably lesser intrusions such as "real-time CSLI or 'tower dumps' (a download of information on all the devices that connected to a particular cell site during a particular interval)"; it did not decide "whether there is a limited period during which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny," but asserted (contrary to a suggestion in the government's brief) "that accessing seven days of CSLI constitutes a Fourth Amendment search"; and it acknowledged that warrantless access to historical CSLI might sometimes be justified by exigent circumstances, e.g., when "related to bomb threats, active shootings, and child abductions." Rather, "having found that the acquisition of *Carpenter*'s CSLI was a search," the Court had concluded "that the Government must generally obtain a warrant supported by probable cause before acquiring such records." As for the contention in a dissent "that the warrant requirement simply does not apply when the Government acquires records using compulsory process," the majority responded that it is *not* the case that "this Court's precedents set forth a categorical rule * * * subjecting subpoenas to lenient scrutiny without regard to the suspect's expectation of privacy in the records."

^{215.2} 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

^{215.3} 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976).

§ 3.3 Probable Cause

(New text, p. 203, 3 lines from bottom, after “suspicions”)

Officers on . . . Responses known . . . prior suspicions. Illustrative is *District of Columbia v. Wesby*,^{292.1} where D.C. police, responding to complaints of a loud, late-night party at a home, ultimately arrested the 21 partygoers for unlawful entry (defined as requiring they knew or should have known they entered without the owner’s permission). In the partygoers’ civil suit claiming violation of their Fourth Amendment rights, the lower court held probable cause was lacking, given that each of the partygoers had “claimed that someone had invited them to the house.” The Supreme Court, concluding otherwise, asserted that the lower court had erred because it improperly “viewed each fact in isolation, rather than as a factor in the totality of the circumstances.” Assessing “the plausibility of the explanation itself” in light of “all the surrounding circumstances,” the Supreme Court concluded there *was* probable cause, given “the condition of the house” (vacant for months with no sign of habitation), “the partygoers’ conduct” (strip club in the living room, sexual intercourse in the bedroom), and the “partygoers’ reaction to the officers” (“scattering and hiding,” giving “vague and implausible responses”).

Justice

^{292.1} *District of Columbia v. Wesby*, ___ U.S. ___, 138 S.Ct. 577, 199 L.Ed.2d 453 (2018).

§ 3.7 Search and Seizure of Vehicles

⁵⁵⁴ Regarding the broader issue of whether the *Carney* automobile exception applies to a search of a vehicle parked within the curtilage of a dwelling, the Court in *Collins v. Virginia*, ___ U.S. ___, 138 S.Ct. 1663, ___ L.Ed.2d ___ (2018), answered in the negative, reasoning that this this exception extends no further than the vehicle itself, and thus did not justify physical entry of the curtilage to conduct a search under a tarp covering a motorcycle, in light of *Florida v. Jardines*, ___ U.S. ___, 133 S.Ct. 1409, 183 L.Ed.2d 495 (2013) (holding that the “implied license” to enter the curtilage does not extend to police activity having the “purpose” to “conduct a search”). Because both *Jardines* and *Collins* were search cases and not seizure cases, it may be less than certain what the result would be if the cycle had not been covered, so that the officer had probable cause to seize it before entering the curtilage for the sole purpose of making a seizure, but it may be significant that the Court said that the reasoning underlying existing limits on “warrantless entry into the home,” such as that “under the plain-view doctrine, ‘any valid warrantless seizure of incriminating evidence’ requires that the officer ‘have a lawful right of access to the object itself,’ applies equally well in this context.”

Chapter 4

NETWORK SURVEILLANCE

§ 4.3 Telephone Surveillance and the Fourth Amendment

(On p. 350, replace the last full paragraph before § 4.4 with the following new material)

In *Carpenter v. United States*,^{10.1} the Supreme Court held that collection of at least seven days' worth of cell-site records is a Fourth Amendment search that requires a search warrant. The Court reasoned that, in the past, a person could not expect that he could be secretly monitored and that his every movement could be tracked for long periods of time. "Allowing government access to cell-site records contravenes that expectation," the Court held, because it "provides an all-encompassing record of the holder's whereabouts."^{10.2} To ensure that "seismic shifts in digital technology" did not give the power to conduct perfect surveillance of everyone, accessing at least seven days' worth of records violated a person's "reasonable expectation of privacy in the whole of his physical movements."^{10.3}

Carpenter places important limits on *Smith v. Maryland*. "There is a world of difference," the Court wrote, "between the limited types of personal information" at issue in *Smith* "and the exhaustive chronicle of location information casually collected by wireless carriers today"^{10.4} through cell-site records. *Carpenter* suggests that the rule of *Smith* does not apply when a new technology is used to create a detailed chronicle of a person's life for a long period of time. *Smith* still applies when the government is using traditional surveillance methods or only gathering a limited amount of information. But at some point a technology becomes too invasive of privacy for its use to go without Fourth Amendment oversight. How courts will apply this approach to short-term surveillance, as well as to other surveillance of non-content information, remains to be seen.

^{10.1} ___ U.S. ___, 138 S.Ct. 2206, ___ L.Ed.2d ___ (2018).

^{10.2} *Id.* at 2217.

^{10.3} *Id.* at 2219.

^{10.4} *Id.*

§ 4.4 Internet Communications and the Fourth Amendment

(On p. 351, add the following new paragraph at the end of § 4.4(b))

Forrester's approach must now be read in light of *Carpenter v. United States*,^{11.1} which placed limits on the third-party doctrine for access to historical cell-site records on the ground that such surveillance was a new government tool that needed to be regulated to keep the government from having far more surveillance power than previously existed. It remains unclear how or whether *Carpenter* will change the result of *Forrester* for other kinds of Internet records. However, *Carpenter* creates the possibility that some kind of long-term acquisition of other kinds of non-content Internet records will now be deemed a search.

^{11.1} ___ U.S. ___, 138 S.Ct. 2206, ___ L.Ed.2d ___ (2018).

§ 4.6 The Wiretap Act

(One new paragraph, p. 370, to be inserted after second full paragraph.)

In *Dahda v. United States*,^{109.1} the Court interpreted 18 U.S.C. § 2518(10)(a)(ii), which requires suppression where a wiretap order is “insufficient on its face.” *Dahda* held that the “core concerns” test of *Giordano* does not apply to § 2518(10)(a)(ii) errors. At the same time, not every defect in an order renders the order insufficient. The Court helpfully summarized the suppression standards for the three provisions of § 2518(10)(a) as follows:

Where the Government’s use of a wiretap is unconstitutional or violates a statutory provision that reflects Congress’ core concerns, an aggrieved person may suppress improperly acquired evidence under subparagraph (i) (as “unlawfully intercepted”). Where an order lacks information that the wiretap statute requires it to include, an aggrieved person may suppress the fruits of the order under subparagraph (ii) (as “insufficient on its face”). And where the Government fails to comply with conditions set forth in the authorizing order, an aggrieved person may suppress its fruits under subparagraph (iii) (as an “interception . . . not made in conformity with the order of authorization or approval”).^{109.2}

^{109.1} ___ U.S. ___, 138 S.Ct. 1491, ___ L.Ed.2d ___ (2018).

^{109.2} *Id.* at 1499–500.

§ 4.8 The Stored Communications Act

(Add a new subsection just before § 4.9 on p. 384)

(g) International Issues

The modern Internet is global. A service provider's customers and its computer servers can be located anywhere in the world. This creates difficult jurisdictional issues. For example, foreign governments conducting criminal investigations abroad may need to access customer account records held by United States providers in the United States. In addition, federal, state, or local governments may wish to access customer account records that domestic providers have stored on servers located outside the United States.

In 2018, Congress enacted a new law called the Cloud Act that applies in these situations.^{172.1} Under the Cloud Act, U.S.-based providers are permitted to disclose the contents of communications pursuant to foreign legal process only to those governments that have been pre-approved as “qualifying foreign governments.”^{172.2} A foreign government can only be qualified if “the domestic law of the foreign government, including the implementation of that law, affords robust substantive and procedural protections for privacy and civil liberties in light of the data collection and activities of the foreign government that will be subject to the agreement.”^{172.3} U.S.-based providers can freely disclose non-content records to foreign governments, regardless of whether they are “qualifying foreign governments”, because [Section 2702\(c\)\(6\)](#) permits disclosure to entities that are not domestic governments.

The Cloud Act also requires that U.S.-based providers must comply with domestic legal process under Section 2703 even if the information has been stored on a server outside the United States.^{172.4} At the same time, the Act permits U.S.-based providers to challenge domestic legal process on grounds of international comity if they have a reasonable belief that the customer is not a United States person and there is a material risk that the disclosure would violate the laws of a qualifying foreign government.^{172.5} A court can modify or quash the legal process if it concludes that the disclosure would violate the laws of the qualifying foreign government, the interests of justice dictate that the legal process should be modified or quashed, and the customer or subscriber is not a United States person and does not reside in the United States.^{172.6}

^{172.1} Clarifying Lawful Overseas Use of Data Act (CLOUD) Act, enacted as part of the Consolidated Appropriations Act, 2018, [Pub. L. 115–141](#).

^{172.2} [18 U.S.C. § 2702\(b\)\(9\)](#).

^{172.3} [18 U.S.C. § 2523\(b\)\(1\)](#).

^{172.4} [18 U.S.C. § 2713](#).

^{172.5} [18 U.S.C. § 2703\(h\)\(2\)\(A\)](#).

^{172.6} [18 U.S.C. § 2703\(h\)\(2\)\(B\)](#).

Chapter 8

GRAND JURY INVESTIGATION

§ 8.7 Fourth Amendment Challenges to Subpoenas

(New text, p. 555, 6 lines from bottom, after “subpoena”)

The majority opinion in *Carpenter v. United States*,^{20.1} in its discussion of the Fourth Amendment’s bearing on document subpoenas, implicitly rejected all three of the above explanations insofar as they justify concluding that the subpoena invariably eliminates the need for a judicial finding of probable cause. *Carpenter* did not involve a grand jury subpoena, as the Stored Communication Act’s provisions authorizing use of grand jury subpoenas do not extend to obtaining historical cell-site location information (CSLI). Instead, as authorized by the Act, the government utilized two court orders, issued upon a finding that the government’s allegation of “specific and articulable facts sho[w] * * * that there are reasonable grounds to believe that the * * * [records sought] are relevant and material to an ongoing criminal investigation.” The orders were used to compel Carpenter’s wireless service carriers to produce historic CSLI, spanning time periods of 152 and 7 days. As discussed in earlier Chapters,^{20.2} the Supreme Court majority concluded that the third-party doctrine of *Miller*^{20.3} did not extend to obtaining such an extensive body of personal data, as the required production of the historic CSLI (at least for a period of seven days or more) invaded Carpenter’s legitimate expectation of privacy, thereby producing a Fourth Amendment search under circumstances which “generally [require] obtain[ing] a search warrant supported by probable cause.”^{20.4} In dissent, Justice Alito argued that, standing apart from the third-party doctrine, compelled production did not require probable cause because cases like *Hale* and *Oklahoma Press* established that a document subpoena constitutes no more than a “figurative or constructive search” and therefore is subject to a “less demanding” reasonableness standard that does not require a “showing of probable cause.” Responding to that contention, the majority noted that the Supreme Court subpoena cases cited by Justice Alito “contemplated requests for evidence implicating diminished privacy interests or for the corporation’s own books” (with the only exception, *Miller*, involving the third

^{20.1} ___ U.S. ___, 138 S.Ct. 2206, ___ L.Ed.2d ___ (2018).

^{20.2} See the discussions in § 3.2 at note 215.1 and § 4.3 at note 10.1.

^{20.3} See the text at note 16 supra, and the discussion of *Smith v. Maryland* in § 4.3(c) at note 10.

^{20.4} Although the Court spoke of the need for a “search warrant,” the search warrant directed at obtaining stored digital information from a service provider typically is not executed through a physical search by police officers. Rather, such a warrant is served on the service provider in the same manner as a court order or grand jury subpoena, and the service provider then collects the specified data and delivers it to the government.

party doctrine).^{20.5} CSLI is an “entirely different species of business record” because of its bearing on personal privacy. If, as Justice Alito argued, “the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, * * * no type of record would ever be protected by the warrant requirement.” This would undercut Fourth Amendment protections, as it would allow “private letters, digital contents of cellphones,^{20.6}—any personal information reduced to document form, in fact—[to be] collected by subpoena for no reason other than ‘official curiosity’ ” (a standard cited in an administrative subpoena case). While the majority in this discussion referred to compelling production by subpoenas generally, both the dissents of Justice Alito and Justice Kennedy described the majority’s analysis as extending to grand jury subpoenas and the majority did not challenge that aspect of the reasoning in either dissent.

^{20.5} The reference was to the Supreme Court cases presenting Fourth Amendment challenges. Neither the majority nor the dissents referred to cases discussing whether grand jury subpoenas directing production of documents having a content related to personal privacy could be successfully challenged under the self-incrimination clause. See e.g. §§ 8.12(g) (discussing “personal diaries and drafts of letters or essays”), 8.13(a) (describing the records subpoenaed in *Hubbell*). These cases addressed the self-incrimination issue without any suggestion that the use of subpoenas, rather than search warrants, presented any other constitutional difficulty. So too, there was no reference in *Carpenter* to the common use of grand jury subpoenas, particularly in white collar crime investigations, to “require production of such potentially private items as reminder pads, notepads, [office] diaries, calendars, day books, telephone directories [and] telephone call logs.” Podgor, et.al., *White Collar Crime*, 539 (2017).

^{20.6} The majority opinion noted in this connection a concession made in the dissent of Justice Kennedy (joined by Justices Thomas and Alito). Though arguing that the third-party doctrine governed historic CSLI, Justice Kennedy noted the doctrine might not apply to the “modern-day equivalent of an individual’s own ‘papers’ * * * even when * * * held by a third party,” and cited *United States v. Warshak*, which held that a search warrant was required to obtain “e-mails held by [an] Internet service provider.” See § 4.4(c). The majority noted that this would be a “sensible exception [to the third-party doctrine], because it would prevent the subpoena doctrine from overcoming any reasonable expectation of privacy,” but such an exception should extend as well to historic CSLI of the magnitude presented in the case before it. Justice Gorsuch’s dissent also cited *Warshak* in noting that: “Whatever may be left of *Smith* and *Miller*, few doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest” [and does not thereby lose Fourth Amendment protection].

Chapter 9

SCOPE OF THE EXCLUSIONARY RULES

§ 9.1 Standing: The “Personal Rights” Approach

(New text, p. 626, line 21, after “arrest”)

was a . . . illegal arrest.

In *Byrd v. United States*,^{50.1} Byrd’s girl friend rented a car in New Jersey while he waited outside the rental facility and immediately turned the car over to him, after which he left alone on a trip to Pittsburgh, but after a traffic stop en route a police search of the trunk uncovered 49 bricks of heroin. Byrd’s motion to suppress was denied on the ground that he lacked a reasonable expectation of privacy in the car, given that he was not listed on the rental agreement as an authorized driver and this agreement stated that permitting an unauthorized driver to operate the vehicle would violate the agreement. A unanimous Supreme Court concluded otherwise, holding “that, as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver.” As for the government’s argument “that permitting an unauthorized driver to take the wheel of a rental car is a breach * * * so serious that the rental company would consider the agreement ‘void’ the moment an unauthorized driver takes the wheel,” the Court aptly responded that this is not what the contract says, for it only provided that permitting an unauthorized driver to take the wheel “may result in any and all coverage otherwise provided by the rental agreement being void and my being fully responsible for all loss or damage, including liability to third parties,” which “has little to do with whether one would have a reasonable expectation of privacy in the rental car if, for example, he or she otherwise has lawful possession of and control over the car.”^{50.2}

^{50.1} ___ U.S. ___, 138 S.Ct. 1518, ___ L.Ed.2d ___ (2018).

^{50.2} There remains in *Byrd* the additional argument that the defendant’s possession of the vehicle was wrongful in another sense, which should suffice as a basis to deny him standing. The government argued that “Byrd should have no greater expectation of privacy than a car thief because he intentionally used a third party as a strawman in a calculated plan to mislead the rental company from the very outset, all to aid him in committing a crime.” The Supreme Court acknowledged that “it may be that there is no reason that the law should distinguish between one who obtains a vehicle through subterfuge of the type the Government alleges occurred here and one who steals the car outright,” but since the government had not raised that specific argument below, the matter was left for resolution on remand.

Part 3

THE COMMENCEMENT OF FORMAL PROCEEDINGS

Chapter 11

THE RIGHT TO COUNSEL

§ 11.6 Counsel’s Control over Defense Strategy

(New text, p. 750, 3 lines from bottom, after “control”)

The McCoy follow-up. McCoy v. Louisiana^{97.1} subsequently answered the issue left open in *Nixon*. The 6–3 majority opinion stated: “We hold that a defendant has a right to insist that counsel refrain from admitting guilt, even where counsel’s experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.” Here, unlike *Nixon*, the defendant clearly opposed counsel’s strategy (which was inconsistent with defendant’s testimony that “he was out of state when the killings occurred and that corrupt police killed the victims when a drug deal went wrong”). Indeed, upon learning of counsel’s intended strategy (which reflected counsel’s view that the evidence establishing that defendant had been the shooter, including the victims’ 911 call, was “overwhelming”), defendant brought his opposition to the attention of trial court in the course of seeking to discharge counsel (which was not allowed because the trial was set to start two days later). The defense counsel, advised by the trial court to make his own decision “as to what you’re going to proceed with,” then followed that strategy of “confessing guilt” at trial.

The *McCoy* majority reasoned that, just as a defendant retains the authority to “steadfastly refuse to plead guilty in the face of overwhelming evidence” or to reject the assistance of counsel, “she retains the autonomy to decide [that] the objective of the defense * * * is maintaining her innocence at the guilt phase of a capital trial.” Here too, what is at stake is not a “strategic choic[e] about how best to achieve a client’s objectives; [but a] choic[e] about what the client’s objectives in fact are.”

As noted in the dissent,^{97.2} the reach of the *McCoy* ruling arguably is not limited to prohibiting a full admission of “guilt.” The opinion did stress that counsel had told the jury that “my client committed three murders” and “on that issue, * * * he ‘took the burden off the prosecutor.’” However, it also

^{97.1} ___ U.S. ___, 138 S.Ct. 1500, ___ L.Ed.2d ___ (2018).

^{97.2} Justice Alito dissented, joined by Justices Thomas and Gorsuch. Justice Alito argued that the “real case is far more complex” than the majority indicated. He noted that defendant’s defense was “incredible and uncorroborated,” contradicted by overwhelming evidence, and counsel’s proposed strategy had been well known to defendant for many months (a point disputed by the majority). He also noted that the Louisiana Supreme Court had held that counsel “could not put on petitioner’s desired defense without violating state ethics rules” (since that would be supporting client conduct that was “fraudulent”). The majority responded that counsel “harbored no doubt that McCoy believed what he was saying” and his “express motivation for conceding guilt was not to avoid suborning perjury, but to try to build credibility with the jury and thus obtain a sentence lesser than death.” The case therefore did not present the situation addressed in *Nix v. Whiteside*, discussed in § 11.10 at note 167.

acknowledged that counsel had argued that defendant had committed only second-degree murder because “his mental incapacity prevented him from forming the requisite specific intent” (as well as pointing to the defendant’s “serious mental and emotional issues” in arguing against the death sentence in the penalty phase). So too, the Court described approved lower court rulings as prohibiting a “concession of defendant’s commission of criminal acts” where defendant “repeatedly and adamantly insisted on maintain his factual innocence.” The dissent therefore suggested that *McCoy* raised doubts as to whether the defense counsel can concede liability as to any level of lesser offense (an issue dividing lower courts) or even concede a single element of a crime, where the defendant opposes that strategy.

(Replace text, p. 750, 2 lines from bottom, between “Nixon” and “client-consultation”)

The need for consultation.

(Replace text, p. 751, line 31, between “defendant]” and “and its discussion”)

Of course, that obligation follows from *McCoy*’s subsequent characterization of the counsel’s decision in *Nixon* as subject to the client’s control, but the *Nixon* Court had left that issue open,

(Replace text, p. 756, line 37, between “result” and the start of the next paragraph, “Denial-of-risk analysis”)

Prior to *McCoy*, lower courts had divided as to whether *Strickland* prejudice had to be shown where counsel’s failed to follow the client’s direction on a choice within defendant’s control but that failure did not result in denial of an entire proceeding. *McCoy* held that such a counsel error did require a “new trial without any need to show prejudice.” The Court noted that counsel’s action in overriding the client’s choice had two characteristics that are common in structural errors. One was having “an immeasurable impact” (the “jury would almost certainly be swayed by a lawyer’s concession of his client’s guilt”). That factor arguably would require an error-by-error evaluation of the particular client choice rejected by counsel. The other grounding, however, related to the core of all violations of personal choice: the “right at issue is not designed to protect the defendant from erroneous conviction, but instead protects some other interest.” The violation of personal choice was thus similar to the violation of the right to proceed pro se and the violation of the right to counsel of choice, both previously held to require automatic reversal.^{107.1}

^{107.1} See *McKaskle v. Wiggins*, discussed in § 11.5 at note 91 and § 27.6 at note 126; *United States v. Gonzalez-Lopez*, discussed in note 44 of § 2.7, § 11.4 at note 80, and § 27.6 at note 127.

§ 11.10 Ineffective Assistance Claims Based upon Lawyer Incompetence

(New text, p. 806, line 18, after “automatic”)

Recognizing that lower court division, the Court in *Weaver v. Massachusetts*^{190.1} granted certiorari to address the question of whether ineffective performance resulting in a “structural error” (thereby deemed per se prejudicial on appellate review) required reversal without a *Strickland* showing of prejudice. The opinion of the Court, however, answered that question only as to one specific type of structural error. The trial court in *Weaver*, facing a venire pool that exceeded the courtroom’s seating capacity, excluded from the courtroom all members of the public, except for prospective jurors, during the two days of jury selection. Believing that the exclusion was constitutionally acceptable, counsel failed to object (notwithstanding the complaints of defendant’s mother and minister, who were among those excluded). Since the public trial claim had been forfeited by lack of an objection, it was not raised on direct appeal. Instead it served as the grounding for an IAC claim, presented in a new trial motion filed five years after conviction. The state courts reviewing that challenge agreed that the total exclusion of the public, without judicial findings, violated defendant’s right to a public trial. They also agreed that counsel’s failure to object constituted ineffective assistance under *Strickland*’s performance prong, but they held that defendant had not established prejudice under *Strickland*’s prejudice prong. In this connection, the Massachusetts Supreme Judicial Court acknowledged that a public trial violation constituted structural error under Supreme Court precedent and therefore would require automatic reversal if reviewed on appeal following the rejection of a proper challenge at trial. The Supreme Court then granted review limited to the prejudice issue, and a majority (7–2) agreed that *Strickland*’s prejudice requirement applied.

The majority opinion (for six justices) initially discussed both the variations in the nature of structural errors and the differences between the appellate setting in which the structural error doctrine normally applied and the collateral attack setting of an IAC claim based on counsel’s failure to challenge a structural error. With respect to the variations, the Court stressed that structural errors were placed in that category for at three (sometimes overlapping) reasons. Constitutional violations were characterized as structural because: (1) the error’s effects are too difficult to measure; (2) the errors effect on the outcome is irrelevant because the right is designed to protect an interest other than the defendant’s interest in a reliable outcome (e.g., the defendant’s right to proceed pro se); or (3) the error “always results in fundamental unfairness (e.g., the denial of the right to counsel).”

^{190.1} ___ U.S. ___, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017), also discussed in § 24.1, following note 5.1.

With respect to the different procedural settings, the Court explored factors that could “justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel.” Initially, the structural error doctrine applied on direct review only to claims that had been put before the trial court. For an error such as the public trial violation, that challenge allowed the trial court to reverse its position and cure the error. Also, on direct review, “the systemic costs of remedying the error are diminished to some extent.” There is a “reasonable chance that not too much time has elapsed (facilitating a retrial if needed), and “there are [the] advantages of direct judicial supervision” (reviewing courts “giving instruction” to the lower courts). An IAC claim, in contrast, is raised in a post-conviction proceeding where both of these advantages are lost, and “the finality interest is more at risk,” especially where the IAC claim “functions * * * to escape the rules of waiver and forfeiture.”

A concurring opinion argued that the special setting of IAC claims justified requiring the showing of prejudice under *Strickland* for all claims except those that fall within the “narrow class” of errors that justify presuming prejudice under *Cronic*.^{190.2} The majority opinion, however, took note of defendant’s argument that *Strickland*’s description of the IAC standard as concentrating on “the fundamental fairness of the inquiry” necessarily required relief where counsel was ineffective in failing to present a structural error that rendered the trial “fundamentally unfair.” “For analytical purposes,” it noted “the Court will assume that petitioner’s interpretation of *Strickland* is the correct one.” That position, however, would only benefit the petitioner if the structural error here was an error placed in the structural classification because it always produces “fundamental unfairness.”

Examining the error before it, the Court offered a variety of reasons as to why it did not fall in the fundamental unfairness category. Initially, public trial errors were placed in the structural category because of the “difficulty in assessing the error” and because the public trial right protects other interests (e.g., promoting judicial transparency). So too, the right had been recognized not to be absolute, as proceedings may sometimes be closed with proper findings. In addition, the character of the closure here, limited to the voir dire, and allowing the presence of members of the venire (most of whom did not become jurors), did not suggest “fundamental unfairness.”

Weaver leaves open the possibility that for some structural errors, meeting the *Strickland* prejudice standard will not be necessary. In describing the class of errors that were deemed structural because they “always result in fundamental unfairness,” the Court cited several examples, including the failure to charge the jury on reasonable doubt, a biased judge, and racial discrimination in the selection of the grand and petit jurors. The Court added: “This opinion does not address whether the result [automatic reversal in the appellate setting] should be any different if * * *

^{190.2} See the discussion at note 201 *infra*.

[such] errors were raised instead in an ineffective-assistance claim on collateral attack.”

Chapter 17

THE SCOPE OF THE PROSECUTION: JOINDER AND SEVERANCE

§ 17.4 Failure to Join Related Offenses

(Replace text, p. 1043, line 28, after “rule” through end of paragraph)

In *Currier v. Virginia*,⁵⁰ the government agreed with the request of the defendant, charged with burglary, grand larceny, and unlawful possession of a firearm by a convicted felon, that the latter charge be severed and tried last. After his acquittal at the first trial, the defendant unsuccessfully sought to stop the second trial on double jeopardy grounds. Five Justices concluded that *Jeffers v. United States*^{50.1} pointed the way, for “[i]f a defendant’s consent to two trials can overcome concerns lying at the historic core of the Double Jeopardy Clause, so too we think it must overcome a double jeopardy complaint under *Ashe*. Nor does anything in *Jeffers* suggest that the outcome should be different if the first trial yields an acquittal rather than a conviction.” Justice Kennedy declined to join the balance of that opinion, where four Justices went on to conclude that that civil issue preclusion principles cannot be imported into the criminal law via the Double Jeopardy Clause to prevent parties from retrying any issue or retrying any evidence about a previously tried issue, so that—even assuming defendant’s consent to holding a second trial did not more broadly imply consent to the manner in which it was conducted—his argument must be rejected.^{50.2}

⁵⁰ ___ U.S. ___, 138 S.Ct. 2144, ___ L.Ed.2d ___ (2018).

^{50.1} 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977), discussed in § 17.4, text at note 87.

^{50.2} The four dissenting Justices, citing *Ashe* for the proposition that the Double Jeopardy Clause also shields “the issue-preclusion effect of an acquittal,” and distinguishing *Jeffers* because it “presented a claim-preclusion question,” rejected the notion “that Currier surrendered his right to assert the issue-preclusion effect of his first-trial acquittals by consent to two trials.”

Part 4

THE ADVERSARY SYSTEM AND THE DETERMINATION OF GUILT AND INNOCENCE

Chapter 21

PLEAS OF GUILTY

§ 21.1 The Plea Negotiation System

(Replace text, p. 1204, lines 5–28, between “The” and “3582(c)(2).”)

The disposition in *Freeman*—consisting of a four-Justice plurality opinion, a narrower (and thus presumably controlling) concurring opinion, and a four-Justice dissent—was such, as the Court later acknowledged in revisiting the issue in *Hughes v. United States*,^{20.1} that lower courts were in disagreement on “the question of what principle or principles considered in *Freeman* controlled.”

In *Hughes*, the defendant, indicted on drug and gun charges, negotiated a Type-(C) plea agreement with the prosecutor which stipulated that he would receive a sentence of 180 months (but did not refer to any particular Guidelines range). At the sentencing hearing following Hughes’ guilty plea, the district court accepted the plea agreement and sentenced Hughes to a term of 180 months. The court calculated his Guidelines range as 188–235 months and determined that his sentence was in accordance with the Guidelines and other factors the court was required to take into account. Soon thereafter, however, the Sentencing Commission adopted, and made retroactive, an amendment that had the effect of reducing Hughes’ sentencing range to 151–188 months. But his motion for a reduced sentence under the above-quoted statutory provision was denied, and that ruling was affirmed on appeal; both courts concluded Hughes was ineligible for a reduced sentence because his plea agreement did not expressly rely on a Guidelines range. But the majority in *Hughes* held, with respect to the above-cited statute, that a “district court imposes a sentence that is ‘based on’ a Guidelines range if the range was a basis for the court’s exercise of discretion in imposing a sentence,” which will be the case in “the typical sentencing case,” given that the applicable statutory provision^{20.2} “requires a district court to calculate and consider a defendant’s Guidelines range in every case.” The *Hughes* majority cautioned, however, that “the Guidelines are advisory only, and so not every sentence will be consistent with the relevant Guidelines range,” as illustrated by the companion case to *Hughes*, *Koons v. United States*,^{20.3} where “the Court today holds that five defendants’ sentences were not ‘based on’ subsequently lowered Guidelines ranges because in that case the Guidelines and the record make clear that the sentencing judge ‘discarded’ their sentencing ranges ‘in favor of mandatory minimums and substantial-assistance factors.’” The three *Hughes*

^{20.1} ___ U.S. ___, 138 S.Ct. 1765, ___ L.Ed.2d ___ (2018).

^{20.2} 18 U.S.C.A. § 3553(a).

^{20.3} ___ U.S. ___, 138 S.Ct. 1783, ___ L.Ed.2d ___ (2018).

dissenters observed that as a result of that decision prosecutors in the future would presumably “add a provision to every Type-C agreement in which the defendant agrees to waive any right to seek a sentence reduction following future Guidelines amendments.”

§ 21.3 Plea Negotiation Responsibilities of the Attorneys and Judge

(New text, p. 1234, line 16, after “context”)

As for the prejudice prong of *Strickland*, the Court in *Padilla* left that for “the Kentucky court to consider in the first instance,” but the Court later addressed it in this context in *Lee v. United States*.^{103.1} As the Court described the case, Lee, “indicted on one count of possessing ecstasy with intent to distribute,” “feared that a criminal conviction might affect his status as a lawful permanent resident” but was assured by his attorney “there was nothing to worry about,” so Lee, “who had no real defense to the charge, opted to accept a plea that carried a lesser prison sentence than he would have faced at trial,” only to later learn that his “attorney was wrong” and his conviction meant he “was subject to mandatory deportation.” The district court, in rejecting Lee’s effort to overturn his guilty plea, emphasized that “[i]n light of the overwhelming evidence of Lee’s guilt,” Lee “would have almost certainly” been found guilty and received “a significantly longer prison sentence and subsequent deportation” had he gone to trial. The court of appeals affirmed, relying on the proposition that “no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence.” The Government asked the Supreme Court to, “like the Court of Appeals below, adopt a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial.” A majority of the Court rejected that proposition outright as grounded in “two errors,” for (1) “categorical rules are ill suited to an inquiry that we have emphasized demand a ‘case-by-case examination’ of the ‘totality of the evidence,’” and (2), “more fundamentally, . . . the inquiry we prescribed in *Hill v. Lockhart*,^{103.2} namely, that the defendant must show “that there is a reasonable probability that but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial,”) may not turn solely on the likelihood of conviction after trial.”

The Supreme Court then proceeded to rule in Lee’s favor, but did so based “upon the unusual circumstances of this case,” thus suggesting that many defendants making such prejudice claims will rightly be denied relief. It appears that the most important of those circumstances are the fact that prior to his guilty plea Lee “asked his attorney repeatedly whether there was any risk of deportation from the proceedings,” and that at the time of the plea colloquy the defendant’s remarks made it clear that he would not have

^{103.1} [Lee v. United States](#), ___ U.S. ___, 137 S.Ct. 1958, 198 L.Ed.2d 476 (2017).

^{103.2} [Hill v. Lockhart](#), 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

entered a guilty plea had he known of the deportation consequence. Indeed, the Court issued this stern warning: “Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant’s expressed preferences.” Next, the Court emphasized that there was “no reason to doubt the paramount importance Lee place on avoiding deportation,” for at the time of his guilty plea he “had lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents,” while on the other hand “there is no indication that he had any ties to South Korea,” as “he had never returned there since leaving as a child.” Finally, the Court stressed that it was *not* the case “that it would be irrational for a defendant in Lee’s position to reject the plea offer in favor of trial,” given that for him deportation was the “determinative issue,” he had “strong connections to this country and no other,” and “the consequences of taking a chance at trial were not markedly harsher than pleading,” for “[b]alanced against holding on to some chance of avoiding deportation was a year or two more of prison time.”

§ 21.6 Effect of Guilty Plea

(New text, p. 1272, 2 lines from bottom, before “The”)

Later, in *Class v. United States*,^{193.1} the Court reaffirmed the *Menna-Blackledge* doctrine. Class, indicted for possessing firearms in his vehicle while it was parked on the grounds of the U.S. Capitol, unsuccessfully sought dismissal of the indictment, claiming that the statute violated the Second Amendment. He later pled guilty to the possession charge pursuant to a plea agreement that listed five categories of rights he agreed to waive and three categories he reserved for appeal. However, as the Court noted, the “agreement said nothing about the right to raise on direct appeal a claim that the statute of conviction was unconstitutional.” The *Class* majority acknowledged that a “valid guilty plea * * * renders irrelevant—and thereby prevents the defendant from appealing—the constitutionality of case-related government conduct that takes place before the plea is entered,” but noted that “those kinds of claims are not at issue here.” The majority also conceded that “a valid guilty plea relinquishes any claim that would contradict the ‘admissions necessarily made upon entry of a voluntary plea of guilty,’” but emphasized this also was not the instant case, as “Class’ challenge does not in any way deny that he engaged in the conduct to which he admitted.” Rather, like the defendants in *Blackledge* and *Menna*, he sought to raise a claim which, “judged on its face” based upon the existing record, would extinguish the government’s power to “constitutionally prosecute” the defendant if the claim were successful. As for the government’s claim that the case was governed by [Fed.R.Crim.P. 11\(c\)\(2\)](#), the “conditional” guilty plea provision, the Court noted that the rule’s

^{193.1} 583 U.S. ___, 138 S.Ct. 798, 200 L.Ed.2d 37 (2018).

drafters specifically stated it “has no application” to the “kinds of constitutional objections” that may be raised under the “*Menna-Blackledge* doctrine.”^{193.2}

The dissenters . . .

^{193.2} The three dissenters objected that the *Menna-Blackledge* doctrine “is vacuous, has no sound foundation, and produces nothing but confusion.”

Chapter 22

TRIAL BY JURY AND IMPARTIAL JUDGE

§ 22.1 The Right to Jury Trial

(New text, p. 1285, line 17, after “decision”)

Oregon and Louisiana remain the only states authorizing non-unanimous verdicts in felony cases.

§ 22.4 Challenging the Judge

(New text, p. 1310, line 24, after “bias”)

The Court later emphasized that this due process standard may demand recusal even when a judge has no actual subjective bias, but, objectively speaking, considering all the circumstances, the probability of actual bias is too high to be constitutionally tolerable.^{135.1}

^{135.1} *Rippo v. Baker*, ___ U.S. ___, 137 S.Ct. 905, 197 L.Ed.2d 167 (2017) (per curiam).

(New text, p. 1314, line 9, after “substitution”)

In many jurisdictions, a trial judge may grant a new trial based on the weight rather than sufficiency of the evidence.^{147.1} Whether a successor judge who has not heard the witnesses testify may decide a motion for new trial on this basis generally depends on the importance of witness demeanor to the case.

^{147.1} See § 24.6(c).

Chapter 24

THE CRIMINAL TRIAL

§ 24.1 The Right to a Public Trial

(Replace text, p. 1355, lines 26 to 27, between “attendance” and “To”)

Even excluding members of the public from jury selection because potential jurors would take up all the seats can violate the defendant’s right, as the parties assumed in *Weaver v. Massachusetts*.^{5.1}

^{5.1} ___ U.S. ___, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017).

(New text, p. 1355, line 31, between “trial” and “, the defendant”)

when the error is properly raised in the trial court

⁶ *Weaver v. Massachusetts*, ___ U.S. ___, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017). See also

(New text, p. 1356, line 1, between “trial” and “Generally”)

As the Court stated in *Weaver*, the public trial right is “subject to exceptions.” “Though these cases should be rare,” the Court explained, “a judge may deprive a defendant of his right to an open courtroom by making proper factual findings in support of the decision to do so.”

(New text, p. 1357, line 19, between “clearance” and “Finally”)

Nor does the enforcement of witness sequestration policies violate a defendant’s right to a public trial.

§ 24.3 The Defendant’s Right of Access to Evidence

(New text, p. 1383, line 27, between “was” and “the”)

whether a subpoena directed to a private party or unrelated governmental agency carries similar constitutional protection. Also undecided was

§ 24.9 Jury Procedures

(Replace text, p. 1429, lines 4–9, between “rights” and § 24.10)

The Court in 2017 recognized one exception to this general principle. It held in *Peña-Rodriguez v. Colorado*,^{200.1} that the defendant was denied his constitutional right to an impartial jury by a state rule that barred introduction of juror affidavits reporting a juror’s anti-Mexican statements during deliberations. The Court explained that “where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to

convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.” This requirement does not arise unless “there is a showing” that one or more jurors made a statement that “exhibit[ed] overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict” and “tend[ed] to show that racial animus was a significant motivating factor in the juror’s vote to convict.”

The Court advanced several reasons for unique treatment of racial bias. First, racial bias differed from the “anomalous behavior from a single jury—or juror—gone off course” in *Tanner* and *Warger*, and “neither history nor common experience show that the jury system is rife with mischief” similar to the misconduct in those cases. Racial bias, by contrast, “implicates unique historical, constitutional, and institutional concerns,” and is “a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.” “An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury,” but is instead “necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.” Second, the Court also argued that the safeguards of voir dire, observation of the jury during the trial, juror reports before the verdict, and nonjuror evidence after trial are not as effective in exposing racial bias as they are in protecting against other forms of bias. The Court also pointed to the experiences of the 17 jurisdictions that have recognized a racial-bias exception to the no-impeachment rule, emphasized the post-civil-war history of race and juries, and listed the Court’s attempts to “enforce the Constitution’s guarantee against state-sponsored racial discrimination in the jury system.” Finally, the Court noted, “the practical mechanics of acquiring and presenting” evidence of clear statements of racial bias during deliberations “will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel’s post-trial contact with jurors.”

^{200.1} ___ U.S. ___, 137 S.Ct. 855, 197 L.Ed.2d 107 (2017).

§ 24.10 Jury Verdicts

(New text, p. 1431, line 24, after “convicted”)

In *Bravo-Fernandez v. United States*,^{206.1} the Court emphasized that this rule allows retrial of a conviction overturned for procedural error, despite the presence of an inconsistent acquittal.

^{206.1} ___ U.S. ___, 137 S.Ct. 352, 196 L.Ed.2d 242 (2016). The Court explained that where a trial yields two verdicts that are incompatible, a defendant cannot meet the burden of demonstrating that the jury necessarily resolved an issue in his favor. It distinguished the situation in *Yeager v. United States*, 557 U.S. 110, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009), discussed in §§ 17.4 & 25.2, where an acquittal barred retrial after a hung jury. In that case, the only actual verdict delivered was an acquittal.

§ 24.11 Post-Verdict Motions

(Replace text, p. 1438, line 8, between “prompted” and “to enact”)

every state

(New text, p. 1438, line 27, between “states have” and “tried”)

recognized a stand-alone claim of actual innocence based on new evidence as a basis for collateral relief. Others have

Chapter 25

DOUBLE JEOPARDY

§ 25.1 Dimensions of the Guarantee

(Delete the word “entire” on p. 1448, line 18)

(New text, p. 1449, line 6, after “selected”)

Crist held that jeopardy attaches when “the jury” is empaneled and sworn, and did not have occasion to consider whether a defendant is placed in jeopardy when some but not all of the jurors are sworn. Nevertheless, all of the opinions in that case appeared to reject the idea that jeopardy should attach at an earlier point during jury selection. Lower courts have also concluded that the entire jury must be sworn, and that a jury is not “sworn” until the jury oath is given.

Chapter 26

SENTENCING PROCEDURES

§ 26.1 Legislative Structuring of Sentencing: Sanctions

¹⁷ *Moore v. Texas*, ___ U.S. ___, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017) (invalidating improper state court application of *Hall*).

§ 26.4 Due Process: The Framework for Sentencing Procedure

(New text, p. 1505, line 39, after “factor”)

Racial references by a witness and a juror were the basis for two decisions from the 2017–18 term, both reinforcing the prohibition on the consideration of race in sentencing. The first case, *Peña-Rodriguez v. Colorado*,^{61.1} created a constitutional exception to a common evidentiary rule barring the consideration of juror affidavits or testimony about deliberations, an exception specifically for reports of racist statements by jurors. Although *Peña-Rodriguez* involved deliberations about guilt, presumably its mandate will extend to all jury deliberations in criminal cases, including jury consideration of punishment. The second case, *Buck v. Davis*,^{61.2} involved a claim of ineffective assistance during capital sentencing. The defendant’s own expert had testified that race should be a factor to weigh in making the determination of future dangerousness. Reversing the refusal of the lower court to hear Buck’s habeas appeal, the Supreme Court concluded that Buck had demonstrated both extraordinary circumstances that warranted reopening of the judgment under Rule 60(b)(6), and ineffective assistance of counsel. “Buck may have been sentenced to death in part because of his race,” the Court wrote. “Relying on race to impose a criminal sanction ‘poisons public confidence’ in the judicial process” and injures “not just the defendant,” but also “the law as an institution,” “the community at large,” and “the democratic ideal reflected in the processes of our courts.” The Court also emphasized that “when a jury hears expert testimony that expressly makes a defendant’s race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses.”

^{61.1} ___ U.S. ___, 137 S.Ct. 855, 197 L.Ed.2d 107 (2017), also discussed in § 24.9.

^{61.2} ___ U.S. ___, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017), also discussed in § 28.5.

(New text, p. 1509, line 3, after “defendant”)

Increasing a sentence because of the exercise of Fourth Amendment rights, too, may be off limits. After the Court held that a motorist cannot be prosecuted for refusing to submit to an illegal warrantless blood test,^{71.1}

lower courts extended this holding to bar enhanced criminal penalties for refusing warrantless blood tests.

^{71.1} *Birchfield v. North Dakota*, ___ U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016).

(New text, p. 1511, last line, after “fundamental”)

In *Nelson v. Colorado*,^{84.1} the Court again applied the *Mathews* framework to a state statutory scheme for the recovery of fines, fees, and restitution by defendants who were exonerated, but emphasized that unlike rules about the deprivation of property after exoneration, procedural rules that are “part of the criminal process” must be evaluated under *Medina*.

^{84.1} ___ U.S. ___, 137 S.Ct. 1249, 197 L.Ed.2d 611 (2017).

(New footnote 84.2 followed by new text, p. 1512, line 7, after “sentencing”)

^{84.2} E.g., *Chavez-Meza v. United States*, ___ U.S. ___, 138 S.Ct. 1959, ___ L.Ed.2d ___ (2018) (discussing explanation requirements in federal sentencing).

In addition to contesting the adequacy of notice regarding their own sentences, defendants have also challenged sentencing provisions on void-for-vagueness grounds. The Court has invalidated on this due-process ground laws that fix the permissible sentences for criminal offenses, such as the statute in *Johnson v. United States*^{84.2} that raise the minimum and maximum sentence for a defendant with prior convictions for crimes involving “conduct that presents a serious potential risk of physical injury to another.” But in *Beckles v. United States*,^{84.3} the Court held that because the advisory United States Sentencing Guidelines “merely guide the district courts’ discretion,” a guideline provision with the same wording as the statute in *Johnson* was not subject to a vagueness challenge. A system of unfettered discretion is not unconstitutionally vague, the Court explained, as all of the notice required is provided by the applicable statutory range. The *Beckles* Court also distinguished Eighth Amendment challenges to vague sentencing factors in capital cases, noting “our approach to vagueness under the Due Process Clause is not interchangeable with ‘the rationale of our cases construing and applying the Eighth Amendment.’”

^{84.2} 576 U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015).

^{84.3} ___ U.S. ___, 137 S.Ct. 886, 197 L.Ed.2d 145 (2017). The Court noted also that “our holding today also does not render “sentencing procedure[s]” entirely “immune from scrutiny under the due process clause,” and cited *Townsend v. Burke*, 334 U.S. 736, 741, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948) (holding that due process is violated when a court relies on “extensively and materially false” evidence to impose a sentence on an uncounseled defendant).

(New text, p. 1515, line 16, after “element”)

Excessive delay between conviction and sentence may also raise concerns about the reliability of sentencing information, as well as other concerns. The Court in *Betterman v. Montana*,^{99.1} held that the Speedy Trial Clause of the Sixth Amendment does not regulate the time period between conviction and sentence. Instead, the primary safeguard here is legislative,

and the “more pliable standard” of due process “serves as a backstop against exorbitant delay.”

^{99.1} ___ U.S. ___, 136 S.Ct. 1609, 194 L.Ed.2d 723 (2016), discussed in § 18.5.

§ 26.6 Special Sentences

(New text, p. 1533, line 21, after “reasoned”)

In *Nelson v. Colorado*,^{153.1} the Court held that once a criminal conviction is “invalidated by a reviewing court and no retrial will occur,” due process requires the government to “refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction.”

^{153.1} ___ U.S. ___, 137 S.Ct. 1249, 197 L.Ed.2d 611 (2017).

(New text, p. 1534, last line, after “Government”)

The Court in *Nelson v. Colorado*,^{161.1} held that once a defendant is acquitted, due process requires the government to “refund fees, court costs, and restitution exacted from the defendant” because of the conviction, but did not consider whether forfeited property must also be returned. To the extent that forfeiture is a form of financial punishment for the commission of a crime, then *Nelson*’s reasoning should mandate the return of forfeited assets once a defendant is acquitted. As the Court in *Nelson* concluded, after acquittal the government “may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions.”

^{161.1} ___ U.S. ___, 137 S.Ct. 1249, 197 L.Ed.2d 611 (2017).

Chapter 27

APPEALS

§ 27.5 The Scope of Appellate Review

(New text, p. 1569, line 11, after “revoked”)

Similarly the Court in *United States v. Sanchez-Gomez*,^{47.1} found the second requirement of this exception had not been met when “litigants simply ‘anticipate violating lawful criminal statutes.’” The Court found the defendants’ claims of unconstitutional restraint during pretrial hearings moot, rejecting the argument that as defendants convicted for illegal entry, they “will again violate the law, be apprehended, and be returned to pretrial custody.” The defendants’ “personal incentives to return to the United States, plus the elevated rate of recidivism associated with illegal entry offenses, do not amount to an inability to obey the law.”

^{47.1} ___ U.S. ___, 138 S.Ct. 1532, ___ L.Ed.2d ___ (2018).

(New text, p. 1574, line 39, after “benefit”)

Forfeiture of the right to appeal—claims inherently waived by guilty plea. As noted in § 21.6, defendants who plead guilty relinquish many claims, unless the right to appeal the claim is reserved as part of a conditional plea. Appellate claims lost by pleading guilty include those raising “the constitutionality of case-related government conduct that takes place before the plea is entered,” or “any claim that would contradict the ‘admissions necessarily made upon entry of a voluntary plea of guilty,’” explained the Court in *Class v. United States*.^{66.1}

^{66.1} 583 U.S. ___, 138 S.Ct. 798, 200 L.Ed.2d 37 (2018), discussed in § 21.6.

(New text, p. 1577, line 12, after “agreement”)

The Court’s reasoning in *Weaver v. Massachusetts*^{75.1} may have laid the groundwork for the Court to find that prejudice should not be presumed under the *Olano* test for every “structural” error. *Weaver* actually answered a different question, whether defense counsel’s failure to raise a public trial violation under the Sixth Amendment automatically constituted “prejudice” necessary for relief for ineffective assistance of counsel under *Strickland*. In holding that prejudice is not established without a showing by the defendant of a reasonable probability there would have been different outcome had the error not occurred, the Court emphasized the narrowness of its ruling, limiting it both to the context of ineffective assistance of counsel claims, and to only those claims based on counsel’s failure to raise a claim of improper closure during jury selection. Several aspects of the Court’s rationale, however, provided a basis for a later ruling that an unpreserved public trial

right claim raised on direct appeal would not automatically establish the “prejudice” required for plain error relief. Reasoned the Court, “not every public-trial violation results in fundamental unfairness.” The error is exempt from harmless error review because of the “difficulty of assessing the effect of the error,” and because it protects interests other than the defendant’s interest in avoiding “unjust conviction,” namely, interests of “the public at large, and the press.” It also emphasized that the failure to raise the error at trial deprives the trial court “of the chance to cure the violation either by opening the courtroom or by explaining the reasons for closure.” To be sure, there is also support in *Weaver* for presuming prejudice from public trial violations under the plain-error test. Of the Court’s reasons for requiring a defendant to show prejudice, three pertained to collateral rather than direct review. Compared to error raised on direct appeal, finality is at greater risk when an error is raised on collateral review, ordering retrial at that later time creates a higher risk that witnesses’ memories and other evidence would be lost, and instructions from reviewing courts to trial courts may be less effective.

^{75.1} ___ U.S. ___, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017).

(New text, p. 1578, line 3, after “proceedings”)

Applying this standard (and rejecting a more stringent “shock-the-conscience” standard), the Court in *Rosales-Mireles v. United States*,^{77.1} concluded that a miscalculation of the United States Sentencing Guidelines range will ordinarily require a court of appeals to exercise its discretion to vacate the defendant’s sentence. Noting that a defendant bears the burden of persuading the reviewing court that the error seriously affected the fairness, integrity or public reputation of judicial proceedings, Justice Sotomayor explained for the Court that an “error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than ‘necessary’ to fulfill the purposes of incarceration.” In asserting that any amount of jail time is significant to both the defendant and society, the Court relied upon social science studies of perceptions of fairness of the justice system. It also noted that miscalculating the Guidelines range was not a strategic error of counsel but a mistake by the judiciary, and observed that “‘remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does.’” Rejecting the argument that its decision invited sandbagging, the Court stated, “It is hard to imagine that defense counsel would ‘deliberately forgo objection now’ to a plain Guidelines error that would subject her client to a higher Guidelines range, ‘because [counsel] perceives some slightly expanded chance to argue for “plain error” later.’” “Even setting aside the conflict such a strategy would create with defense counsel’s ethical obligations to represent her client vigorously and her duty of candor toward the court,” the Court wrote, “any benefit from such a strategy is highly speculative.”

^{77.1} 583 U.S. ___, 138 S.Ct. 1897, ___ L.Ed.2d ___ (2018).

§ 27.6 Harmless Error

(New text, p. 1587, line 10, after “choice”)

counsel’s admission of a client’s guilt during his capital trial over the client’s express objection,^{127.1}

^{127.1} *McCoy v. Louisiana*, ___ U.S. ___, 138 S.Ct. 1500, ___ L.Ed.2d ___ (2018), reasoning that the admission “blocks the defendant’s right to make the fundamental choices about his own defense” and its effects “would be immeasurable, because a jury would almost certainly be swayed by a lawyer’s concession of his client’s guilt.”

¹²⁸ *Weaver v. Massachusetts*, ___ U.S. ___, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017) (“This Court . . . has granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury, though the Court has yet to label those errors structural in express terms.”) See

(New text p. 1591, line 35, after “process”)

In *Weaver v. Massachusetts*,^{158.1} the Court again reiterated the “three broad rationales” it had recognized for exempting an error from harmless error review: (1) the error’s effects are too difficult to measure; (2) the error’s effects are irrelevant because the right is designed to protect an interest other than the defendant’s interest in a reliable outcome; or (3) the error “always results in fundamental unfairness.” As examples of this last category, the *Weaver* Court noted *Gideon* and *Sullivan*. In these cases, the Court explained, “the resulting trial is always a fundamentally unfair one,” and it “would be futile for the government to try to show harmlessness.”

^{158.1} ___ U.S. ___, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017).

Chapter 28

POST CONVICTION REVIEW: COLLATERAL REMEDIES

§ 28.3 Cognizable Claims

(On page 1614, replace subheading for § 28.3(e) with:

(e) “Freestanding,” “Stand-Alone,” or “Bare” Innocence Claims

§ 28.4 Claims Foreclosed by State Procedural Defaults

(New text, p. 1620, line 10, before “Petitioners”)

To establish cause “the prisoner must ‘show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.’” A factor is external to the defense if it ‘cannot fairly be attributed to’ the prisoner.”^{87.1}

^{87.1} *Davila v. Davis*, ___ U.S. ___, 137 S.Ct. 2058, 198 L.Ed.2d 603 (2017).

(New text, p. 1622, line 26, after “review”)

For example, as the Court later held in *Davila v. Davis*,^{91.1} *Martinez* does not “allow a federal court to hear a substantial but procedurally defaulted claim of ineffective assistance of appellate counsel when a prisoner’s state postconviction counsel provides ineffective assistance by failing to raise that claim.” Extending *Martinez* to claims of ineffective appellate counsel was not required to ensure that meritorious trial error receives review, the Court explained. “The criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not.” Trial “is where the stakes for the defendant are highest, not least because it is where a presumptively innocent defendant is adjudged guilty, and where the trial judge or jury makes factual findings that nearly always receive deference on appeal and collateral review.” The Court also stated that if the “claim of appellate ineffectiveness [is] premised on a preserved trial error,” at least one court will have considered the claim on the merits; and if it was based on an unpreserved trial error “so obvious that appellate counsel was constitutionally required to raise it on appeal, then trial counsel likely provided ineffective assistance by failing to object to it in the first instance,” and *Martinez* would provide a vehicle for obtaining review in most circumstances. Finally, it warned that extending *Martinez* to claims of ineffective appellate counsel “could ultimately knock down the procedural barriers to federal habeas review of nearly any defaulted claim of trial error,” likely generating “high systemic costs and low systemic benefits.”

^{91.1} ___ U.S. ___, 137 S.Ct. 2058, 198 L.Ed.2d 603 (2017).

(Replace text, p. 1624, lines 24 to 26, between “Batson” and end of paragraph)

The Court’s reasoning in *Weaver v. Massachusetts*,^{100.1} could have foreshadowed the rejection of a presumption of prejudice under *Sykes* for at least some public trial violations, even though public trial violations are considered “structural” and exempt from harmless error review when properly raised at trial. *Weaver* addressed whether defense counsel’s failure to raise a public trial violation under the Sixth Amendment automatically constituted “prejudice” necessary for relief for ineffective assistance of counsel under *Strickland*. In holding that a defendant must demonstrate a reasonable probability of a different outcome had counsel acted competently, the Court relied upon arguments that also support a decision that a procedurally defaulted public trial right claim would not automatically establish the “prejudice” under *Sykes*. Public trial violations are exempt from harmless error review when preserved not because they are always prejudicial or fundamentally unfair, but because of the “difficulty of assessing the effect of the error,” because the public trial right protects interests of the press and public, not just the defendant, because the failure to raise the error at trial deprives the trial court “of the chance to cure the violation either by opening the courtroom or by explaining the reasons for closure,” and because compared to earlier review, review at the post-conviction stage presents greater threats to finality, accuracy upon retrial, and effective oversight by reviewing courts. These rationales could support extending the prejudice requirement to at least some procedurally defaulted claims of structural error.

^{100.1} ___ U.S. ___, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017).

(New text, p. 1625, last line, after “penalty”)

When evaluating a defaulted claim challenging instructions during the penalty phase, *Sawyer* requires a court to ask “whether a properly instructed jury could have recommended death,” not “whether the alleged error might have affected the jury’s verdict.”^{106.1}

^{106.1} *Jenkins v. Hutton*, ___ U.S. ___, 137 S.Ct. 1769, 198 L.Ed.2d 415 (2017) (per curiam).

§ 28.5 Claims Foreclosed Due to Premature, Successive, or Delayed Applications

(New text, p. 1636, line 2, after “relief”)

Similarly, in *Buck v. Davis*,^{157.1} the Court reasoned that although relief under Rule 60(b)(6) is “available only in ‘extraordinary circumstances,’” that standard was met when the district court denied the capital petitioner’s motion to reopen the judgment after an expert had testified that race is a factor the jury should weigh in making its determination of dangerousness.

“Relying on race to impose a criminal sanction ‘poisons public confidence’ in the judicial process. It thus injures not just the defendant, but ‘the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.’ Such concerns are precisely among those we have identified as supporting relief under Rule 60(b)(6).”

^{157.1} ___ U.S. ___, 137 S.Ct 759, 780, 197 L.Ed.2d 1 (2017).

§ 28.6 Constitutional Interpretation on Habeas Review

¹⁶⁸ *Buck v. Davis*, ___ U.S. ___, 137 S.Ct 759, 197 L.Ed.2d 1 (2017) (ignoring waived *Teague* claim, noting “a State’s failure to raise a *Teague* argument at the petition stage is particularly ‘significant’ in deciding whether such an exercise of discretion is appropriate”).

(New text, p. 1643, line 26, after “court”)

Held the Court in *Wilson v. Sellers*,^{201.1} “the federal court should ‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale,” and “presume that the unexplained decision adopted the same reasoning.” A state may rebut the presumption by showing that the unexplained decision “most likely did rely on different grounds than the lower state court’s decision such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed.”

^{201.1} ___ U.S. ___, 138 S.Ct. 1188, 200 L.Ed.2d 530 (2018).

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