

Table of Contents

	Page
PREFACE	V
CHAPTER 1. INTRODUCTION: THE STUDY OF CRIMINAL PROCEDURE.....	1
1.01 The Warren Court, Incorporation, and the Federalization of Criminal Procedure	1
1.02 The Post-Warren Court: Four Themes	3
1.03 The Crime Control and Due Process Models of Criminal Procedure.....	8
1.04 The Stages of the Criminal Process	10
1.05 A Brief Outline of the Book	13
 PART A. THE FOURTH AMENDMENT: SEARCH AND SEIZURE LAW 	
CHAPTER 2. THE EXCLUSIONARY RULE AND OTHER REMEDIES FOR FOURTH AMENDMENT VIOLATIONS	17
2.01 Introduction	17
2.02 The Genesis of the Rule	17
2.03 The Scope of the Rule.....	20
(a) Criminal Proceedings Other than Trial	20
(b) Non-Criminal Proceedings.....	21
(c) The Reasonable “Good Faith” Exception	23
(1) Reliance on Warrants.....	23
(2) Reliance on Statutes.....	27
(3) Reliance on Records and Reports	28
(4) Reliance on Previous Caselaw	29
(5) Reliance on the Searching Officer’s Observations.....	30
(d) Impeachment Evidence.....	31
(1) Against the Defendant	31
(2) Against Other Witnesses	33
2.04 The “Fruit of the Poisonous Tree” Doctrine.....	33
(a) Rationale	33
(b) The Attenuation Exception.....	34
(1) Confessions as Fruit.....	35
(2) Other Types of Fruit.....	36
(3) Atypical Poisonous Trees	37
(c) The Independent Source Doctrine.....	39
(d) The Inevitable Discovery Exception.....	41
2.05 Should the Rule Be Abolished?: Other Remedies for Constitutional Violations	42
(a) Damages.....	44
(1) Federal Officers: <i>Bivens</i> Actions.....	44
(2) Federal Government: FTCA	46
(3) State Officers: § 1983	48

	(4) State Governmental Units: § 1983	51
	(5) Summary	54
	(b) Injunctive Relief	55
	(c) Criminal Remedies	57
	(d) Non-Judicial Remedies	58
	(1) Internal Review	59
	(2) Civilian Review Boards	59
	(3) Ombudsman	60
	(4) Quasi-Judicial Review	60
2.06	Conclusion	61
CHAPTER 3. THE LAW OF ARREST		65
3.01	Introduction	65
3.02	The Definition of Arrest	66
	(a) Detentions in the Stationhouse or Its Equivalent	66
	(b) Detentions in the Field	68
	(c) Detentions at the Border	70
	(d) Detentions in the Home	70
	(e) Grand Jury Subpoenas	72
	(f) Summary	72
3.03	The Probable Cause Requirement for Arrests	72
	(a) Secondhand Sources	73
	(1) Informants	73
	(2) Victims and Eyewitnesses	75
	(3) Other Police	76
	(4) Dogs	76
	(b) First-Hand Knowledge	77
	(1) Post-Detention Information	77
	(2) Proximity to Criminal Suspects	79
	(3) Investigative Profiles	80
	(c) Mistake	82
3.04	The Arrest Warrant Requirement	83
	(a) Public Arrests	84
	(b) Arrests in the Home	85
	(c) Arrests in Third Party Homes	85
	(d) Hot Pursuit: The Exception to the Warrant Requirement	86
3.05	Executing an Arrest	88
	(a) The Method of Entry	88
	(b) The Use of Deadly Force	91
	(c) Mistake as to Identity	92
	(d) Due Process Limitations	93
3.06	Conclusion	94
CHAPTER 4. INTRODUCTION TO THE LAW OF SEARCHES: A FRAMEWORK FOR ANALYZING WHEN “SEARCHES” OCCUR AND WHEN THEY ARE REASONABLE		97
4.01	Introduction	97
4.02	The Definition of Governmental Conduct	97
	(a) Government Officials	98

	(b) Government Agents.....	99
	(c) What a Private Search Authorizes.....	100
	(d) Searches in Foreign Countries	101
4.03	The Definition of “Search” and “Seizure”	102
	(a) Undercover and “Institutional” Agents.....	103
	(b) Physical Characteristics	106
	(c) Open Fields and Curtilage.....	107
	(d) Containers and Other Effects.....	109
	(e) Controlled Delivery	111
	(f) Enhancement Devices	111
	(1) The Nature of the Place Surveilled	111
	(2) The Nature of the Activity Surveilled	113
	(3) The Care Taken to Ensure Privacy	115
	(4) The Lawfulness of the Vantage Point	115
	(5) The Availability and Sophistication of the Technology.....	116
	(6) The Extent to Which Technology Enhances the Natural Senses	116
	(7) Pervasiveness of the Surveillance	117
	(g) Government Monitored Institutions	118
	(h) An Alternative Definition	119
4.04	Standing.....	119
	(a) Property-Based Standing.....	120
	(b) The <i>Jones</i> Criteria	120
	(c) Legitimate Expectations of Privacy Analysis	121
	(d) Current Standing Rules.....	122
	(1) The Right to Exclude Others	123
	(2) Continuing Access Plus Possessory Interest	124
	(3) Legitimate Presence Plus Possessory Interest	125
	(4) Bailment.....	126
	(5) Subjective Expectations of Privacy.....	127
4.05	Determining Whether a Search or Seizure Is Reasonable	127
	(a) The Warrant Requirement	127
	(b) The Probable Cause Requirement.....	129
	(c) Adequacy of the Warrant.....	130
	(d) Exceptions to the Warrant and Probable Cause Requirements.....	130
	(e) Burdens and Standards of Proof	131
4.06	Conclusion	132
CHAPTER 5. THE SEARCH WARRANT		137
5.01	Introduction	137
5.02	The Neutral and Detached Decisionmaker	138
5.03	The Probable Cause Determination.....	139
	(a) General Definition.....	139
	(b) Hearsay Information: Criteria for Use	141
	(1) Basis of Knowledge.....	143
	(2) Detailed Description of Activity	143
	(3) Past Reliability of Informant	144
	(4) Corroboration by Police	145
	(5) Other Indicia of Reliability	145
	(c) Oath or Affirmation.....	146

	(d) Challenging the Probable Cause Determination; the Informant Privilege	147
5.04	The Particularity Requirement	149
	(a) Place to Be Searched	149
	(b) Things to Be Seized	150
5.05	Execution of the Warrant	151
	(a) Time Limitations	151
	(b) Mistake as to Premises to Be Searched	152
	(c) Announcement of Presence	152
	(d) Manner of Search	153
	(e) Seizures Not Authorized by the Warrant	154
	(f) Presence of the Media	156
	(g) Inventory of Seized Evidence	156
5.06	When a Warrant Is Insufficient	157
	(a) The “Mere Evidence” Rule	157
	(b) First Amendment Material	158
	(c) Bodily Intrusions	159
	(d) Forfeitures	160
5.07	Conclusion	162
CHAPTER 6. SEARCH INCIDENT TO A LAWFUL ARREST.....		165
6.01	Introduction	165
6.02	Arrests Which Justify a Search	165
6.03	The Timing of the Search	168
6.04	The Scope of a Search Incident	169
	(a) The Armspan Rule	169
	(b) Confederates and Destructible Evidence	172
	(1) Searches for Confederates	172
	(2) Searches for Evidence	173
	(3) An Alternative: Securing the Premises	174
	(c) Search Incident Doctrine and Cars	175
6.05	Conclusion	176
CHAPTER 7. THE “AUTOMOBILE EXCEPTION”		179
7.01	Introduction	179
7.02	The Rationale for the Exception	180
7.03	Elements of the Exception	181
	(a) Vehicles Covered	181
	(b) Probable Cause	182
	(c) Exigency	183
	(1) Measuring Exigency “Backward”	183
	(2) Measuring Exigency “Forward”	184
7.04	Scope of the Search	185
7.05	Conclusion	188
CHAPTER 8. HOT PURSUIT.....		189
8.01	Introduction	189
8.02	When Hot Pursuit Justifies Entry	190
	(a) Probable Cause as to Crime and Location	190

(b)	Cause as to Exigency.....	190
(c)	Lawful Starting Point.....	191
(d)	Type of Crime.....	191
8.03	The Definition of “Hot Pursuit”.....	192
(a)	Supreme Court Cases.....	192
(b)	Lower Court Cases.....	194
8.04	Scope of the Search.....	195
8.05	Conclusion.....	196
CHAPTER 9. EVANESCENT EVIDENCE AND ENDANGERED PERSONS....		197
9.01	Introduction.....	197
9.02	Persons.....	197
(a)	The Exigency Requirement.....	198
(b)	The Clear Indication Standard.....	200
(c)	The Reasonable Manner Requirement.....	201
9.03	Houses, Papers and Effects.....	202
9.04	Conclusion.....	203
CHAPTER 10. PLAIN VIEW.....		205
10.01	Introduction.....	205
10.02	Prior Valid Intrusion.....	205
10.03	Items That May Be Seized.....	207
10.04	Inadvertence and Pretextual Searches.....	209
10.05	Conclusion.....	212
CHAPTER 11. STOP AND FRISK.....		215
11.01	Introduction.....	215
11.02	The Definition of “Seizure”.....	217
(a)	Of the Person.....	217
(b)	Of Effects.....	221
11.03	Permissible Grounds for Stops and Other Seizures.....	222
(a)	<i>Terry</i> Stops and the Reasonable Suspicion Standard.....	222
(b)	Other Types of Seizures.....	226
(1)	Seizures of Car Occupants.....	226
(2)	Stops for Loitering.....	229
(c)	Permissible Sources of Information.....	230
(1)	Informants.....	231
(2)	Police Flyers.....	233
(3)	Profiles and Plans.....	233
(d)	Types of Crimes.....	233
11.04	Permissible Grounds for a Frisk.....	234
11.05	The Scope of a Frisk.....	235
11.06	Stop and Frisk in the Lower Courts.....	237
(a)	The Definition of Seizures and Stops.....	237
(b)	Permissible Grounds for Seizures and Stops.....	238
(c)	Permissible Grounds for a Frisk.....	240
(d)	The Scope of a Frisk.....	242
11.07	Conclusion.....	243

CHAPTER 12. CONSENT SEARCHES	247
12.01 Introduction	247
12.02 The Voluntariness Requirement	247
(a) Knowledge of the Right	248
(b) Custody	249
(c) Force, Show of Force and Threats	250
(d) Personal Characteristics	252
12.03 The Scope of a Consent Search	253
12.04 Third Party Consent	254
12.05 Conclusion	258
CHAPTER 13. REGULATORY INSPECTIONS AND SEARCHES.....	261
13.01 Introduction	261
13.02 Inspections of Homes	262
(a) Health and Safety Inspections	262
(b) Welfare Inspections	263
13.03 Inspections of Businesses	264
(a) The Closely Regulated Business Doctrine	264
(b) Non-Programmatic Searches of Businesses	268
13.04 Fire Inspections	269
13.05 Border Inspections	270
(a) Routine Searches	271
(b) Nonroutine Searches	271
(c) International Mail	272
13.06 Checkpoints	272
(a) Illegal Immigrants.....	273
(b) Sobriety Checkpoints	273
(c) License and Safety Checks	274
(d) Boat Inspections	275
(e) Airport Screenings.....	275
(f) Checkpoints Aimed at Ordinary Crime Control.....	276
13.07 Inventories	277
(a) Of Vehicles	277
(b) Of Persons.....	280
13.08 School and Workplace Searches	280
13.09 Testing for Drug and Alcohol Use	283
13.10 Probation and Parole Supervision	289
13.11 DNA Testing.....	290
13.12 Conclusion	291
CHAPTER 14. TECHNOLOGICAL SURVEILLANCE.....	295
14.01 Introduction.....	295
14.02 Regulation of Communications Surveillance Prior to Title III	296
(a) The Trespass Doctrine	296
(b) The Federal Communications Act.....	296
(c) <i>Katz</i> and Expectation of Privacy Analysis	297
(d) The Fourth Amendment Warrant Requirement	298
14.03 Federal Eavesdropping Law: Title III	298
(a) The Scope of Title III.....	299

	(1) Types of Communications Protected	300
	(2) The Definition of “Interception”	301
(b)	Authorized Interceptions	302
(c)	Application for an Order	303
	(1) Identity of the Applicant	303
	(2) Details of the Offense	304
	(3) Particularity Requirements	304
	(4) The Last Resort Requirement.....	305
	(5) Durational Elements	306
(d)	The Wiretap Order	307
(e)	Executing the Order	307
	(1) Covert Entry	308
	(2) The Minimization Requirement	308
	(3) Amendments	309
(f)	Post-Interception Procedures	309
(g)	The Suppression Remedy.....	310
	(1) General Scope	310
	(2) The “Central Role” Test.....	311
	(3) The Good Faith Exception	312
	(4) Standing	313
(h)	Criminal and Civil Remedies.....	314
14.04	Tracking Devices	315
14.05	Video Surveillance.....	319
	(a) Private Areas	319
	(b) Public Spaces	321
14.06	Detection Devices	322
14.07	Conclusion	323

PART B. THE FIFTH AMENDMENT’S PRIVILEGE AGAINST SELF-INCRIMINATION

CHAPTER 15. OVERVIEW OF THE PRIVILEGE AGAINST SELF- INCRIMINATION	329	
15.01 Introduction	329	
15.02 Compulsion	329	
(a) During Questioning.....	330	
	(1) Defendants in Custody.....	330
	(2) Trial Witnesses	330
	(3) Grand Jury Witnesses	331
	(4) The Fair Examination Rule	332
	(5) The Continuing Waiver Theory	334
	(6) Non-Custodial Questioning; the “Exculpatory” No Doctrine.....	334
(b) Statutory Compulsion	335	
	(1) Innocently-Posed Questions.....	335
	(2) The Suspect Class Exception	336
	(3) The “Regulatory Purpose” Doctrine	338
(c) Compulsion Through Non-Criminal Sanctions	340	
15.03 Incrimination.....	342	
(a) The Definition of Criminal Proceeding	343	

	(b) Foreign Prosecutions.....	346
	(c) The Link-in-the-Chain Rule	347
	(d) Immunity	348
	(1) Types of Immunity	348
	(2) Use of Immunized Testimony to Impeach	349
	(3) The Effect on Testimony in Later Proceedings.....	350
	(4) The Procedure for Granting Immunity	350
	(e) Other Means of Avoiding Incrimination	351
15.04	The “Testimonial Evidence” Requirement.....	351
15.05	The Personal Basis of the Right.....	353
15.06	The Fifth Amendment and Subpoenas	354
	(a) <i>Boyd</i> and the “Zone of Privacy”	354
	(b) The Collective Entity Doctrine	354
	(c) The Rejection of a Privacy Basis for the Amendment.....	355
	(d) Custodians of Impersonal Records	357
15.07	Conclusion	359
CHAPTER 16. CONFESSIONS.....		363
16.01	Introduction.....	363
16.02	Approaches to Regulating the Interrogation Process	364
	(a) The Due Process “Voluntariness” Test.....	364
	(1) Police Conduct	364
	(2) Characteristics of the Accused.....	367
	(3) Analysis of the “Voluntariness” Test.....	368
	(b) The <i>McNabb-Mallory</i> Rule	369
	(c) <i>Massiah</i> and <i>Escobedo</i> : The Sixth Amendment Approach	371
	(d) <i>Miranda</i> and Fifth Amendment Analysis.....	373
	(1) The Holding	373
	(2) Research on <i>Miranda</i>	374
	(3) The Conceptual Importance of <i>Miranda</i>	375
	(e) Other Approaches.....	377
	(1) The Congressional Voluntariness Test	377
	(2) The Waiver-with-Counsel Approach	378
	(3) Judicial Questioning.....	378
	(4) Videotaping of Interrogations	379
16.03	The Elements of <i>Miranda</i>	379
	(a) Custody	380
	(1) Field Stops	380
	(2) Questioning in the Home	381
	(3) Questioning at the Stationhouse or Its Equivalent.....	382
	(4) Minor Crimes	385
	(5) Questioning by Non-Police.....	385
	(b) Interrogation.....	386
	(1) The <i>Innis</i> Formulation	386
	(2) When Custodial Questioning Is Not Interrogation	387
	(c) The Warnings	388
	(1) <i>De Minimis</i> Variations	389
	(2) Collateral Information	390
	(3) The “Public Safety” Exception	391

	(d) Waiver: Generally.....	393
	(1) Express v. Implied Waiver.....	394
	(2) The Knowing and Intelligent Requirement.....	395
	(3) The Voluntariness Requirement.....	397
	(e) Waiver: After Assertion of Rights.....	398
	(1) Assertion of the Right to Remain Silent.....	398
	(2) Assertion of the Right to Counsel.....	399
	(3) How Rights Must Be Asserted.....	400
	(4) Protection Afforded by Assertion of Right to Counsel.....	402
	(5) Initiation and Waiver.....	403
16.04	The Resurgence of the Sixth Amendment Approach.....	404
	(a) The Initiation of Criminal Prosecution.....	405
	(b) Deliberate Elicitation.....	407
	(c) Waiver.....	408
16.05	Confessions and the Exclusionary Rule.....	410
	(a) Standing.....	410
	(b) The Impeachment Exception.....	411
	(1) Use of Statements.....	411
	(2) Use of Silence.....	413
	(c) Derivative Evidence.....	415
	(1) Other Confessions.....	416
	(2) Witnesses.....	419
	(3) Physical Evidence.....	419
16.06	Assessing the Admissibility and Credibility of a Confession.....	421
	(a) The Decisionmaker.....	421
	(b) Burden and Standard of Proof.....	422
	(c) Challenging the Confession at Trial.....	423
16.07	Conclusion.....	423

PART C. IDENTIFICATION PROCEDURES

	CHAPTER 17. GENERAL RESTRICTIONS ON IDENTIFICATION PROCEDURES.....	431
17.01	Introduction.....	431
17.02	The Right to Counsel.....	432
	(a) Type of Procedure.....	433
	(b) Timing of the Procedure.....	434
	(c) Waiver and Alternatives to Counsel.....	435
17.03	Due Process.....	435
	(a) Suggestiveness.....	436
	(b) Necessity.....	437
	(c) Reliability.....	437
17.04	Other Constitutional Considerations.....	438
	(a) Fourth Amendment.....	438
	(b) Fifth Amendment.....	439
17.05	Identifications as Fruit.....	439
	(a) Of Previous Illegal Identifications.....	439
	(b) Of Other Illegality.....	441
17.06	Procedure for Determining Admissibility.....	442

17.07	Conclusion	443
CHAPTER 18. EYEWITNESS IDENTIFICATION TECHNIQUES.....		445
18.01	Introduction.....	445
18.02	Lineups	445
	(a) Compelling Participation.....	445
	(b) Defense Request for a Lineup.....	446
	(c) The Role of Counsel.....	447
	(d) Substitute Counsel.....	448
	(e) Unnecessary Suggestiveness and Lineups	448
18.03	Showups.....	449
	(a) When Permissible.....	450
	(1) Immobility or Loss of Witness	450
	(2) Inaccessibility of Suspect	450
	(3) On-the-Scene Identifications	450
	(4) Non-Emergency Showups	451
	(5) Accidental Confrontations	452
	(6) In-Court Identifications	452
	(b) The Right to Counsel.....	452
18.04	Photograph Identification.....	453
	(a) When Permissible.....	453
	(b) Due Process Requirements	453
18.05	Conclusion	454

PART D. ENTRAPMENT

CHAPTER 19. THE ENTRAPMENT DEFENSE		459
19.01	Introduction.....	459
19.02	Supreme Court Cases	460
	(a) The Statutory Basis of the Defense.....	460
	(b) Predisposition v. Conduct of Authorities	461
	(c) The Definition of Predisposition.....	464
	(d) A Due Process Test?	466
19.03	Entrapment in the Lower Courts.....	467
	(a) The Conduct of Authorities and Due Process Tests.....	467
	(b) The Predisposition Test	468
19.04	Conclusion	470

PART E. THE PRETRIAL PROCESS

CHAPTER 20. INITIAL CUSTODIAL DECISIONS: PRETRIAL DETENTION AND RELEASE		475
20.01	Introduction.....	475
20.02	The Probable Cause Hearing.....	475
	(a) When a Hearing Is Required	475
	(b) Procedural Protections.....	476
	(c) Timing of the Hearing.....	477
20.03	Bail and Other Pretrial Release Conditions.....	478
	(a) The History of Pretrial Release	478
	(1) English Antecedents.....	479

	(2) The Money Bail and Bondsman System	479
	(3) The First Reform Movement: Personal Recognizance	480
	(4) The Second Reform Movement: Preventive Detention	481
	(b) The “Right” to Pretrial Release	483
	(c) Constitutional Criteria for Pretrial Release	484
	(1) Likelihood of Flight	484
	(2) Dangerousness	485
	(3) Lack of Financial Resources	486
	(4) Non-Citizenship	487
	(5) Material Witnesses.....	489
	(d) The Pretrial Release Hearing.....	490
	(e) Trial and Post-Conviction Bail.....	492
	(f) Appeal of the Pretrial Release Decision.....	492
20.04	Disposition of Pretrial Detainees	493
20.05	Conclusion	495

**CHAPTER 21. CONSTRAINTS ON PROSECUTORIAL DISCRETION:
CHARGING, JOINDER AND VENUE RULES.....**

	CHARGING, JOINDER AND VENUE RULES.....	497
21.01	Introduction	497
21.02	The Decision to Forego Prosecution.....	497
	(a) Reasons for Non-Prosecution.....	498
	(b) Limitations on Non-Prosecution.....	499
	(c) Agreements Not to Prosecute	501
21.03	Constraints on Bringing Charges	501
	(a) Discriminatory Prosecution	502
	(1) The Three-Prong Test	502
	(2) Prosecution of Conspicuous Lawbreakers.....	503
	(3) Prosecution of “Significant” Offenders	505
	(4) Pretextual Prosecution.....	506
	(5) Discovery	506
	(b) Vindictive Prosecution	508
	(c) Duplicative Statutes.....	510
21.04	Joinder	511
	(a) Joinder Analysis.....	511
	(b) Joinder of Charges.....	512
	(1) Inferring Criminal Disposition	512
	(2) Cumulation of Evidence	513
	(3) Inhibition of Defense	514
	(4) Double Jeopardy Concerns.....	515
	(c) Joinder of Defendants	515
21.05	Venue	517
21.06	Conclusion	519

CHAPTER 22. THE PRELIMINARY HEARING.....

22.01	Introduction.....	523
22.02	When the Hearing Is Required.....	523
	(a) Under the Federal Constitution	523
	(b) Under Federal and State Statutes	523

22.03	The “Probable Cause” Standard.....	524
	(a) Definition	524
	(b) Consequences of Probable Cause Finding	525
22.04	Procedural Rights.....	526
	(a) Right to Counsel	526
	(b) Rules of Evidence	527
	(c) Right to Cross-Examine and Subpoena Witnesses	528
22.05	Conclusion	529
CHAPTER 23. THE GRAND JURY.....		531
23.01	Introduction.....	531
23.02	Structure and Composition.....	532
	(a) Creation and Duration.....	532
	(b) Size and Voting Requirements	533
	(c) Selection.....	533
	(1) The Venire.....	533
	(2) The Jury.....	534
23.03	Secrecy	536
	(a) Rationale.....	536
	(b) Disclosure by Witnesses.....	536
	(c) Disclosure to the Defendant	537
	(d) Disclosure to Third Parties	538
23.04	Rights of Grand Jury Witnesses	540
	(a) Right to Testify.....	540
	(b) Warnings.....	540
	(c) Right to Counsel.....	541
23.05	Investigative Powers.....	542
	(a) The Subpoena Power.....	543
	(1) Fourth Amendment Limitations	543
	(2) Fifth Amendment Limitations.....	546
	(3) Miscellaneous Limitations	547
	(b) The Immunity Power	548
	(c) The Contempt Power.....	548
	(d) The Role of the Prosecutor and the Court	549
23.06	Grand Jury Screening: Challenges to the Indictment.....	550
	(a) Sufficiency and Admissibility of Evidence	550
	(1) Application of Evidentiary Rules.....	550
	(2) Application of Exclusionary Rules.....	551
	(b) Prosecutorial Misconduct.....	552
	(c) Discrimination in the Selection Process	554
	(d) The Essential Elements Requirement and Variance.....	554
23.07	An Assessment of the Grand Jury	556
23.08	Conclusion	558
CHAPTER 24. DISCOVERY.....		563
24.01	Introduction.....	563
24.02	Discovery by the Prosecution	564
	(a) Fifth Amendment Limitations.....	564
	(1) Notice of Alibi and Other Defenses	565

	(2) Witness Lists and Statements	566
	(3) Identities of Non-Witnesses	567
	(4) Tangible and Documentary Evidence	568
	(b) Sixth Amendment Limitations	569
	(c) Reciprocity Limitations	570
	(d) Sanctions on Defense	570
24.03	Discovery by the Defense	571
	(a) Mandatory Reciprocal Disclosure by the Prosecution	572
	(b) Limitations on Defense Discovery	572
24.04	The Constitutional Duty to Disclose Exculpatory Information	574
	(a) The Duty to Reveal False Testimony	574
	(b) The Materiality Test	575
	(c) The Decisionmaker	579
	(d) Timing of the Disclosure	580
24.05	The Constitutional Duty to Preserve Evidence	582
24.06	Conclusion	584
CHAPTER 25. THE RIGHT TO SPEEDY TRIAL		587
25.01	Introduction	587
25.02	When the Right Is Implicated	588
	(a) The Post-Accusation Rule	588
	(b) Pre-Accusation Delay	590
25.03	The Dismissal Remedy	591
25.04	The Constitutional Criteria	591
	(a) Length of Delay	592
	(b) Reasons for Delay	592
	(c) Assertion of the Right	594
	(d) Prejudice	595
25.05	Legislation: The Federal Speedy Trial Act	596
	(a) An Overview	596
	(b) Specific Time Limits	596
	(c) Exemptions	597
	(d) Continuances	598
	(e) Dismissal/Reprosecution	599
	(1) The Courts' Approach	600
	(2) An Alternative Approach	601
	(f) Burden of Proof	602
	(g) Sixth Amendment Rights	602
25.06	Conclusion	602

PART F. ADJUDICATION OF GUILT

CHAPTER 26. GUILTY PLEAS AND PLEA BARGAINING		607
26.01	Introduction	607
26.02	The Plea Bargaining Process	609
	(a) Types of Bargains and Pleas	609
	(b) Rights During Bargaining	609
	(1) The Right to Effective Counsel	609
	(2) The Right to Exculpatory Evidence	611

	(3) The Right to Be Present	612
	(c) Permissible Inducements and Concessions	612
	(1) Causation v. Compulsion	612
	(2) Prosecutorial Inducements	613
	(3) Statutory Inducements	615
	(4) Judicial Inducements	616
	(d) Admission of Statements Made in Connection with Bargaining	617
26.03	The Legal Effect of a Bargain	618
	(a) On the Court	618
	(b) On the Prosecution	618
	(1) Post-Arrest	619
	(2) Pre-Arrest	619
	(3) Remedy for Breach	620
	(c) On the Defendant	621
26.04	Taking the Plea	622
	(a) The Intelligent Plea Requirement	623
	(1) Understanding the Charge	623
	(2) Understanding of Consequences	624
	(3) Understanding Rights Waived by a Plea	625
	(4) Understanding the Bargain	626
	(5) Competence	627
	(b) The Voluntariness Requirement	628
	(c) The Factual Basis Requirement	628
26.05	Challenging a Guilty Plea	630
	(a) Substantive and Procedural Options	630
	(b) Withdrawal of the Plea	630
	(c) Appeal	631
	(d) Federal Habeas: Direct and Bargain Challenges	633
	(e) Federal Habeas: Independent Challenges	634
	(1) The General Rule	634
	(2) Ineffective Assistance	635
	(3) “Incurable” Defects	636
	(4) Conditional Pleas	637
	(f) The Effect of an Overturned Plea	638
26.06	Conclusion	639
CHAPTER 27. THE RIGHT TO AN IMPARTIAL JURY AND JUDGE		643
27.01	Introduction	643
27.02	The Scope of the Right to Jury Trial	643
	(a) History and Rationale of the Right	643
	(1) Application to the States	644
	(2) Application to “Sentencing Factors”	645
	(b) The Right in Noncriminal Proceedings	647
	(c) The Petty Crime Exception	648
	(1) The Six-Month Imprisonment Rule	648
	(2) Relevance of Other Penalties	649
	(3) Aggregation of Imprisonment Sanctions	649
	(d) Jury Size	650
	(e) Voting Requirements	651

	(f) Trials <i>De Novo</i>	653
	(g) Waiver	653
	(1) When Waiver May Occur	653
	(2) “Veto” of Waiver	654
27.03	Selection of Prospective Jurors	654
	(a) The Selection Process and Its Rationale	654
	(b) Equal Protection Challenges	656
	(c) The Fair Cross-Section Requirement	659
	(1) Distinctive Group	660
	(2) Underrepresentation	662
	(3) Systematic Exclusion	663
	(d) The Right to the Jury List	664
27.04	Voir Dire	664
	(a) The Basic Structure	664
	(b) Voir Dire Questioning	665
	(1) Questions About Racial Prejudice	665
	(2) Questions About Attitudes Toward the Death Penalty	666
	(3) Questions About Other Matters	667
	(c) For Cause Challenges	668
	(1) Implied Bias	668
	(2) Death Penalty Cases	669
	(d) Peremptory Challenges	672
	(1) By the Prosecution	672
	(2) By the Defense	678
27.05	The Right to an Impartial Judge	681
	(a) The Constitutional Right	681
	(b) Mechanisms for Assuring Impartiality	682
27.06	Fair Proceedings and Media Access	682
	(a) The Effects of Publicity	682
	(b) Alleviating the Effects of Publicity	683
	(1) Voir Dire Inquiry	683
	(2) Change of Venue	686
	(3) Sequestration of the Jury	687
	(c) Preventing Pretrial Publicity	687
	(1) Gag Orders on the Media	687
	(2) Gag Orders on the Participants	688
	(3) Closure of the Proceedings	689
	(d) The Media in the Courtroom	691
27.07	Conclusion	692
CHAPTER 28. ADVERSARIAL RIGHTS: OPENNESS, CONFRONTATION,		
AND COMPULSORY PROCESS		697
28.01	Introduction	697
28.02	The Right to Public Adjudication	697
	(a) Rationale and Scope	697
	(b) Closure of Normally Open Proceedings	698
28.03	The Right to Be Present	699
	(a) Physical Presence	699
	(1) Proceedings at Which Applicable	699

	(2) Waiver/Forfeiture Through Absence	700
	(3) Forfeiture Through Conduct	701
	(b) Competency to Proceed	702
	(1) The Standard	702
	(2) Raising the Competency Issue.....	703
	(3) Self-Incrimination and the Competency Evaluation.....	704
	(4) Disposition of the Incompetent Defendant	705
	(c) Prejudicial Aspects of Presence	706
	(1) Refusal to Testify.....	707
	(2) Prejudicial Physical Appearance	708
	(3) Presence During Prosecution’s Case	708
28.04	The Right to Live Testimony: When Hearsay Is Permitted	709
	(a) The Definition of Testimonial Evidence	711
	(b) When Testimonial Evidence Is Admissible	717
	(1) Unavailability and Cross-Examination	717
	(2) Forfeiture	720
	(3) Declarant Is Available.....	721
	(4) Non-Hearsay Use.....	723
	(5) Dying Declarations	723
	(c) When Nontestimonial Evidence Is Admissible	723
	(d) Co-Defendant Confessions	724
	(1) Redaction.....	725
	(2) Testimony by the Maker of the Confession.....	726
	(3) Interlocking Confessions.....	726
28.05	Challenging Witnesses in the Courtroom.....	727
	(a) The Right to a Face-to-Face Encounter	727
	(b) The Right to Cross-Examine.....	728
	(1) State-Imposed Limitations	728
	(2) Discovery for Impeachment Purposes	730
	(3) Witness-Created Limitations.....	731
28.06	Compulsory Process and the Right to Present Evidence.....	731
	(a) The Defendant’s Right to Testify	731
	(b) The Right to Subpoena Witnesses.....	733
	(c) The Right to Present Evidence	734
	(1) State-Imposed Limitations; Generally	735
	(2) Sanctions for Defense Misconduct.....	737
	(3) Immunity for Defense Witnesses	739
28.07	Conclusion	739
CHAPTER 29. APPEALS		743
29.01	Introduction	743
29.02	Assuring a Meaningful Appeal.....	744
	(a) The Right to Trial Transcripts	744
	(b) The Right to Counsel.....	744
	(c) The Right to Pursue “Non-Frivolous” Arguments.....	746
	(d) The Right to Appeal Without Fear of Retaliation	746
	(1) When the Presumption of Vindictiveness Applies	747
	(2) Overcoming the Presumption	748
	(e) Waiver/Forfeiture of Appeal and Plain Error.....	749

29.03	The Final Judgment Rule	750
	(a) Defense Appeals	750
	(b) Prosecution Appeals	753
	(c) Third Party Appeals	754
29.04	Appeals by the Prosecution	754
29.05	Harmless Error.....	755
	(a) Various Approaches.....	755
	(b) The Federal Rule for Non-Constitutional Error.....	757
	(c) Constitutional Error.....	757
	(1) The Reasonable Doubt Test	758
	(2) Errors Requiring Automatic Reversal.....	760
29.06	Retroactivity	762
	(a) The <i>Linkletter-Stovall</i> Rule	763
	(1) Retroactive Rules: Definition	764
	(2) The Effect of Retroactive Rules	765
	(b) Cases on Appeal.....	765
	(c) Cases on Habeas Review.....	767
	(1) The Definition of “New Rule”	769
	(2) Exceptions to Non-Retroactivity of New Rules.....	771
29.07	Conclusion	772
CHAPTER 30. DOUBLE JEOPARDY		777
30.01	Introduction	777
30.02	When Jeopardy Attaches	778
	(a) Type of Proceeding	778
	(1) Confiscations of Property	780
	(2) Deprivations of Liberty	782
	(b) Point in the Proceedings	783
30.03	Exceptions to the Double Jeopardy Prohibition	784
	(a) Reprosecution After Reversal of Conviction	785
	(1) The “Implied Acquittal” Doctrine	785
	(2) The Evidentiary Insufficiency Exception.....	786
	(3) The Termination Requirement	788
	(b) Dismissals Which Are Not “Acquittals”	788
	(c) Mistrials.....	791
	(1) The Manifest Necessity Doctrine; Prosecution or Judicial Motion	792
	(2) Prosecutorial Overreaching; Defense Motion	795
30.04	The “Same Offense” Prohibition.....	796
	(a) Defining Same Offense.....	796
	(1) Various Approaches.....	797
	(2) The Supreme Court’s Approach.....	799
	(3) Collateral Estoppel.....	801
	(b) Exceptions to the Same Offense Prohibition	805
	(1) New Conduct or Event	805
	(2) Severance by the Defendant	806
	(3) Jurisdictional Bar.....	807
	(4) Guilty Pleas over Prosecution Objection.....	807
	(c) Cumulative Punishments	808

30.05	Resentencing	809
	(a) After Reversal of Conviction	810
	(b) After Prosecution Appeal of Sentence.....	812
	(c) After Discovery of a Defect in the Sentence	813
30.06	The Dual Sovereignty Doctrine	814
	(a) Federal-State/Tribe Prosecutions.....	814
	(b) State-State Prosecutions.....	816
	(c) State-Municipal Prosecutions.....	816
30.07	Conclusion	816

PART G. THE ROLE OF THE DEFENSE LAWYER

CHAPTER 31. THE RIGHT TO COUNSEL.....	821	
31.01 Introduction.....	821	
31.02 The Right to Counsel at Trial.....	822	
	(a) Due Process Origins	822
	(b) The Sixth Amendment Actual Imprisonment Threshold	823
	(c) Non-Criminal Trials.....	826
31.03 Counsel at Other Stages of the Criminal Process.....	827	
	(a) Under the Sixth Amendment	827
	(1) Critical Stage Analysis.....	828
	(2) Trial-Like Confrontation Analysis	829
	(3) The Definition of “Criminal Prosecution”	831
	(b) Under the Fifth Amendment.....	832
	(c) Under the Equal Protection and Due Process Clauses.....	832
	(1) Appeals as of Right.....	833
	(2) Probation and Parole Revocations.....	833
	(3) Discretionary Appeals	834
	(4) Habeas Proceedings.....	835
31.04 Waiver of the Right to Counsel	836	
	(a) The Right to Self-Representation.....	837
	(b) The Definition of Waiver.....	838
	(c) Standby Counsel.....	841
	(d) Reasserting the Right to Counsel.....	842
31.05 The Right to Counsel of One’s Choice	843	
	(a) The Indigent’s Right.....	843
	(b) The Non-Indigent’s Right	843
31.06 The Right to Expert Assistance.....	846	
31.07 Reimbursement of Defense Fees	848	
31.08 Conclusion	849	
CHAPTER 32. EFFECTIVE ASSISTANCE OF COUNSEL.....	853	
32.01 Introduction.....	853	
32.02 When the Right Applies.....	853	
	(a) Linkage to Right to Counsel	853
	(b) Retained Counsel.....	854
32.03 The Substantive Standard.....	855	
	(a) Differing Approaches in the Lower Courts	855

	(b) The Supreme Court's Approach.....	857
	(1) The Performance Prong.....	858
	(2) The Prejudice Prong.....	859
32.04	Application of the Standard.....	860
	(a) State Interference Cases.....	860
	(1) Denial or Late Appointment of Counsel.....	860
	(2) Obstruction of Counsel's Performance.....	862
	(3) Intrusion into the Attorney-Client Relationship.....	863
	(b) Conflict of Interests Cases.....	863
	(1) The Judicial Notice Requirement.....	864
	(2) The Actual Conflict Requirement.....	866
	(3) The Legitimate Interest Requirement.....	867
	(4) Waiver.....	868
	(c) Attorney Errors: Relevant Considerations.....	869
	(1) Specification of the Error.....	870
	(2) Existence of a Reasonable Explanation.....	871
	(3) The Prejudice Inquiry.....	875
	(4) The Defendant's Control over the Decision.....	878
32.05	Methods of Improving Representation.....	881
32.06	Conclusion.....	883

PART H. THE RELATIONSHIP BETWEEN THE FEDERAL AND STATE COURTS

	CHAPTER 33. FEDERAL HABEAS CORPUS: THE CLOSING DOOR.....	889
33.01	Introduction.....	889
33.02	The Substantive Scope of the Writ.....	892
	(a) From <i>Watkins</i> to <i>Brown</i> : Expansion of the Writ.....	892
	(b) The Full and Fair Hearing Exception.....	893
	(1) The Scope of the Exception.....	894
	(2) Criteria for a Full and Fair Hearing.....	896
	(3) 1996 Habeas Reform.....	897
	(c) The New Rule Exception.....	897
	(d) The Federal Question Requirement.....	901
	(e) The Fundamental Defect Exception.....	902
	(f) Harmless Error.....	903
	(g) Application of the Writ in Wartime and Outside the United States.....	904
33.03	The Effect of Default Under State Procedural Rules.....	908
	(a) The Adequate and Independent Requirement.....	908
	(b) The Deliberate Bypass Rule.....	910
	(c) Development of the Cause and Prejudice Standard.....	911
	(d) The Definition of Cause and Prejudice.....	914
	(1) Cause: Novel Claims.....	914
	(2) Cause: State Interference.....	916
	(3) Cause: Ineffective Assistance.....	916
	(4) Prejudice.....	920
	(e) The Actual Innocence Exception.....	921
	(f) Procedural Default in Capital Cases.....	924

33.04	Other Procedural Hurdles	925
	(a) The Exhaustion Requirement.....	925
	(1) Available State Remedies	926
	(2) Ineffective Corrective Processes	927
	(3) The Fair Presentation Requirement	928
	(4) Mixed Petitions	929
	(b) Successive Petitions	930
	(1) Raising the Same Claim.....	930
	(2) Raising a Different Claim	932
	(c) The Custody Requirement	934
	(d) Filing Deadlines	936
33.05	Independent Factfinding	937
	(a) The Presumption of Correctness	938
	(b) Mixed Questions of Fact and Law	939
	(c) Evidentiary Hearings.....	940
33.06	The Right to Assistance on Collateral Review	942
33.07	Conclusion	943
CHAPTER 34. STATE CONSTITUTIONS AS AN INDEPENDENT SOURCE OF RIGHTS.....		949
34.01	Introduction	949
34.02	The Four Phases of State-Federal Judicial Interplay.....	949
	(a) Dual Federalism	950
	(b) Co-Option	951
	(c) New Federalism.....	951
	(d) Forced Linkage	953
34.03	An Assessment of the Different Approaches to State Constitutional Interpretation	955
	(a) Differences in Local Law.....	955
	(b) When Local Factors Are Absent: The Cases For and Against Linkage....	956
	(1) Uncertainty	956
	(2) Duplication of Review.....	956
	(3) Result-Oriented Decisionmaking	957
	(c) A Case Study	958
34.04	The Supreme Court's Reaction to the New Federalism.....	960
34.05	Conclusion	961
TABLE OF CASES		963
INDEX.....		983