

TABLE OF CONTENTS

PREFACE	V
INTRODUCTION	VII
TABLE OF CASES	LXVII
TABLE OF AUTHORITIES.....	LXXXVII
Chapter 1. Basic Principles.....	1
I. A Criminal Case.....	1
Legislative Designation.....	1
Civil Penalty: United States v. L.O. Ward.....	2
Commitment of Sex Offenders: Allen v. Illinois and Kansas v. Hendricks	2
Registration of Sex Offenders—Civil Regulation or Criminal Punishment?: Smith v. Doe.....	4
Criminal Procedure Issues in a Civil Context	4
II. Two Special Aspects of Constitutional Law	5
A. Incorporation.....	5
Duncan v. Louisiana	7
Note on Incorporation.....	13
Note on State Constitutional Protections.....	14
B. Retroactivity.....	15
1. The Impact of New Decisions	15
2. Prior Supreme Court Law on Retroactivity, and the Harlan Approach.....	16
3. Current Supreme Court Approach to Retroactivity	16
Teague v. Lane	17
Commentary on the Teague Rule	23
What Is a “New Rule”?.....	23
Refusal to Promulgate a New Rule as a Decision on the Merits?	25
Substantive Changes Are Fully Retroactive Under Teague v. Lane.....	25
The Teague Rule and Statutory Limitations on Habeas Corpus Relief	28
Abandoning the Watershed Rule: Edwards v. Vannoy	30
Retroactivity of Fourth Amendment New Rules Does Not Justify Exclusion: Davis v. United States	30
Can States Apply a New Supreme Court Rule Retroactively Even if the Supreme Court Does Not? Danforth v. Minnesota	31
Retroactive Application Against the Defendant?: Lockhart v. Fretwell.....	31

Chapter 2. Searches and Seizures of Persons and Things	33
I. An Introduction to the Fourth Amendment.....	33
The Fourth Amendment Protects “The People”.....	34
The Fourth Amendment Governs State Action	35
The Fourth Amendment Applies to “Searches” and “Seizures”	35
The Fourth Amendment Applies in Non-Criminal Cases.....	35
The Fourth Amendment Is Composed of Two Clauses	36
The Fourth Amendment Is Silent on Consequences	36
II. The State Action Requirement	38
Foreign Officials.....	39
III. What Is a “Search”?	40
A. Historical Foundations of the Fourth Amendment	40
B. The Physical Intrusion Test	42
Olmstead v. United States	43
Note on Olmstead v. United States	50
Continuing the Physical Intrusion Test	51
Growing Discontent with the Physical Trespass Test.....	52
C. The Reasonable Expectation Test.....	53
Katz v. United States	53
Katz as a Two-Pronged Test	58
Did Katz Displace Olmstead?.....	59
United States v. Jones	59
Note on United States v. Jones	68
Property Interest Required to Invoke the Fourth Amendment	
Trespass Theory	69
D. Applications of the Physical Intrusion and Reasonable	
Expectation of Privacy Tests	69
1. Subjective Manifestation Under <i>Katz</i>	70
2. Open Fields.....	71
Questions About Oliver and the Open Fields Doctrine	72
Defining “Curtilage”: United States v. Dunn	73
Implied Permission to Enter Curtilage	74
Florida v. Jardines	74
Questions About Jardines	78
3. Information Voluntarily Shared with Third Parties	80
a. Consensual Electronic Surveillance: Misplaced	
Trust.....	80
b. Financial Records.....	81
c. Pen Registers.....	82
4. Government Investigative Activity Subsequent to Private	
and Other Legal Searches	82
Limits Imposed by the Initial Search: Walter v. United	
States	82
Reopening Permitted: United States v. Jacobsen	83
Controlled Deliveries: Illinois v. Andreas.....	85

5.	Exposure to Public View—the Public Observation Doctrine	86
a.	Tracking Public Movements: Radio Beepers	86
b.	Tracking Public Movements: Cell Site Location Information	89
	Carpenter v. United States	89
	Questions After Carpenter	103
c.	Aerial Surveillance	105
d.	Trash	108
	Questions About Greenwood	109
e.	Manipulation of Bags in Public Transit	110
6.	Investigative Methods That Can Only Reveal Illegal Activity	110
a.	Canine Sniffs	111
b.	Chemical Testing for Drugs	112
7.	Methods That Can Reveal Both Innocent and Illegal Activity	113
8.	Jails, Prison Cells, and Convicts	116
9.	Public Schools and Public Employees	117
IV.	What Is a “Seizure”?	118
	Seizures and Searches Implicate Different Interests	119
A.	Seizures of Persons	120
	Torres v. Madrid	120
	Note on Torres: California v. Hodari D.	124
	Questions After Torres and Hodari D.	125
	Seizures by Displays of Authority: The Mendenhall “Free to Leave” Test	126
	Applying the “Free to Leave” Test: Florida v. Royer	127
	Factors Relevant to Finding a Seizure Under Mendenhall and Royer	129
	Factory Sweeps: INS v. Delgado	130
	Bus Sweeps: Florida v. Bostick and United States v. Drayton	132
	United States v. Drayton	132
	Is the “Freedom to Walk Away” Test “Reasonable”	136
	State of Mind Required for a Stop: Brower v. County of Inyo and Brendlin v. California	138
	When Does Submission Occur?	139
B.	Seizures of Houses	140
C.	Seizures of Papers and Effects	141
V.	The Tension Between the Reasonableness and the Warrant Clauses	143
A.	The Importance of the Warrant Clause Generally	143
B.	The Reason for the Warrant Requirement	144
	Johnson v. United States	144
	Note on Johnson	146

C.	The Function of the Warrant Requirement	146
	The Warrant Requirement in Reality	148
VI.	Obtaining a Search Warrant: Constitutional Prerequisites	149
A.	Demonstrating Probable Cause	149
1.	Source of Information on Which Probable Cause Is Based.....	149
	Spinelli v. United States.....	150
	Applying Spinelli.....	154
2.	Rejection of a Rigid Two-Pronged Test.....	156
	Illinois v. Gates	156
	Note on Gates	165
	Strong Prong/Weak Prong	165
	The Function of Corroboration After Gates	165
	Insufficient Corroboration	166
	The Gates Test Applied: Massachusetts v. Upton	167
3.	The Citizen Informant	170
4.	Accomplices	171
5.	Quantity of Information Required for Probable Cause	171
	Equivocal Activity	171
	Probable Cause to Arrest.....	175
	Mistaken Arrests.....	178
	Probabilities with Multiple Suspects	178
	Maryland v. Pringle	179
	Questions on Pringle.....	181
	Dog Sniffs and Probable Cause: Florida v. Harris.....	181
	Probable Cause to Arrest for a Crime Different from the Charge on Which the Defendant Was Arrested: Devenpeck v. Alford	183
6.	Collective Knowledge.....	184
7.	Staleness of Information.....	184
8.	First Amendment Concerns	185
B.	Probable Cause, Specificity and Reasonableness	186
1.	The Things That Can Be Seized.....	186
	Warden v. Hayden	186
	Note on the Mere Evidence Rule.....	188
2.	Probable Cause as to Location of Evidence	189
3.	Searches of Non-Suspects' Premises.....	190
4.	Describing the Place to Be Searched	192
	Function of the Particularity Requirement.....	192
	Reasonable Particularity	193
	The Wrong Address.....	194
	The Breadth of the Place to Be Searched	195
5.	Particularity for Arrest Warrants.....	196
6.	Describing the Things to Be Seized	196
	Andresen v. Maryland	197
	The Particularity Requirement as Applied to Searches of Computers, Cellphones, etc.	199

	Protocols for Searching for Electronic Information	203
	Particularity as to Information in a Facebook Account.....	203
	Reasonable Particularity	204
	Severability.....	205
	7. Limitations on Warranted Searches	206
	8. Anticipatory Warrants.....	206
	9. “Sneak and Peek” Warrants	208
C.	Executing the Warrant.....	209
	1. The Knock and Announce Requirement.....	209
	“Refused Admittance”	210
	2. Exceptions to the Notice Rule	211
	No “Breaking”	211
	Emergency Circumstances: Richards v. Wisconsin	211
	No-Knock Warrants	214
	No-Knock Entries and Destruction of Property: United States v. Ramirez	214
	3. Exigent Circumstances After Knocking	215
	4. Does the Violation of the Knock and Announce Requirement Justify Exclusion of Evidence?	216
	5. Timing and Scope of Execution	217
	Destruction and Excessiveness	217
	Unnecessarily Intrusive Searches	218
	When Is the Search Completed?	220
	6. Presence of the Warrant	221
	7. Enlisting Private Citizens to Help Search	221
	Compelling Assistance from Third Parties—Including Decryption.....	221
	Willing Assistance.....	222
	8. Media Ride-Alongs	223
D.	The Screening Magistrate	225
	1. Detached and Neutral.....	225
	Rubber Stamp.....	225
	2. Who Qualifies as a Magistrate?: Legal Training	226
	Note on Shadwick	227
	3. Records of Magistrate Decisions	227
VII.	To Apply or Not Apply the Warrant Clause.....	227
	A. Arrests in Public	227
	United States v. Watson.....	228
	Arrest for Minor Crimes	231
	Note on the Use of Force in Making an Arrest	232
	High-Speed Chases: Scott v. Harris	233
	B. The Role of Magistrates in Arrests	234
	Detentions for Less than 48 Hours	235
	Remedy for a McLaughlin Violation	236
	C. Arrests in the Home.....	236
	Reason to Believe the Suspect Is at Home	238
	Is the Arrest at Home or in Public?	238

Hotels and Motels	239
Arrests in the Home of a Third Party.....	239
Who May Object to a Search	241
D. Material Witnesses	242
Pretextual Use of Material Witness Detention: <i>Ashcroft v. Al-Kidd</i>	243
E. Stop and Frisk.....	245
1. Stop and Frisk Established	246
<i>Terry v. Ohio</i>	246
Note on the Impact of <i>Terry</i>	254
Critique of <i>Terry</i>	254
An Early Application of <i>Terry</i> — <i>Adams v. Williams</i>	255
Bright Line Rules Under <i>Terry</i> — <i>Pennsylvania v. Mimms</i>	257
Questions About <i>Mimms</i>	259
<i>Mimms</i> and Passengers	259
Protective Frisks During Traffic Stops: <i>Arizona v. Johnson</i>	260
<i>Mimms</i> Applied: <i>New York v. Class</i>	260
Detention of Occupants of a Residence During Legal Law Enforcement Activity: Note on <i>Michigan v. Summers</i> , <i>Muehler v. Mena</i> , and <i>Bailey v. United States</i>	261
2. The Reasonable Suspicion Standard	264
a. Quantum of Suspicion.....	264
Comparison to Probable Cause	265
Probability, Alternative Explanations, and Common Sense: Assessing Reasonable Suspicion.....	266
<i>Kansas v. Glover</i>	267
Questions After <i>Kansas v. Glover</i>	277
b. Source of Information.....	278
Anonymous Tips	279
In-Person Anonymous Tips	281
Inferring Reliability and Basis of Knowledge	283
<i>Navarette v. California</i>	283
Questions After <i>Navarette</i>	290
Reasonable Suspicion of a Completed Crime: <i>United States v. Hensley</i>	292
Relevance of the Race of the Suspect	292
Use of Profiles.....	296
Overbroad Profile Factors.....	297
Reasonable Suspicion and Flight from the Police: <i>Illinois v. Wardlaw</i>	298
Reasonable Suspicion and Bad Answers to Police Questions	299
c. Can a Mistake of Law Give Rise to Reasonable Suspicion? <i>Heien v. North Carolina</i>	300
<i>Heien v. North Carolina</i>	300

3.	Searches for Police Protection Under the <i>Terry</i> Doctrine	304
	Frisk Cannot Be Used to Search for Evidence: <i>Minnesota v. Dickerson</i>	304
	Suspicion Required to Support the Right to Frisk.....	305
	The Effect of Concealed Gun Permits on the Right to Frisk for Weapons	307
	Frisking Based on the Type of Crime for Which the Person Is Suspected	307
	Protective Searches Beyond the Suspect’s Person: <i>Michigan v. Long</i>	308
	Applying <i>Michigan v. Long</i>	309
	Protective Searches of Persons Other than the Suspect	310
	Inspecting Objects During the Course of a Protective Frisk	311
	Protective Sweeps: <i>Maryland v. Buie</i>	312
	Protective Sweep Other than During an Arrest	313
4.	Brief and Limited Detentions: The Line Between “Stop” and “Arrest”	314
	a. Applications of Physical Force.....	314
	b. Forced Movement of the Suspect to a Custodial Area	315
	c. Forced Movement for Identification Purposes	317
	d. Investigative Techniques That Are Permissible Within the Confines of a <i>Terry</i> Stop	318
	Criminalizing the Refusal to Provide Identification During a <i>Terry</i> Stop: <i>Hiibel v. Sixth Judicial District Court of Nevada</i>	318
	e. Overly Intrusive Investigation Techniques	319
	f. Investigation of Matters Other than the Reasonable Suspicion That Supported the Stop: Stop After a Stop	319
	Reasonable Suspicion as to Another Crime.....	321
	Consensual Encounters After a Stop Has Ended: <i>Ohio v. Robinette</i>	322
	g. Interrogations Beyond the Confines of <i>Terry</i>	323
	h. Fingerprinting	323
	i. Time Limits on <i>Terry</i> Stops.....	324
	Questions After <i>Sharpe</i>	326
5.	Limited Searches for Evidence by Law Enforcement Officers Under <i>Terry</i>	326
	Questions After <i>Hicks</i>	327
6.	Detention of Property Under <i>Terry</i>	328
	Unreasonably Lengthy Detention of Property: <i>United States v. Place</i>	328
	Questions After <i>Place</i>	329

7.	Application of the <i>Terry</i> Reasonableness Analysis Outside the Stop and Frisk Context—to Probationers and Parolees.....	330
	Questions About Knights.....	331
	Suspicionless Searches of Parolees Found Reasonable:	
	<i>Samson v. California</i>	331
	Can the Knights/ <i>Samson</i> Balancing Test Be Extended Beyond Probationers and Parolees?.....	332
F.	Search Incident to Arrest: The Arrest Power Rule.....	333
1.	Spatial Limitations	333
	<i>Chimel v. California</i>	333
	Application of <i>Chimel's</i> Case-by-Case Approach to the Permissible Scope of a Search Incident to Arrest	336
	Timing of Grab Area Determination.....	337
	Arrest Power Can Be Invoked for Any Custodial Arrest and Can Cover Post-Arrest Movements:	
	<i>Washington v. Chrisman</i>	339
	Arrest Leading to Exigent Circumstances	340
	Protective Sweep Incident to an Arrest: <i>Maryland v. Buie</i>	341
2.	Temporal Limitations	342
	Sequence of Search and Arrest	342
	Removal from the Arrest Scene	342
3.	Comparing Searches Incident to Arrest to Frisks	343
	<i>United States v. Robinson</i>	343
4.	The Arrest Power Rule Applied to Automobiles	347
	The <i>Belton</i> Rule.....	347
	Limitations on Arrest-Power Rule as Applied to Automobile Searches: <i>Arizona v. Gant</i>	349
	<i>Arizona v. Gant</i>	349
	Questions After <i>Gant</i>	357
5.	Searches of Cellphones and Other Electronics Incident to Arrest.....	359
	<i>Riley v. California</i>	359
	Note on <i>Riley</i>	371
6.	Breathalyzers and Blood Tests Incident to Arrest.....	371
	<i>Birchfield v. North Dakota</i>	371
7.	Custodial Arrests for Minor Offenses	379
	<i>Atwater v. City of Lago Vista</i>	380
	Arrests for Minor Offenses After <i>Atwater</i>	384
8.	The Arrest Power Rule Where No Custodial Arrest Takes Place	385
	Question on <i>Knowles</i>	385
9.	The Arrest Power Rule Where the Arrest Violates State Law.....	385
	Question After <i>Virginia v. Moore</i>	386

G.	Pretextual Stops and Arrests	386
	Whren v. United States	387
	Questions About Whren	390
	Testifying?	392
	Equal Protection Issues	393
	First Amendment Issues	394
	Probable Cause of a Traffic Violation	395
H.	Plain View and Plain Touch Seizures.....	396
	Horton v. California	397
	Inadvertence and Computer and Cellphone Searches	400
	Probable Cause to Seize an Item in Plain View: Arizona v. Hicks	402
	Plain View, Probable Cause, and Legalized Marijuana	403
	The Plain Touch Doctrine.....	404
I.	Automobiles and Other Movable Objects	405
	1. The <i>Carroll</i> Doctrine	405
	2. The Progeny of <i>Carroll</i>	406
	Chambers v. Maroney	406
	Questions After Chambers	408
	The Diminished Expectation of Privacy Rationale: California v. Carney	409
	Motor Homes	410
	Vehicles on Private Property: Collins v. Virginia	411
	3. Movable Containers—in and out of Cars	413
	Questions After Chadwick.....	414
	Mobile Containers in the Car	414
	California v. Acevedo	414
	Probable Cause Issues After Acevedo.....	420
	Delayed Search of Containers: United States v. Johns	421
	Search of a Cellphone Found in a Car	421
	Search of Passengers' Property: Wyoming v. Houghton	423
	Questions After Houghton.....	426
J.	Exigent Circumstances.....	426
	1. Exigent Circumstances Generally	426
	2. Hot Pursuit.....	426
	3. Police and Public Safety	428
	Public Safety and the Relevance of a Law Enforcement Objective: Brigham City v. Stuart.....	429
	Brigham City v. Stuart	429
	Application of Brigham City v. Stuart: Michigan v. Fisher	431
	Pinging a Cellphone for Public Safety	432
	4. The Risk of Destruction of Evidence.....	433
	The Seriousness of the Offense	434
	Murder Scene	434
	Minor Offenses	435

	Drawing Blood in a DUI Arrest to Prevent the Loss of Evidence: <i>Missouri v. McNeely</i>	436
5.	When Police Provoke an Exigent Circumstance	437
	<i>Kentucky v. King</i>	438
	<i>Kentucky v. King</i> and the Relevance of a Prior Opportunity to Obtain a Warrant.....	444
6.	Electronic Warrants.....	445
7.	Seizing Premises in the Absence of Exigent Circumstances	445
	Prohibiting Entry While a Warrant Is Being Obtained:	
	<i>Illinois v. McArthur</i>	446
	<i>Illinois v. McArthur</i>	446
K.	Administrative Searches and Other Searches and Seizures	
	Based on “Special Needs”	448
1.	Safety Inspections of Homes	449
	The Assessment of Cause for a Safety Inspection	450
	Warrants Without Probable Cause?	450
2.	Administrative Searches of Businesses	451
	<i>New York v. Burger</i>	451
	A Narrower Definition of “Closely Regulated” Businesses:	
	<i>City of Los Angeles v. Patel</i>	459
	Substitute for a Warrant	461
	The Element of Surprise.....	462
	Administrative Inspections by Law Enforcement	
	Officers.....	463
	“Special Needs” Search of Text Messages of a Public	
	Employee: <i>City of Ontario v. Quon</i>	465
3.	“Special Needs” Searches and Seizures of	
	Individuals.....	466
a.	Searches and Seizures on the Basis of	
	Reasonable Suspicion Rather than Probable Cause	466
	Limitations on Searches of Students: <i>Safford Unified</i>	
	<i>School District v. Redding</i>	467
b.	Suspicionless Searches of Persons on the Basis of	
	“Special Needs”	468
	Drug-Testing of Employees: <i>Skinner v. Railway</i>	
	Labor Executives	468
	Drug-Testing of Employees: <i>National Treasury</i>	
	Employees v. <i>Von Raab</i>	470
	What if There Is No Record of Drug Abuse?.....	472
	Drug-Testing of Schoolchildren.....	473
	Questions After <i>Earls</i>	477
	Drug-Testing Politicians.....	477
	Drug-Testing Cases After <i>Chandler</i>	479
	The Purpose of Drug-Testing: <i>Ferguson v. City of</i>	
	<i>Charleston</i>	480

Suspicionless Safety Searches in Airports, Subways,
Public Buildings, etc..... 481

Searching Beyond the Scope of Safety 486

Safety-Based Strip Searches of Detainees Without
Reasonable Suspicion: *Florence v. Board of
Chosen Freeholders* 487

Monitoring Parolees and Sex Offenders 489

4. DNA Testing..... 489

Maryland v. King 489

Questions After *King*: DNA Investigations 499

5. Roadblocks, Checkpoints and Suspicionless Seizures 500

Individual Stops Without Suspicion 500

Permanent Checkpoints 500

Temporary DUI Checkpoints: Michigan Department of
State Police *v. Sitz*..... 500

Questions After *Sitz*..... 502

Drug Checkpoints..... 503

City of Indianapolis v. Edmond..... 503

Note on *Edmond* and Security Checkpoints..... 509

Drug Interdiction as a Secondary Purpose..... 510

Drug-Detection as a Vehicle-Related Safety Interest..... 511

Suspicionless Checkpoints to Obtain Information About
a Crime: *Illinois v. Lidster*..... 511

6. Inventory Searches 512

Community Caretaking Function 512

Warrantless, Suspicionless Searches: *South Dakota v.
Opperman* 513

Property Carried by an Arrestee: *Illinois v. Lafayette*..... 515

Limits on Police Discretion: *Colorado v. Bertine* 516

Unlimited Police Discretion Invalidates an Inventory
Search: *Florida v. Wells* 517

The Problem of Pretext..... 518

Less Onerous Alternatives 519

Searches and Seizures That Serve No Inventory
Interest..... 520

Inventory Searches of Cellphones..... 521

7. Border Searches 521

Warrantless, Suspicionless Search of International Mail:
United States v. Ramsey..... 522

“Routine” Border Searches 523

United States v. Flores-Montano 524

Questions After *Flores-Montano*..... 526

Border Searches and Seizures of Persons: United States
v. Montoya de Hernandez 528

The Consequences of *Montoya* 529

Border Searches of Laptops, Video Cameras, Cellphones,
etc. 530

	Searches Away from the Border.....	531
L.	Consent Searches	533
1.	Voluntary Consent	533
	Voluntariness Distinguished from Waiver: <i>Schneckloth</i> v. <i>Bustamonte</i>	533
	Reaffirming <i>Schneckloth</i> : <i>United States v. Drayton</i>	534
	The Consequences of Refusing Consent	535
	The Impact of Custody.....	535
	Totality of the Circumstances	536
	Threats of Action if Consent Is Refused	538
	Must a Person Who Is Stopped Be Told He Is Free to Leave?	539
	Did the Person Consent?	540
2.	Third Party Consent	541
	Actual Authority: <i>United States v. Matlock</i>	541
	Third-Party Consent to Search Cellphones and Computers.....	541
	Apparent Authority: <i>Illinois v. Rodriguez</i>	542
	Mistakes of Law	543
	The Duty to Investigate Third Party Authority to Consent	543
	Third Party Consent Where the Defendant Is Present and Objecting: <i>Georgia v. Randolph</i>	544
	What Does It Mean to Be “Present” and “Objecting” Under <i>Randolph</i> ?.....	546
	Does <i>Randolph</i> Apply Outside the Home?.....	547
3.	Scope of Consent	548
	Scope Defined by the Object of the Search: <i>Florida v.</i> <i>Jimeno</i>	548
	Ambiguity Construed Against the Citizen	549
4.	Withdrawing Consent	550
5.	Credibility Determinations	551
VIII.	Statutory Regulation of Searches and Seizures	552
A.	The Federal Statutory Response to <i>Berger</i> and <i>Katz</i> : Title III and Its Amendments	553
B.	The Foreign Intelligence Surveillance Act	557
	Data Mining Under—and Around—FISA.....	560
IX.	Remedies for Fourth Amendment Violations	561
A.	The Background of the Exclusionary Rule.....	561
	Exclusionary Rule for the Federal Courts: <i>Weeks v. United</i> <i>States</i>	562
B.	The Exclusionary Rule and the States	562
	<i>Mapp v. Ohio</i>	565
	Note on <i>Mapp</i>	567
C.	Arguments for and Against the Exclusionary Rule.....	568

D.	Alternatives to Exclusion	572
1.	Civil Damages Recovery	573
	Supreme Court View on Civil Damage Recovery as an Alternative to the Exclusionary Rule: <i>Hudson v.</i> <i>Michigan</i>	574
	Fortified Civil Damages Remedy	575
	Proposals in Congress for Alternatives to the Exclusionary Rule	576
2.	Criminal Prosecutions of Offending Officers.....	577
3.	Police Rulemaking and Other Administrative Solutions	577
4.	Sentence Reductions	578
E.	Limitations on Exclusion.....	578
1.	“Good Faith”—Reasonable Belief That Conduct Is Legal	578
	<i>United States v. Leon</i>	579
	Note on <i>Massachusetts v. Sheppard</i>	587
	Reasonable Reliance on Unreasonable Warrants	589
	<i>Leon, Gates and Warrants Clearly Lacking in Probable Cause</i>	590
	<i>Leon and Warrants Lacking Particularity</i>	592
	<i>Leon and Untrue or Omitted Statements in the Warrant Application</i>	593
	<i>Leon and the Abdicating Magistrate</i>	595
	<i>The Teaching Function</i>	596
2.	The Good Faith Exception and Warrantless Searches	597
	Reasonable Reliance on Legislative Acts: <i>Illinois v.</i> <i>Krull</i>	598
	Reliance on Court Clerical Personnel: <i>Arizona v. Evans</i>	598
	Reliance on Law Enforcement Clerical Personnel: <i>Herring v. United States</i>	600
	<i>Herring v. United States</i>	600
	New Rules, Retroactivity, and Remedies: <i>Davis v.</i> <i>United States</i>	604
	<i>Davis and the Applicability of the Supreme Court’s New Fourth Amendment Rulings</i>	605
	Good Faith Where the Arresting/Searching Officer Is at Fault?	606
3.	Establishing a Violation of a Personal Fourth Amendment Right.....	609
	<i>Rakas v. Illinois</i>	609
	Note on <i>Rakas</i>	613
	Abolition of Automatic Standing: <i>United States v.</i> <i>Salvucci</i>	614
	Ownership of Seized Property Does Not Necessarily Confer Standing: <i>Rawlings v. Kentucky</i>	615

	Targets Without Standing: <i>United States v. Payner</i>	615
	Presence in the Home of Another: <i>Minnesota v. Carter</i>	616
	Cars, Drivers, Passengers	616
	Disassociation from Property	618
	Rental Cars.....	619
	Coconspirator “Standing” Rejected: <i>United States v. Padilla</i>	619
4.	The Requirement of Causation and the Exception for Attenuation.....	620
	Searches and Seizures That Produce No Evidence: The Ker-Frisbie Doctrine	620
	Causal Connection: Evidence Found After a Fourth Amendment Violation	620
	<i>Brown v. Illinois</i>	621
	Statements Tainted by an Illegal Arrest: <i>Dunaway v. New York</i> , <i>Taylor v. Alabama</i> , and <i>Kaupp v. Texas</i>	624
	Statements Not Tainted by an Illegal Arrest: <i>Rawlings v. Kentucky</i>	625
	Warrantless In-Home Arrest Is Not Causally Connected to a Subsequent Confession: <i>New York v. Harris</i>	626
	Insufficient Causal Connection Between a Knock-and-Announce Violation and Evidence Found in the Home: <i>Hudson v. Michigan</i>	627
	Consent as Breaking the Chain of Causation	629
	Witness Testimony After Illegal Arrests and Searches: <i>United States v. Ceccolini</i>	630
	Outstanding Warrants Breaking the Chain of Causation: <i>Utah v. Strieff</i>	631
	<i>Utah v. Strieff</i>	631
5.	Independent Source	638
	<i>Murray v. United States</i>	638
	Questions About <i>Murray</i>	642
6.	Inevitable Discovery	643
	Establishing the Exception: <i>Nix v. Williams</i>	643
	Inevitable Discovery Through a Hypothetical Inventory Search	645
	“We Would Have Obtained a Warrant”	646
	Establishing Inevitability	647
7.	Use of Illegally Seized Evidence Outside the Criminal Trial Context	648
	Grand Jury Proceedings	648
	Civil Tax Proceedings	649
	Civil Deportation Proceedings.....	649
	Habeas Corpus Proceedings	650
	Parole Revocation Proceedings.....	650
	Sentencing Proceedings	652

8.	Use of Illegally Obtained Evidence for Impeachment Purposes.....	654
	Opening the Door on Direct Examination: <i>Walder v. United States</i>	654
	Opening the Door on Cross-Examination: <i>United States v. Havens</i>	654
	Impeachment of Defense Witnesses: <i>James v. Illinois</i>	655
F.	Procedural Aspects of the Exclusionary Rule.....	657
1.	Attacking the Warrant.....	657
	Challenging the Truthfulness of the Warrant Application: <i>Franks v. Delaware</i>	657
	Materiality Requirement.....	658
2.	Challenging a Warrantless Search.....	658
3.	The Suppression Hearing and Judicial Review.....	658
	Limitations on Use of Suppression Hearing Testimony at Trial: <i>Simmons v. United States</i>	659
	Appellate Review.....	659
Chapter 3. Self-Incrimination and Confessions.....		661
I.	The Privilege Against Compelled Self-Incrimination.....	661
A.	The Policies of the Privilege Against Compelled Self-Incrimination.....	661
1.	The Need to Examine Policies.....	661
2.	A Chart to Assist Analysis.....	662
B.	Scope of the Privilege.....	667
1.	Proceedings in Which the Privilege Applies.....	667
	Applicability to Non-Criminal Cases: <i>Counselman v. Hitchcock</i>	667
2.	Criminal Cases.....	668
	Civil Penalties: <i>United States v. L.O. Ward</i>	668
	Detention for “Treatment”.....	669
	Invoking the Privilege in a Civil Case to Prevent Use of Statements in a Criminal Case.....	670
3.	Foreign Prosecution.....	670
4.	Compulsion of Statements Never Admitted at a Criminal Trial.....	672
C.	What Is Compulsion?.....	673
1.	Use of the Contempt Power.....	673
2.	Other State-Imposed Sanctions.....	674
	<i>Lefkowitz v. Turley</i>	674
	The Function of Immunity.....	676
	Threat of Disbarment as Compulsion.....	676
	The Benefit-Penalty Distinction.....	676
	Self-Incrimination and Clemency Proceedings: <i>Ohio Adult Parole Authority v. Woodard</i>	677
	The Benefit-Penalty Distinction and Penalties Imposed on Incarcerated Sex Offenders: <i>McKune v. Lile</i>	678

3.	Comment on the Invocation of the Privilege	681
	The Griffin Rule	681
	Adverse Inferences at Sentencing: <i>Mitchell v. United States</i>	682
	Adverse Inferences Drawn in Civil Cases	684
4.	Compulsion and the “Exculpatory No” Doctrine	684
D.	To Whom Does the Privilege Belong?	685
	<i>Fisher v. United States</i>	685
	Note on the Collective Entity Rule	687
E.	What Is Protected	688
1.	Non-Testimonial Evidence	688
	<i>Schmerber v. California</i>	688
	Note on Testimonial vs. Non-Testimonial Evidence	690
	Testimonial Evidence and the Cruel Trilemma:	
	<i>Pennsylvania v. Muniz</i>	692
	Express or Implied Assertions of Fact: <i>Doe v. United States</i>	694
	Psychological Evaluations	694
	Drawing an Adverse Inference for Refusing to Produce	
	Non-Testimonial Evidence	695
2.	Documents and Other Information Existing Before	
	Compulsion	695
	<i>Fisher v. United States</i>	696
	Application of the Fisher Analysis: <i>United States v. Doe</i>	
	and the Act of Production	698
	Private Papers	698
	When Is the Act of Production Incriminating?	699
	Production of Corporate Documents: <i>Braswell v. United States</i>	702
	The Difference Between a Corporate Agent’s	
	Compelled Oral Testimony and Compelled Document	
	Production	704
	Production of a Person in Response to a Court Order:	
	<i>Baltimore City Dept. of Social Services v. Bouknight</i>	704
3.	Required Records	705
	Limitations on the Required Records Exception	706
	Compelled Reporting of an Accident: <i>California v. Byers</i>	708
	Is the Target Group Inherently Suspect?	708
F.	Procedural Aspects of Self-Incrimination Claims	710
1.	Determining the Risk of Incrimination	710
	Compelled Self-Identification and the Tendency to	
	Incriminate	711
	<i>Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County</i>	711

	The Risk of Incrimination and Denial of Guilt: <i>Ohio v. Reiner</i>	712
2.	Immunity	713
	The Constitutionality of Use Immunity: <i>Kastigar v. United States</i>	714
	Proving That Immunized Testimony Was Not Used	715
	Impeachment, Perjury	715
	Subsequent Statements: <i>Pennsylvania v. Conboy</i>	716
3.	Invoking the Privilege.....	717
	The Requirement of Expressly Invoking the Privilege: <i>Garner v. United States, Minnesota v. Murphy and Salinas v. Texas</i>	717
4.	Waiver of the Privilege	720
	Determining the Scope of a Waiver	720
	Waiver of the Privilege at a Guilty Plea Hearing? <i>Mitchell v. United States</i>	721
	Defenses Regarding Mental State	722
II.	Confessions and Due Process	722
A.	Introduction.....	722
B.	The Due Process Cases	724
	The Involuntariness Test: <i>Brown v. Mississippi</i>	724
	Pre-Miranda Cases: Circumstances Relevant to Involuntariness	726
	Criticism of the Involuntariness Test.....	728
	Increasing Emphasis on Assistance of Counsel: <i>Spano v. New York</i>	729
	The Importance of <i>Spano</i>	732
	The Continuing Relevance of Due Process Protection.....	732
	Modern Due Process Cases	733
	Deception and False Promises by the Police	733
	False Documentary Evidence.....	737
	Honest Promises vs. False Promises	737
	Threats of Physical Violence: <i>Arizona v. Fulminante</i>	738
	Focus on Police Misconduct: <i>Colorado v. Connelly</i>	739
	Problems with a Test Based on Free Will	740
	The Involuntariness Test and False Confessions	741
	Coercive Interrogation of Suspected Terrorists	742
III.	The Fifth Amendment Privilege Against Compelled Self-Incrimination	743
A.	<i>Miranda v. Arizona</i>	743
	<i>Miranda v. Arizona</i>	743
	Analysis of <i>Miranda</i>	756
	Judicial Review and Education of the Public.....	759
	The Impact of <i>Miranda</i>	761
	<i>Miranda's</i> Costs on Habeas Review: <i>Withrow v. Williams</i>	763
	<i>Miranda's</i> Impact on Review of Confessions for Voluntariness	763

	The Miranda Compromise.....	764
	Alternatives to Miranda	765
B.	Did Congress Overrule <i>Miranda</i> ?.....	767
	Dickerson v. United States.....	767
	Note on Dickerson.....	773
	Fed. R. Crim. P. 5.....	774
C.	Limitations on <i>Miranda</i> Exclusion.....	775
	1. Impeaching the Defendant-Witness	775
	Impeachment with Prior Silence.....	778
	Pre-Arrest Silence	780
	Post-Arrest, Pre-Miranda Silence	780
	2. Admitting the Fruits of a <i>Miranda</i> Violation.....	781
	Leads to Witnesses: Michigan v. Tucker	781
	Subsequent Confessions: Oregon v. Elstad and Missouri	
	v. Seibert.....	782
	Missouri v. Seibert	783
	Questions After Seibert	790
	Is There a Seibert Violation if the Mirandized Statement	
	Is Not Repetitive of the Unwarned Statement?:	
	Bobby v. Dixon.....	792
	Physical Evidence Derived from Miranda-Defective	
	Confessions	793
	Questions After Patane.....	795
	3. An Emergency Exception.....	796
	New York v. Quarles	796
	Questions After Quarles	799
	The Scope of the Public Safety Exception	799
	Categorical Application of the Public Safety Exception	800
	Questioning Suspected Terrorists Under the Public	
	Safety Exception.....	801
D.	Open Questions After <i>Miranda</i>	801
	1. What Is Custody?.....	801
	Arrest Is Custody	802
	Objective Test: Stansbury v. California.....	802
	The Relevance of the Suspect's Youth: J.D.B. v. North	
	Carolina	803
	Prisoners in Custody: Mathis v. United States and	
	Howes v. Fields.....	804
	Interrogation at the Police Station: Oregon v. Mathiason	
	and California v. Beheler.....	805
	Meetings with a Probation Officer: Minnesota v.	
	Murphy.....	806
	Terry Stops: Berkemer v. McCarty	806
	Summary on Custody: Relevant Factors	807
	2. What Is Interrogation?	809
	Rhode Island v. Innis	809
	Application of Innis: Arizona v. Mauro.....	814

	Appeals to the Welfare of Others as Interrogation?	815
	Confronting the Suspect with Incriminating Evidence	816
	Direct vs. Indirect Statements	817
	Clarifying Ambiguous, Voluntary Statements of the Suspect	818
	The Relevance of the Officer's Intent to Obtain an Incriminating Answer	818
	Questions Attendant to Custody: <i>Pennsylvania v.</i> <i>Muniz</i>	819
	Determining the Scope of the Booking Questions Exception	820
3.	Does <i>Miranda</i> Apply to Undercover Activity?	820
4.	Does <i>Miranda</i> Protection Depend on the Seriousness of the Offense?	821
5.	How Complete and Accurate Must the Warnings Be?	822
	Ambiguity About the Right to Have an Attorney Present Throughout the Questioning: <i>Florida v. Powell</i>	823
6.	Do the <i>Miranda</i> Safeguards Apply to Custodial Interrogations of Foreigners Conducted Abroad?	824
E.	Waiver of Rights During Custodial Interrogation	826
1.	Waiver and the Role of Counsel	826
	Knowing and Voluntary.....	826
	Relationship of Waiver Standards to the Test for Voluntary Confessions	827
	Understanding the <i>Miranda</i> Warnings	828
	Conditional Waivers: <i>Connecticut v. Barrett</i>	829
	Information Needed for an Intelligent Waiver: The Scope of the Interrogation— <i>Colorado v. Spring</i>	830
	Information Needed for an Intelligent Waiver: The Inadmissibility of a Previous Confession— <i>Oregon v.</i> <i>Elstad</i>	831
	Information Needed for an Intelligent Waiver: Efforts of a Lawyer to Contact the Suspect— <i>Moran v.</i> <i>Burbine</i>	831
	State of Mind of Police Irrelevant	833
	The Role of Counsel Under <i>Miranda</i>	833
	No Requirement to Inform the Suspect of Counsel's Efforts	834
	Dissent in <i>Burbine</i>	835
	Abstract Right to Counsel vs. Concrete Offer of Assistance	835
2.	Waiver After Invocation of <i>Miranda</i> Rights—and Questions of Whether Those Rights <i>Have</i> Been Invoked....	836
a.	Invocation of the Right to Silence	836
	Scrupulous Honor: <i>Michigan v. Mosley</i>	836
	Scrupulously Honoring an Invocation of Silence	837

	Right to Silence Must Be Clearly Invoked; Waiver Can Be Implied from the Confession Itself; and Interrogation After Warnings Is Permissible So Long as Waiver Is Ultimately Found: <i>Berghuis</i> <i>v. Thompkins</i>	838
	<i>Berghuis v. Thompkins</i>	839
	Is <i>Thompkins</i> Consistent with <i>Miranda</i> ?	846
	Custodial Interrogation Requirement.....	846
b.	Invocation of the Right to Counsel.....	847
	Bright Line Rule: <i>Edwards v. Arizona</i>	847
	Relationship Between <i>Edwards</i> and <i>Innis</i>	847
	Defining Initiation: <i>Oregon v. Bradshaw</i>	848
	Applications of <i>Bradshaw</i>	850
	Ambiguous Invocation of the Right to Counsel: <i>Davis</i> <i>v. United States</i>	850
	Questions After <i>Davis</i>	853
	Consequences of Explicit Invocation: <i>Smith v.</i> <i>Illinois</i>	853
	Unrelated Crimes: <i>Arizona v. Roberson</i>	854
	Waiver After the Suspect Has Consulted with Counsel: <i>Minnick v. Mississippi</i>	855
	The Requirement of Continuous Custody for <i>Edwards</i> Protection: <i>Maryland v. Shatzer</i>	857
	Which Constitutional Right to Counsel Is Invoked? <i>McNeil v. Wisconsin</i>	859
	Can <i>Edwards</i> Protections Be Triggered in Advance of Interrogation?	860
IV.	Confessions and the Sixth Amendment Right to Counsel	861
A.	The <i>Massiah</i> Rule	861
	<i>Massiah v. United States</i>	861
	The Rationale of <i>Massiah</i>	864
	Note on <i>Escobedo v. Illinois</i>	864
B.	Obtaining Information from Formally Charged Defendants.....	865
	<i>Brewer v. Williams</i>	866
	Sixth Amendment Attaches at Formal Charge: <i>United</i> <i>States v. Gouveia</i>	873
	On the Meaning of “Deliberate” Elicitation	874
	Application of the Deliberate Elicitation Standard: <i>Fellers v.</i> <i>United States</i>	875
C.	Use of Undercover Officers and State Agents.....	876
	Jailhouse Plant: <i>United States v. Henry</i>	876
	The Listening Post: <i>Kuhlmann v. Wilson</i>	878
	Is the Informant a State Agent?	879
D.	Continuing Investigations.....	880
	<i>Maine v. Moulton</i>	880

	In a Continuing Investigation, Which Crimes Are Related to the Crime Charged for Purposes of the Sixth Amendment?: <i>Texas v. Cobb</i>	882
E.	Waiver of Sixth Amendment Protections	883
	Waiving Sixth Amendment Rights After Receiving Miranda Warnings: <i>Brewer v. Williams</i> , <i>Berghuis v. Thompkins</i> , and <i>Patterson v. Illinois</i>	883
	Indictment Warnings.....	885
	Waiving the Sixth Amendment Right to Counsel After Invoking It: <i>Michigan v. Jackson</i> and <i>Montejo v.</i> <i>Louisiana</i>	885
	<i>Montejo v. Louisiana</i>	886
	Questions After <i>Patterson</i> and <i>Montejo</i>	891
F.	Sixth Amendment Exclusion.....	892
	Chapter 4. Identifying Suspects.....	895
I.	Introduction	895
II.	The Judicial Response	898
A.	Identifications and the Right to Counsel	898
	1. The <i>Wade-Gilbert</i> Rule	898
	<i>United States v. Wade</i>	899
	Note on the Meaning of <i>Wade</i>	903
	Evidence of the Prior Identification Itself: <i>Gilbert v.</i> <i>California</i>	903
	The Role of a Lawyer at a Lineup	905
	2. Limits on the Right to Counsel at Identification Procedures	906
	Post-Charge Photographic Identifications: <i>United</i> <i>States v. Ash</i>	907
B.	Due Process Limitations on Identification Evidence.....	908
	1. The Foundations of a Due Process Test.....	908
	<i>Stovall v. Denno</i>	908
	Permissible Suggestiveness?	910
	2. Applying the Due Process Test	912
	<i>Simmons v. United States</i>	912
	Violation of Due Process: <i>Foster v. California</i>	912
	3. Unnecessary Police Suggestiveness Is Not Enough	913
	<i>Manson v. Brathwaite</i>	913
	Questions After <i>Manson</i>	918
	4. State Courts Reject <i>Manson</i>	919
	<i>State v. Martinez</i>	920
	Note on the New Mexico Legislation	926
	5. Unnecessary Police Suggestiveness Required for a Due Process Violation	928
	<i>Perry v. New Hampshire</i>	928
	Independent Source for In-Court Identification?.....	935

6.	Determining Whether Unnecessary Suggestiveness Caused an Unreliable Identification.....	935
7.	The Effect of Identification Procedures on Trials	936
8.	The Unreliability of In-Court Identifications	937
9.	Voice Identification	938
C.	Non-Constitutional Protections Against Unreliable Identifications	939
	Jury Instructions	940
Chapter 5.	The Right to Counsel.....	945
I.	The Background.....	945
II.	The Early Development of the Right.....	946
	The Right to Appointed Counsel in Felony Cases	946
	Powell v. Alabama	946
	Note on Powell and Betts v. Brady.....	949
	Between Betts and Gideon.....	951
III.	A New and Sweeping Right and Its Limits.....	951
A.	Appointed Counsel for Indigents in All Felony Prosecutions	951
	Gideon v. Wainwright.....	951
	Establishing Indigency	953
B.	The Right to Appointed Counsel in Misdemeanor Cases	954
	Argersinger v. Hamlin	954
	Note on Argersinger.....	956
	The Actual Imprisonment Rule for Misdemeanor Cases: Scott v. Illinois	956
	Applying the Actual Imprisonment Approach	958
	Use of Uncounseled Convictions to Enhance a Sentence: Baldasar v. Illinois and Nichols v. United States	958
IV.	The Scope of the Right.....	960
A.	Critical Stages.....	960
	Definition of a Critical Stage: United States v. Wade	960
	Preliminary Hearings: Coleman v. Alabama	961
	Other Pre-Trial Critical Stages.....	961
B.	Post-Trial Stages.....	963
	Mempa v. Rhay	963
	Limitations on Mempa	965
	Right to Counsel on Appeal: Douglas v. California and Ross v. Moffitt	965
	Applying Ross to Other Post-Trial Stages.....	967
	Parole and Probation Revocation Proceedings: Gagnon v. Scarpelli	968
	Juvenile Proceedings: In re Gault	969
C.	The Right Extended to Experts	969
	Ake Violation: McWilliams v. Dunn	970
	Note on Ake	972
D.	Civil Contempt Proceedings.....	972

V. The Promise of *Gideon* 973

Chapter 6. The Screening and Charging Process..... 977

I. Criminal Justice Choices..... 977

 A. Controlled and Uncontrolled Choices 977

 B. Less than Full Enforcement of the Law 977

II. Screening by the Police 979

 A. The Nature of Police Choices 979

 The Choice Not to Arrest 979

 B. Some Typical Cases 981

III. The Prosecutorial Decision Whether to Charge 982

 A. The Power of the Prosecutor 982

 B. The Nature of the Charging Decision 983

 C. The Factors That Are Considered 984

 Sample Cases 986

 Politics, and the Chance of a Favorable Outcome 989

 D. The Decision Not to Prosecute 990

 Refusing to Prosecute a Certain Type of Crime 990

 Overriding the Grand Jury’s Decision to Indict 991

 Explaining the Decision Not to Prosecute 992

 E. Prosecutorial Rulemaking 993

 F. Selective Enforcement 994

 1. Charges on Collateral Matters 994

 2. Constitutional Limitations on the Charging Decision 996

 United States v. Armstrong 996

 Critique of Armstrong 1001

 Unprosecuted Similar Conduct 1002

 Example of a Case in Which Discovery Was Ordered on a
 Selective Prosecution Claim 1002

 3. Choice of Forum 1004

 4. Choice of Crime to Charge 1005

IV. The Grand Jury 1005

 A. Background on the Grand Jury 1006

 The Historical Role of the Grand Jury 1006

 A Right Not Incorporated 1009

 What Is an Infamous Crime? 1010

 How the Grand Jury Works 1010

 B. The Charge to the Grand Jury 1011

 C. The Procedures of the Grand Jury 1017

 Discriminatory Selection of Grand Jurors 1018

 Discriminatory Selection of Grand Jury Forepersons 1018

 Secrecy of Grand Jury Proceedings 1018

 Grand Jury Witnesses and Secrecy 1019

 Exceptions to Grand Jury Secrecy 1019

 D. The Relationship of the Grand Jury to the Prosecutor and to
 the Court 1020

 Role of the Prosecutor 1021

E.	The Grand Jury as a Protection Against Unjust Prosecution	1022
F.	The Evidence Before the Grand Jury	1023
	Costello v. United States	1023
	Analysis of Costello	1024
	Use of Illegally Obtained Evidence	1025
	Warnings to Witnesses Testifying Before the Grand Jury	1025
	Exculpatory Evidence: United States v. Williams	1026
G.	The Grand Jury's Powers of Investigation	1028
	Grand Jury Subpoena Power	1028
	Grand Jury Cattle Call: United States v. Dionisio	1030
	Minimal Limits on Grand Jury Subpoenas: United States v. R. Enterprises, Inc.	1031
	State Grand Jury Investigations and Federal Interests:	
	Trump v. Vance	1031
	Trump v. Vance	1032
H.	Suggested Reforms of Grand Jury Procedures	1043
	Counsel in the Grand Jury Room	1044
	Grand Jury Nullification	1046
V.	The Preliminary Hearing and Its Relationship to Indictments and Informations	1047
	Procedural Requirements for a Preliminary Hearing	1048
	Preclusive Effect of a Preliminary Determination	1049
VI.	Notice of Charges, Constructive Amendment, and Variance	1050
	Constructive Amendments and Variance from Indictment at Trial	1051
	Inspecific Charges	1053
	The Elements of the Crime: Apprendi v. New Jersey	1055
	Chapter 7. Bail and Preventive Detention	1057
I.	Introduction to the Problems of Pretrial Restraint	1057
	A. The Suspect's Concerns	1057
	B. Countervailing Concerns	1060
II.	Bail: Its History and the Constitution	1060
	A. The Common Law Origins of Bail	1060
	B. The Constitutional Prohibition Against Excessive Bail: The Eighth Amendment	1061
III.	The Operation of a Bail Release System	1062
	A. The Administration of Bail: The Procedures	1062
	B. The Bondsman	1063
	Forfeiture of the Bond	1065
	C. The Bail Setting Decision	1066
	Amount of Bail Must Support the Purposes for Setting It:	
	Stack v. Boyle	1066
	Relevant Factors in Setting Bail	1067
	D. Four Sample Cases	1068

IV.	Bail Reform	1069
	A. The Federal Bail Reform Acts	1069
	Applying the Bail Reform Act of 1984	1072
	Risk to a Foreign Community?	1074
	Prior History	1075
	Drug Cases	1075
	Less Intrusive Alternatives.....	1077
	The Right to a Prompt Hearing: <i>United States v. Montalvo-</i> <i>Murillo</i>	1079
	Time Served and the Bail Reform Act: <i>Reno v. Koray</i>	1080
	Application of the Bail Reform Act to Persons Charged with Acts of Terrorism.....	1081
	B. The Bail Reform Movement	1081
V.	The Constitutionality of Preventive Detention.....	1085
	<i>United States v. Salerno</i>	1085
	Unconstitutional Applications of Preventive Detention	1090
	Constitutionality of Other Forms of Preventive Detention— Insanity Acquittees: <i>Foucha v. Louisiana</i>	1091
	Constitutionality of Other Forms of Preventive Detention— Sexual Predators: <i>Kansas v. Hendricks</i>	1092
	Constitutionality of Other Forms of Preventive Detention— Persons Subject to Deportation: <i>Zadvydas v. Davis</i>	1094
	Constitutionality of Other Forms of Preventive Detention— Detention of Undocumented Persons During Removal Proceedings: <i>Demore v. Kim</i>	1095
VI.	Special Problems in the Operation of Bail	1096
	A. Capital Offenses	1096
	B. Juvenile Offenders	1097
	C. Bail After Conviction	1098
	Chapter 8. Discovery.....	1101
I.	Criminal Discovery: Unlike Civil Discovery	1101
	The Role of Constitutional Law	1102
II.	The Basic Issues	1102
	A. Arguments Against Broad Criminal Discovery	1102
	Case-by-Case Approach?	1104
	B. Arguments Favoring Criminal Discovery	1104
III.	Discovery on Behalf of the Defendant	1105
	A. The State of the Law.....	1105
	1. The Defendant’s Statements	1106
	What Is a “Statement”?	1107
	2. Codefendants’ Statements	1108
	3. Discovery of Prior Criminal Records	1109
	4. Documents and Tangible Objects.....	1109
	Defenses Not Going to the Merits: <i>United States v.</i> <i>Armstrong</i>	1110
	Fishing Expeditions	1111

	Electronic Discovery	1112
	Department of Justice Principles and Guidelines on Electronic Discovery, and New Criminal Rule 16.1 ...	1113
5.	Experts, Examinations, and Tests	1115
	Discovery of Expert Methodology.....	1115
6.	Names, Addresses, and Statements of Witnesses.....	1117
	Jencks Act Timing Issue.....	1118
	Jencks Act Statements	1118
	The Objections to Advance Disclosure of Witness Names and Statements.....	1119
7.	Grand Jury Minutes and Transcripts.....	1120
8.	Work Product.....	1120
B.	Mechanisms for Discovery by the Defendant.....	1121
IV.	The Prosecutor’s Constitutional Duty to Disclose	1122
A.	The <i>Brady</i> Rule	1122
	Disclosure of False Evidence: <i>Mooney v. Holohan</i> and Its Progeny	1122
	Mandatory Disclosure of Materially Exculpatory Evidence: The <i>Brady</i> Rule	1123
	Knowledge Attributable to the Prosecutor: <i>Giglio v. United States</i>	1124
	Materiality and the Relevance of a Defense Request for Information: <i>United States v. Agurs</i>	1124
	<i>United States v. Agurs</i>	1124
	Refining the Test of Materiality: <i>United States v. Bagley</i>	1129
	Comments on <i>Brady-Agurs-Bagley</i>	1130
	The Relevance of a Specific Request.....	1131
B.	Applying the <i>Brady</i> Rule	1132
	Fact-Intensive Applications: Three Illustrative Cases.....	1132
	Suppressed Evidence That Would Have Been Inadmissible at Trial: <i>Wood v. Bartholemew</i>	1138
	Impeachment Evidence Found Material Under <i>Brady</i> : <i>Smith v. Cain</i>	1139
	Impeachment Evidence That Does Not Raise a Reasonable Probability of a Different Result: <i>Strickler v. Greene</i>	1140
	More Suppressed Impeachment Evidence: <i>Banks v. Dretke</i>	1143
	<i>Brady</i> and Guilty Pleas: <i>United States v. Ruiz</i>	1145
	Disclosure of Evidence Without Indicating What Is Exculpatory	1146
	“Materially Exculpatory Evidence” or “All Favorable Evidence”?.....	1147
	Congressional Legislation on the Prosecutor’s <i>Brady</i> Obligation	1149
C.	Preserving and Seeking out Exculpatory Evidence.....	1150
	Is There a Duty to Seek out Exculpatory Evidence?	1152
D.	Does the Government’s <i>Brady</i> Obligation Continue to Apply After the Defendant Has Been Convicted?.....	1152

	Ethical Responsibilities of Prosecutors	1154
V.	Discovery by the Prosecution	1155
	A. Constitutional Implications	1155
	Williams v. Florida	1155
	Reciprocity Requirement	1157
	Other Notice Requirements	1157
	B. General Discovery	1157
	C. Work Product Protection	1160
	United States v. Nobles	1160
	Note on Nobles and the Criminal Rules	1164
	Chapter 9. Guilty Pleas and Bargaining	1165
I.	The General Issues	1165
	A. Overview of the Plea Bargaining System	1165
	Prevalence (and Inevitability?) of Plea Bargaining	1165
	Cooperating Witnesses	1169
	Sentencing Differential Between Guilty Plea and Trial	1169
	Pleas by Innocent Defendants	1169
	Supreme Court Support for Plea Bargaining: Brady v. United States	1170
	B. Arguments in Favor of Plea Bargaining	1170
	C. Critique of Plea Bargaining	1171
	D. The Distinction Between Rewarding a Guilty Plea and Punishing the Decision to Go to Trial	1174
	Acceptance of Responsibility	1174
	E. Guilty Pleas, Charging Decisions, and Mandatory Minimum Sentences	1175
	F. Efficiency at What Price?	1176
	Problem	1176
	Inverted Sentencing	1177
	Three Strikes	1177
	G. Problems of Overcharging	1178
	Timing Questions: Bordenkircher v. Hayes	1178
II.	The Requirements for a Valid Guilty Plea	1179
	A. Distinguishing Bargaining from the Plea Procedure	1179
	B. The Requirement of Some Kind of a Record	1179
	The Boykin Requirements	1179
	Application of Boykin	1180
	Guilty Pleas Used for Enhancement of Sentence: Parke v. Raley	1180
	C. Voluntary and Knowing Pleas and the Advantages of a Complete Record	1181
	1. A Voluntary Plea	1181
	Package Deals	1181

	Can the Defendant Voluntarily Waive the Right to Disclosure of Information That Could Be Used to Impeach Government Witnesses or for Affirmative Defenses? <i>United States v. Ruiz</i>	1183
	<i>United States v. Ruiz</i>	1184
	Fast-Track Plea Bargaining	1186
2.	A Knowing Plea	1187
	Knowledge of the Elements of the Crime: <i>Henderson v. Morgan</i>	1187
	Applying <i>Henderson v. Morgan</i>	1187
	Knowledge of Immigration Consequences: <i>Padilla v. Kentucky</i>	1188
	Pleading to Something That Is Not a Crime: <i>Bousley v. United States</i>	1189
3.	Competence to Plead Guilty	1190
4.	Waiver of the Right to Counsel at the Plea Hearing	1192
D.	Regulating Guilty Pleas Under Federal Rule 11	1193
	1. Procedural Requirements of the Rule	1193
	2. The Role of the Court	1195
	The Judge's Power to Review the Agreement	1195
	Intrusion into the Negotiations	1196
	Example of Improper Intrusions and the Need for a Harmless/Plain Error Review: <i>United States v. Davila</i>	1197
	3. Harmless Error and Plain Error	1198
E.	Guilty Plea with a Claim of Innocence: <i>Alford Pleas</i>	1199
F.	Factual Basis for Pleas	1200
	Lack of Factual Basis for a Forfeiture: <i>Libretti v. United States</i>	1200
G.	The Finality of Guilty Pleas	1200
	1. Withdrawal of a Plea	1200
	Withdrawal of Plea Before the Agreement Is Accepted: <i>United States v. Hyde</i>	1201
	Constraints on Withdrawal and Poorly Advised Defendants	1202
	2. Breach of a Plea Agreement	1204
	Breach by the Prosecution: <i>Santobello v. New York</i>	1204
	Remedies for Prosecutorial Breach	1204
	Is There a Breach?	1205
	Government Agreement to Recommend a Sentence	1205
	Oral Promises	1206
	Cooperation Agreements	1206
	Breach by the Defendant: <i>Ricketts v. Adamson</i>	1208
	3. Appeal and Collateral Attack	1209
	4. Conditional Pleas	1211

Chapter 10. Trial and Trial-Related Rights	1213
I. The Right to a Speedy Trial	1213
A. The Background of and Policies Supporting the Right	1213
Fundamental Right: <i>Klopfert v. North Carolina</i>	1213
Interests Protected by the Speedy Trial Right	1214
Imprisonment on Other Offenses: <i>Smith v. Hooy and Dickey</i> <i>v. Florida</i>	1214
B. Delay in Arresting or Charging the Defendant	1215
1. Speedy Trial Clause Analysis	1215
<i>United States v. Marion</i>	1215
Second Indictment: <i>United States v. MacDonald</i>	1217
Inconsistent Attachment of Sixth Amendment Rights?	1217
2. Due Process Clause Analysis	1218
<i>United States v. Lovasco</i>	1218
Comment on <i>Lovasco</i>	1221
C. Assessing Speedy Trial Claims	1222
<i>Barker v. Wingo</i>	1222
Application of the Barker Test: <i>Doggett v. United States</i>	1228
Questions After <i>Doggett</i>	1231
Excusable Delay	1232
Defendant's Diligence	1232
Delay and Prejudice	1233
Delay Caused by Appointed Counsel Is Not Attributable to the State: <i>Vermont v. Brillon</i>	1234
D. Remedies for Speedy Trial Violations	1235
E. The Right to Speedy Sentencing	1235
F. Beyond the Constitution: Statutory and Judicial Time Limits	1237
The Federal Speedy Trial Act	1237
Dismissal with or Without Prejudice	1238
Time Limits of the Speedy Trial Act Cannot Be Waived Prospectively: <i>Zedner v. United States</i>	1239
COVID-19, the Pandemic and Speedy Trial	1240
II. Joinder and Severance	1242
A. Some General Rules and Problems	1242
B. Joinder of Claims	1243
C. Joinder of Defendants	1245
Exculpatory Testimony from a Codefendant	1245
Disparity in the Evidence	1246
Finger-Pointing: <i>Zafiro v. United States</i>	1246
D. Misjoinder	1248
Violation of Rule 8: <i>United States v. Lane</i>	1248
The Bruton Problem	1248
III. Constitutionally Based Proof Requirements	1249
A. Proof Beyond a Reasonable Doubt Generally	1249
Constitutional Requirement: <i>In re Winship</i>	1249

B.	Reasonable Doubt and Jury Instructions.....	1251
	“Presumed Innocent” Instructions.....	1251
	Reasonable Doubt Instructions.....	1251
C.	The Scope of the Reasonable Doubt Requirement: What Is an Element of the Crime?.....	1255
1.	Element of the Crime or Affirmative Defense?.....	1255
	Impermissible Burden-Shifting: <i>Mullaney v.</i> <i>Wilbur</i>	1255
	Flexibility to Determine Affirmative Defenses: <i>Patterson v. New York</i>	1256
	Withdrawal from a Conspiracy as an Affirmative Defense: <i>Smith v. United States</i>	1258
2.	Element of the Crime or Sentencing Factor?.....	1259
	Preponderance of the Evidence at Sentencing: <i>McMillan</i> <i>v. Pennsylvania</i>	1260
	Recidivism as a Sentencing Factor or as an Element of the Crime?.....	1260
	Facts That, if Found, Extend the Sentence Beyond the Statutory Maximum Penalty, Are Elements of the Crime: <i>Apprendi v. New Jersey</i>	1261
	<i>Apprendi v. New Jersey</i>	1262
	Note on <i>Apprendi</i>	1268
	<i>Apprendi</i> and Sentencing Factors That Do Not Increase the Minimum Penalty: <i>Harris v. United States</i> and <i>Alleyne v. United States</i>	1269
	<i>Apprendi</i> and the Death Penalty: <i>Ring v. Arizona</i>	1272
	Application of <i>Ring v. Arizona</i> : <i>Hurst v. Florida</i>	1273
	Application of <i>Ring v. Arizona</i> : <i>Hurst v. Florida</i>	1274
	Facts That Trigger Enhancement of a Sentence Under Mandatory Sentencing Guidelines Must Be Proved to a Jury: <i>Blakely v. Washington</i>	1274
	Applying <i>Apprendi-Blakely</i> to the Federal Sentencing Guidelines: <i>United States v. Booker</i>	1277
	State Sentencing Scheme Found Mandatory, Not Advisory: <i>Cunningham v. California</i>	1279
	<i>Apprendi</i> and the Determination of Facts Necessary to Impose a Consecutive Sentence: <i>Oregon v. Ice</i>	1280
	Application of <i>Apprendi</i> to Criminal Fines: <i>Southern</i> <i>Union Co. v. United States</i>	1282
	<i>Apprendi</i> Limitations as Applied to Supervised Release Revocation Proceedings: <i>United States v.</i> <i>Haymond</i>	1283
D.	Proof of Alternative Means of Committing a Single Crime.....	1287
	Distinction Between Means and Elements: <i>Richardson v.</i> <i>United States</i>	1289
E.	Presumptions.....	1291
	County Court <i>v. Allen</i>	1291

	Comment on Presumption Cases	1296
	Shifting the Burden on Intent: <i>Sandstrom v. Montana</i> and <i>Francis v. Franklin</i>	1296
	Observations About <i>Sandstrom</i> and <i>Francis</i>	1298
IV.	Trial by Jury	1299
	A. The Fundamental Right	1299
	<i>Duncan v. Louisiana</i>	1299
	Note on the Definition of Petty Offenses	1302
	Joinder of Multiple Petty Offenses: <i>Lewis v. United States</i>	1302
	Penalties Other than Incarceration	1304
	B. What the Jury Decides	1305
	C. Requisite Features of the Jury	1306
	1. Size	1306
	<i>Williams v. Florida</i>	1306
	<i>Ballew v. Georgia</i>	1309
	2. Unanimity	1312
	<i>Ramos v. Louisiana</i>	1312
	Questions After <i>Ramos v. Louisiana</i>	1317
	3. The Interplay Between Size and Unanimity	1318
	D. Jury Selection and Composition	1318
	1. The Jury Pool	1318
	2. The Fair Cross-Section Requirement and the Equal Protection Clause	1319
	Two Separate Rights	1319
	Early Cases Establishing the Rights	1320
	Fair Cross-Section Requirement Does Not Apply to Petit Jury	1321
	Standing to Object to a Fair Cross-Section Violation	1321
	<i>Taylor v. Louisiana</i>	1321
	Standards for Prima Facie Violation of the Fair Cross- Section Requirement: <i>Duren v. Missouri</i>	1323
	Distinctive Groups for Fair Cross-Section Purposes	1323
	Proper Sources for the Jury Pool	1324
	3. Voir Dire and Court Control	1325
	Questions Concerning Racial Prejudice: <i>Ham v. South</i> <i>Carolina</i>	1326
	Inquiry into Racial Prejudice Not Automatically Required: <i>Ristaino v. Ross</i>	1327
	Limits on Mandatory Inquiry into Race: <i>Rosales-Lopez</i> <i>v. United States</i>	1328
	Capital Defendants and Interracial Crime: <i>Turner v.</i> <i>Murray</i>	1329
	Voir Dire and the Need to Screen for Prejudicial Pretrial Publicity: <i>Mu'Min v. Virginia</i>	1329
	Voir Dire and Jurors' Feelings About the Death Penalty: <i>Morgan v. Illinois</i>	1330
	Voir Dire and the Federal Supervisory Power	1331

4.	Challenges for Cause	1332
a.	Jurors Who Cannot Be Excused for Cause	1332
	Willingness and Ability to Follow Instructions as to the Death Penalty: <i>Witherspoon v. Illinois</i> and <i>Adams v. Texas</i>	1332
	Death-Qualified Juries and Guilty Verdicts: <i>Lockhart v. McCree</i> and <i>Buchanan v.</i> <i>Kentucky</i>	1334
	Limitation on <i>Witherspoon</i> : <i>Wainwright v. Witt</i>	1335
	Trial Court Discretion to Strike Jurors to Maintain a Death-Qualified Jury: <i>Uttecht v. Brown</i>	1336
	Effect of a <i>Witherspoon</i> Violation: <i>Gray v.</i> <i>Mississippi</i>	1337
b.	Jurors Who Must Be Excused for Cause	1337
	Jurors Who Will Never Consider Mitigating Evidence in a Capital Case: <i>Morgan v.</i> <i>Illinois</i>	1340
	Error by Failure to Excuse for Cause, Corrected by a Peremptory Challenge: <i>Ross v. Oklahoma</i> and <i>Martinez-Salazar v. United States</i>	1341
5.	The Use of Peremptory Challenges	1342
a.	The Purpose and Function of the Peremptory Challenge	1342
	Voiur Dire and the Peremptory Challenge	1343
	Number of Peremptories	1343
	Procedure for Exercising Peremptories	1343
b.	Constitutional Limits on Peremptory Challenges	1344
	<i>Batson v. Kentucky</i>	1344
	Open Questions Left by <i>Batson</i>	1351
	Exclusion of Hispanic Jurors	1351
	Standing to Assert a <i>Batson</i> Violation: <i>Powers v.</i> <i>Ohio</i>	1351
	Peremptory Strikes by Private Litigants: <i>Edmonson</i> <i>v. Leesville Concrete Co.</i>	1353
	Peremptory Challenges by Criminal Defense Counsel: <i>Georgia v. McCollum</i>	1353
	Questions After <i>McCollum</i>	1355
	Applying <i>Batson</i> Beyond Racial Exclusions: <i>J.E.B.</i> <i>v. Alabama</i>	1355
	Prima Facie Case of Discrimination	1357
	More Likely than Not Is Too Stringent a Standard for a Prima Facie Case: <i>Johnson v.</i> <i>California</i>	1358
	Neutral Explanations: <i>Purkett v. Elem</i>	1359
	Neutral Explanations and Bilingual Jurors: <i>Hernandez v. New York</i>	1360

	Fact-Intensive Reviews of Peremptory Challenges: Snyder v. Louisiana, Foster v. Chapman, and Flowers v. Mississippi	1362
	c. The Future of Peremptory Challenges.....	1364
E.	Preserving the Integrity of Jury Deliberations.....	1366
	1. Anonymous Juries.....	1367
	2. Protecting Against Judicial Influence on Jury Deliberations	1368
	Breaking a Deadlock: The Allen Charge	1368
	Successive Allen Charges	1370
	Capital Punishment and the Allen Charge	1370
	3. Protecting Against Jury Misconduct and Outside Influence	1371
	Sequestration	1372
	Sequestration During Deliberations	1372
	Ex Parte Communications with the Jury	1373
	Evidentiary Limitations on Proof of Jury Misconduct: Tanner v. United States.....	1373
	Lies on Voir Dire	1376
	4. The Use and Function of Alternate Jurors.....	1377
F.	The Trial Judge and the Right to Jury Trial	1377
	1. The Role of the Judge Generally	1377
	2. Selection of Judges	1378
	3. Challenges Against the Judge.....	1378
	Biased Judge: Bracy v. Gramley	1378
	Note on Bracy	1379
	Judge with a Conflict of Interest Due to Previous Role as Prosecutor: Williams v. Pennsylvania.....	1379
	Showing of Actual Bias Not Required: Rippo v. Baker.....	1380
	4. Limitations on Judicial Powers.....	1381
	No Directed Verdict of Guilt.....	1381
	Jury Nullification	1381
	Racially-Based Jury Nullification	1384
	Instructions on the Power to Nullify	1385
	Commenting on the Evidence and Questioning Witnesses	1385
	Instructing the Jury.....	1386
G.	The Jury Verdict	1386
	Inconsistent Verdicts	1387
	Inconsistent Defenses	1388
	Use of Interrogatories.....	1388
	Lesser Included Offenses.....	1389
H.	Waiver of Jury Trial; Trial by the Court	1391
V.	The Impartiality of the Tribunal and the Influence of the Media ...	1392
	A. The Impact of Media Coverage on Litigation.....	1393
	1. Prejudicial Pretrial Publicity	1393
	Pervasive Prejudice: Irvin v. Dowd.....	1393

	Televised Confession: <i>Rideau v. Louisiana</i>	1394
	Questions About <i>Rideau</i>	1395
	Extended Period of Time Between Publicity and the Trial: <i>Patton v. Yount</i>	1395
	Deference to Trial Courts: <i>Mu'Min v. Virginia</i>	1396
	Lower Court Cases	1397
2.	Television in the Courtroom	1397
	Media Invades the Courtroom: <i>Estes v. Texas</i>	1397
	<i>Chandler v. Florida</i>	1399
3.	Protecting the Integrity of Judicial Proceedings.....	1401
	Circus Atmosphere: <i>Sheppard v. Maxwell</i>	1401
	Gag Orders	1403
	Overbroad Gag Orders.....	1404
	Ethical Proscriptions: <i>Gentile v. State Bar of Nevada</i>	1405
B.	Controlling the Media's Impact	1407
1.	Controlling Media Access to Criminal Proceedings.....	1407
	Pretrial Proceedings: <i>Gannett Co., Inc. v. DePasquale</i>	1407
	Limited Right of Access to Criminal Trials: <i>Richmond</i> <i>Newspapers, Inc. v. Virginia</i>	1408
	Closure to Protect Witnesses: <i>Globe Newspaper Co. v.</i> <i>Superior Court</i>	1409
	Closure of Voir Dire: <i>Press Enterprise I</i>	1410
	Closure of Voir Dire Proceedings in a High Profile Trial— <i>Martha Stewart</i>	1411
	Procedural Requirements for Determining the Propriety of Closure: <i>Waller v. Georgia</i>	1412
	Sixth Amendment Limitation on Excluding the Public from Juror Voir Dire: <i>Presley v. Georgia</i>	1413
	Preliminary Hearings: <i>Press-Enterprise II</i>	1413
2.	Change of Venue and Continuance.....	1414
	Transfer of Venue.....	1414
	Continuance.....	1415
VI.	The Defendant's Right to Participate in the Trial.....	1416
A.	The Right of the Defendant to Be Present	1416
	<i>Illinois v. Allen</i>	1416
	Shackling, Courtroom Security, and Prejudice to the Defendant	1418
	Shackling at the Penalty Phase of a Capital Case: <i>Deck v.</i> <i>Missouri</i>	1419
	Commenting on the Defendant's Presence at Trial: <i>Portuondo v. Agard</i>	1419
B.	The Requirement of Competence to Stand Trial	1421
	Forced Medication to Assure Competence: <i>Riggins v.</i> <i>Nevada</i>	1421
	Burden of Proof as to Competency: <i>Medina v. California</i>	1423
	Requiring the Defendant to Prove Competency by Clear and Convincing Evidence: <i>Cooper v. Oklahoma</i>	1424

C.	The Right to Be Present at All Stages of the Proceedings	1424
	Exclusion from Hearing on Competency of Witnesses:	
	Kentucky v. Stincer.....	1425
D.	Trial in Absentia	1426
VII.	The Right to Effective Assistance of Counsel	1426
A.	Ineffectiveness and Prejudice.....	1427
1.	The <i>Strickland</i> Two-Pronged Test	1427
	Strickland v. Washington	1427
2.	Scope of the Right to Effective Assistance of Counsel	1437
	Retained Counsel	1437
	First Appeal of Right: <i>Evitts v. Lucey, Roe v. Flores-</i> <i>Ortega, and Garza v. Idaho</i>	1437
	Appeals Without Merit: <i>Anders v. California</i>	1440
	Other Methods to Determine Whether an Appeal Is Frivolous: <i>Smith v. Robbins</i>	1440
	Subsequent Appeals and Collateral Attack	1441
	Strickland Procedures.....	1441
3.	Assessing Counsel’s Effectiveness	1442
	Concerns About Prosecutorial Rebuttal: <i>Darden v.</i> <i>Wainright</i>	1442
	Failure to Investigate and Ignorance of the Law.....	1443
	Strategy or Not?	1448
	No Strategy at All	1450
	Closing Argument: <i>Yarborough v. Gentry</i>	1451
	Conceding Guilt in a Capital Prosecution: <i>Florida v.</i> <i>Nixon and McCoy v. Louisiana</i>	1452
	Ineffectiveness Charge Against a Lawyer Who Refuses to Bring a Defense That Is Likely to Fail: <i>Knowles</i> <i>v. Mirzayance</i>	1453
	Failure to Challenge a Widely Accepted Analysis That Is Later Discredited: <i>Maryland v. Kulbicki</i>	1454
4.	The Impact of <i>AEDPA</i> on Ineffective Assistance Claims	1454
	Fact-Intensive Review Under <i>AEDPA</i> of Claim of Ineffectiveness for Failure to Investigate and Present Mitigating Evidence at the Penalty Phase: <i>Cullen v. Pinholster</i>	1454
	Application of <i>Strickland</i> —and <i>AEDPA</i> Standards of Deference—to Trial Counsel’s Failure to Retain and Present a Forensic Expert: <i>Harrington v.</i> <i>Richter</i>	1456
5.	Assessing Prejudice.....	1457
	The Strength of the Case Against the Defendant.....	1457
	The Strength of Evidence Not Presented	1458
	Prejudice Assessed at Time of Review: <i>Lockhart v.</i> <i>Fretwell</i>	1458

	Prejudice Must Be Assessed by What Evidence— Including Damaging Evidence—Would Have Been Admitted Had Defense Counsel Acted Effectively: Wong v. Belmontes.....	1460
	Defense Counsel’s Argument at the Penalty Phase of a Capital Trial, Stressing the Severity of the Crimes, Did Not Prejudice the Defendant: Smith v. Spisak.....	1461
	Calling an Expert Who Testifies at the Capital Phase That the Defendant is Dangerous Because He Is Black: Buck v. Davis	1462
	“Significant” Prejudice Requirement Rejected: Glover v. United States.....	1462
	Prejudice Due to Ineffectiveness on Appeal.....	1463
6.	Per Se Ineffectiveness and Prejudice.....	1464
	Denial of “Counsel” Within the Meaning of the Sixth Amendment	1466
	Sleeping Defense Counsel.....	1466
	Absence of Counsel for Ten Minutes During Presentation of Evidence Unrelated to the Defendant Is Not Clearly Per Se Prejudicial Under Cronic: Woods v. Donald	1467
	Counsel Present Only by Speakerphone: Wright v. Van Patten.....	1468
	Application of Per Se Prejudice Standard Not Warranted: Bell v. Cone.....	1468
7.	The Right to Effective Assistance of Counsel at the Guilty Plea Stage	1469
	The Duty to Inform the Defendant About Immigration Consequences of a Guilty Plea: Padilla v. Kentucky.....	1469
	Padilla v. Kentucky.....	1469
	Application of Strickland and AEDPA Review Standards to Counsel’s Conduct When a Guilty Plea Is Entered Early in the Proceedings: Premo v. Moore	1473
	Assessing Prejudice Where the Defendant, Through Counsel’s Ineffectiveness, Is Not Informed of a Plea Bargain and Accepts a Less Favorable One: Missouri v. Frye.....	1474
	Missouri v. Frye	1474
	Assessing Prejudice When the Defendant, on Bad Advice, Rejects a Plea Bargain and Goes to Trial: Lafler v. Cooper	1479
	Lafler v. Cooper	1479
	Counseling Client to Withdraw a Cooperation Agreement on the Basis of the Client’s Protestation of Innocence: Burt v. Titlow.....	1482

	Reasonable Probability of Going to Trial Even Without a Strong Defense: <i>Lee v. United States</i>	1483
8.	Waiver of the Right to Effective Assistance	1485
B.	The Right to Conflict-Free Representation	1485
1.	The Duty of Court Inquiry	1487
	Per Se Reversal for Failure to Inquire into Joint Representation: <i>Holloway v. Arkansas</i>	1487
	Question About <i>Holloway</i>	1488
	Federal Rule 44	1489
2.	Active Conflict Impairing the Representation	1489
	A Different Kind of Prejudice Test: <i>Cuyler v. Sullivan</i>	1489
	Application of the <i>Cuyler</i> Standard: <i>Burger v. Kemp</i>	1490
	Relationship Between the <i>Holloway</i> Automatic Reversal Rule and the <i>Cuyler</i> Rule Regulating Active Representation of Conflicting Interests: <i>Mickens v.</i> <i>Taylor</i>	1491
	Comment on <i>Mickens</i>	1493
	Conflict with the Attorney's Personal Interests	1494
3.	Waiver of the Right to Conflict-Free Counsel	1494
C.	Ineffective Assistance Without Fault on the Part of Defense Counsel	1495
	Impairing Defense Strategy	1495
	Limiting Consultation Between Defendant and Counsel	1496
	Interference with the Attorney-Client Relationship	1497
D.	The Perjury Problem	1498
	Applying <i>Strickland</i> to Client Perjury: <i>Nix v. Whiteside</i>	1498
	<i>Whiteside</i> Was Too Easy	1500
	Harder Questions	1500
E.	Ineffectiveness and Systems of Appointed Counsel	1503
	Inadequate Funding	1503
	Systematic Inadequacy in Capital Cases	1504
F.	The Right to Counsel of Choice	1506
	Violation of Right to Chosen Counsel Can Never Be Harmless: <i>United States v. Gonzalez-Lopez</i>	1507
1.	Disqualification of Defendant's Counsel of Choice	1508
	Analysis of <i>Wheat</i>	1510
	Cases Applying <i>Wheat</i>	1511
2.	Rendering the Defendant Unable to Pay for Counsel of Choice	1513
	<i>Caplin & Drysdale v. United States</i>	1513
	Questions on <i>Caplin</i>	1517
	Forfeiture Hearings Not Required After Indictment: <i>Kaley v. United States</i>	1518
	Freezing Untainted Assets That Would Be Used to Pay for Counsel: <i>Luis v. United States</i>	1519
	<i>Luis v. United States</i>	1519

3.	Other Limitations on the Right to Counsel of Choice.....	1525
VIII.	Self-Representation	1526
A.	The Constitutional Right.....	1526
	Faretta v. California	1526
	Defendant May Be Prohibited from Pro Se Representation if Not Competent to Conduct a Trial: Indiana v. Edwards	1530
	Knowing and Intelligent Waiver.....	1532
	Faretta Warning?.....	1534
	Requirement of Unequivocal Invocation	1535
	Remedy for a Faretta Violation	1536
	Right to Self-Representation in Death Penalty Proceedings	1537
B.	Limits on the Right of Self-Representation.....	1537
1.	Timeliness.....	1537
2.	Disruption of the Court.....	1537
3.	Protection of Witnesses.....	1538
4.	Standby Counsel	1539
5.	Hybrid Counsel and Control of the Defense	1541
	Ceding Control over the Defense	1541
	Retained Hybrid Counsel?.....	1542
6.	Non-Lawyer Representation	1542
7.	Self-Representation on Appeal.....	1543
	Chapter 11. Sentencing	1547
I.	Introduction	1547
A.	The Importance of Sentencing	1547
B.	The Responsibility for Sentencing	1547
C.	The Determination of Sentences.....	1548
	Indeterminate Sentencing.....	1548
	Federal Rejection of Indeterminate Sentencing	1549
D.	Constitutional Limitations on Punishment	1549
1.	Sentencing Enhancements, the Right to Jury Trial, and the Right to Due Process	1549
	Apprendi v. New Jersey and Blakely v. Washington	1549
	Apprendi and the Federal Sentencing Guidelines: United States v. Booker	1550
2.	Eighth Amendment Limitations on Sentencing	1551
	Rummell v. Estelle	1551
	Three-Pronged Test for Disproportionality: Solem v. Helm.....	1551
	Limiting Proportionality Review: Harmelin v. Michigan	1553
	The Scalia Opinion in Harmelin	1553
	The Kennedy Opinion in Harmelin.....	1554
	The White Dissent in Harmelin	1554
	The Mandatory Sentencing Issue in Harmelin.....	1555

	Three Strikes Legislation: California v. Ewing.....	1555
	Ewing v. California	1555
	Life Without Parole Sentence Imposed on a Person Who Was Less than 18 at the Time of the Crime:	
	Graham v. Florida and Miller v. Alabama	1559
	Life Without Parole Sentence Without a Finding of Impossibility of Rehabilitation: Jones v. Mississippi	1562
	Note on the Death Penalty	1563
3.	The First Amendment.....	1565
	Enhancement for Hate Crimes: Wisconsin v. Mitchell	1565
4.	The Equal Protection Clause.....	1566
E.	Sentencing Alternatives Other than Incarceration	1567
1.	Fines and Forfeitures.....	1567
	Problems in Using a Fine as a Sanction	1567
	Indigents and Fines	1568
	Forfeiture of the Proceeds of Crime	1569
	Constitutional Limitations on Forfeiture: Alexander v. United States.....	1570
	Excessive Forfeiture: United States v. Bajakajian	1571
	Proportionality Limitations on In Rem Forfeitures: Austin v. United States.....	1572
	Excessive Fines Clause Binding on the States: Timbs v. Indiana	1573
2.	Probation	1573
3.	Restitution	1575
	Restitution for Victims of Child Pornography: Paroline v. United States.....	1576
4.	Youth Offenders	1579
5.	Insanity Acquittees and Civil Commitment.....	1580
II.	Guidelines Sentencing.....	1580
A.	The Perceived Need for Consistency in Sentencing	1580
	The Goals of the Sentencing Commission	1582
B.	How the Federal Sentencing Guidelines Work.....	1583
	Base Offense Level.....	1583
	Relevant Conduct.....	1584
	Adjustments	1584
	Acceptance of Responsibility	1585
	Criminal History Category.....	1585
	Using the 258-Box Sentencing Grid	1586
	Authorized Departures	1586
	The Effect of Mandatory Minimum Sentences on Guidelines Sentencing	1587
	The First Step Act: An Attempt to Reduce the Effect of Mandatory Minimums	1588
C.	Criticism of Mandatory Federal Sentencing Guidelines	1589

D.	Supreme Court Construction of the Federal Sentencing Guidelines.....	1591
1.	Guidelines as Advisory, Not Mandatory: <i>United States v. Booker</i>	1591
	How to Solve the Constitutional Infirmity in the Guidelines?	1592
	The Remedial Majority Opinion in <i>Booker</i>	1595
	Dissents from the <i>Booker</i> Remedial Opinion	1598
2.	Application of Advisory Guidelines After <i>Booker</i>	1599
	Guidelines Entitled to “Great Weight” After <i>Booker</i> ?	1600
	Sentencing Disparity After <i>Booker</i> ?	1602
	Disagreement with Guidelines Policy: <i>Kimbrough v. United States</i>	1603
	<i>Kimbrough v. United States</i>	1603
	Rehabilitation and Guidelines Sentencing: <i>Tapia v. United States</i>	1607
	Appellate Review of Advisory Guidelines Sentences	1607
	<i>Rita v. United States</i>	1608
	Review of Outside-Guidelines Sentences for Reasonableness: <i>Gall v. United States</i>	1613
	Trial Court’s Explanation of a Guideline Reduction or Sentence Modification: <i>Chavez-Mesa v. United States</i>	1615
	Appellate Court May Not Increase a Sentence in the Absence of a Government Appeal: <i>Greenlaw v. United States</i>	1616
	Sentencing Under a Guideline That Advises a Greater Sentence than the Guideline Existing When the Crime Was Committed: <i>Peugh v. United States</i>	1616
	Incorrect Sentencing That Ends up to Be in the Correct Guidelines Range: <i>Molina-Martinez v. United States</i>	1617
	Considering Post-Sentence Rehabilitation When a Sentence Is Vacated on Appeal: <i>Pepper v. United States</i>	1618
	Sentencing Guidelines Cannot Be Subject to Void-for-Vagueness Challenges: <i>Beckles v. United States</i>	1620
3.	The Principle of Relevant Conduct	1622
	Relevant Conduct and Subsequent Convictions: <i>Witte v. United States</i>	1622
4.	Reductions for Substantial Assistance to the Government	1622
	Substantial Assistance Motions: <i>Wade v. United States</i>	1622
	Substantial Assistance Motions and Mandatory Minimums: <i>Melendez v. United States</i>	1623
E.	Sentencing Developments in the States	1624

III.	Sentencing Procedures	1626
A.	General Procedures.....	1626
	Williams v. New York	1626
	Pre-Sentence Reports and the Sentencing Guidelines	1628
	Rule 32 Notice Requirement Does Not Apply to Court’s Decision to Consider a Sentence Outside the Guidelines: Irizzary v. United States	1628
	Preponderance of the Evidence	1629
	Consideration of Prior Convictions at the Sentencing Proceeding	1630
	Use of Hearsay at Sentencing Under the Guidelines	1631
B.	Parole and Probation Procedures	1632
1.	Probation and Parole Denials; Classification Decisions....	1632
2.	Probation and Parole Revocations	1633
	Morrissey v. Brewer	1633
	Procedural Protections at a Probation Revocation Proceeding: Gagnon v. Scarpelli.....	1636
	Consideration of Alternatives: Black v. Romano	1637
3.	The Relationship Between Supervised Release and Imprisonment	1638
4.	Probation and Parole Officers	1638
	Chapter 12. Double Jeopardy	1641
I.	Introduction	1641
II.	The Effect of an Acquittal	1641
	United States v. Scott.....	1642
	Entry of a Judgment of Acquittal	1648
	Acquittal for Failure to Prove an Element That the Government Never Had to Prove: Evans v. Michigan	1650
	Is the Jury’s Announcement That It Is Unanimous Against Guilt on One Count—but Deadlocked on Others—an Acquittal on That Count?: Blueford v. Arkansas	1652
	Reversal of a Judgment of Acquittal During the Trial: Smith v. Massachusetts	1653
	Acquittal After a Jury Convicts	1654
	Dismissal When the Government Refuses to Participate in the Trial After the Jury Has Been Empaneled: Martinez v. Illinois	1654
III.	Aborted Proceedings	1655
A.	The Right to a Determination from the First Jury Impaneled.....	1655
B.	Mistrial Declared over the Defendant’s Objection.....	1655
1.	The Requirement of Manifest Necessity for a Mistrial Granted over the Defendant’s Objection	1656
	Illinois v. Somerville	1656
	Note on the Impact of Somerville.....	1659

	Trial Court's Declaring Mistrial Was Not an Unreasonable Application of Manifest Necessity Standard: <i>Renico v. Lett</i>	1660
	2. Manifest Necessity as a Flexible Test	1661
	<i>Arizona v. Washington</i>	1661
	Applying the Manifest Necessity Test	1664
	Deadlocked Juries: <i>Blueford v. Arkansas</i>	1664
	C. Mistrial Declared upon Defendant's Motion	1665
	Goading the Defendant into Moving for a Mistrial: <i>Oregon</i> <i>v. Kennedy</i>	1665
	The Rationale of <i>Oregon v. Kennedy</i>	1667
	Why Should the Defendant's Motion Make a Difference?.....	1668
IV.	The Convicted Defendant Appeals	1669
	A. Insufficient Evidence to Convict	1669
	<i>Burks v. United States</i>	1669
	<i>Burks</i> Applied: <i>Hudson v. Louisiana</i>	1671
	B. Insufficient Evidence and Trial Court Error.....	1671
	Erroneously Admitted Evidence: <i>Lockhart v. Nelson</i>	1671
	Charged with the Wrong Crime: <i>Montana v. Hall</i>	1672
	Reversal of Convictions Rendered Against the Weight of the Evidence: <i>Tibbs v. Florida</i>	1673
	C. Trial De Novo and Continuing Jeopardy.....	1673
	Two-Tiered System: <i>Justices v. Lydon</i>	1673
	Event Necessary to Terminate Jeopardy: <i>Richardson v.</i> <i>United States</i>	1674
V.	Multiple Prosecutions of Convicted Defendants.....	1675
	A. The Same Offense	1675
	Lesser Included Offenses: <i>Brown v. Ohio</i> and the Blockburger Test.....	1675
	The <i>Grady v. Corbin</i> "Same Conduct" Test.....	1676
	Return to the Blockburger Test	1677
	<i>United States v. Dixon</i>	1678
	Question After <i>Dixon</i>	1685
	Dispute About the Blockburger Test	1685
	Application of Blockburger to Criminal Enterprises: <i>Rutledge</i> <i>v. United States</i>	1686
	Guilty Plea Problems Under the Blockburger Test.....	1687
	Remedy for Multiple Prosecutions in Violation of the Double Jeopardy Clause: <i>Morris v. Mathews</i>	1688
	B. Defense Responsibility for Multiple Trials	1689
	Opposing Joinder of Charges: <i>Jeffers v. United States</i>	1689
	Defense Agreement to Sever Charges: <i>Currier v. Virginia</i>	1689
	Guilty Plea to a Lesser Offense over Government Objection: <i>Ohio v. Johnson</i>	1691
	C. Subsequent Developments and Jeopardy.....	1691
	Continuing Violations: <i>Garrett v. United States</i>	1691
	Post-Charge Changes of Fact.....	1691

	D. Sentencing Enhancements and Subsequent Prosecution	1692
VI.	Multiple Punishments in a Single Case	1693
	A. Prohibition on Two Punishments When Only One Is Authorized	1693
	B. Legislative Intent to Impose Multiple Punishments for the Same Offense.....	1694
	Felony Murder and the Underlying Felony: Whalen v. United States.....	1694
	Conspiracy to Import and Conspiracy to Distribute: Albernaz v. United States.....	1695
	Overcoming the Presumption That Multiple Punishments for the Same Offense Are Not Intended: Missouri v. Hunter.....	1695
	Charged with Two, Sentenced for One: Ball v. United States	1696
VII.	Double Jeopardy and Sentencing	1696
	A. Government Appeals of Sentences	1696
	Seeking a Harsher Sentence: United States v. DiFrancesco	1696
	B. Capital Sentences	1697
	Death Is Different: Bullington v. Missouri	1697
	Trial Court Error in Favor of the Defendant: Arizona v. Rumsey	1697
	Review of Individual Issues After a Death Sentence Is Imposed: Poland v. Arizona	1698
	Capital Sentencing Proceeding Is Not a Successive Prosecution: Schiro v. Farley.....	1698
	Jury Deadlock on the Death Penalty and Death Penalty Imposed on a Retrial: Sattazahn v. Pennsylvania	1700
	C. Resentencing Following Partial Reversal	1701
VIII.	Collateral Estoppel	1701
	Ashe v. Swenson	1701
	The Problem of General Verdicts.....	1704
	Application of Ashe When There Is an Acquittal on Some Counts and a Deadlock on Others: Yeager v. United States	1705
	Identity of Party Requirement.....	1707
	Issue Preclusion Applied Against the Accused?	1707
	Relitigation of Facts Offered as Uncharged Misconduct: Dowling v. United States	1708
	Collateral Estoppel in a Criminal Case is Narrower than in a Civil Case, Because it is Limited to a Trial on the Same Offense: Currier v. Virginia.....	1708
	Use of Acquitted Conduct for Sentencing Purposes	1710
IX.	Dual Sovereigns	1711
	Adhering to the Dual Sovereignty Doctrine: Gamble v. United States	1712
	Gamble v. United States	1712

	The Petite Policy	1720
	Municipality Is Not a Separate Sovereign: <i>Waller v. Florida</i>	1721
	The States as Dual Sovereigns: <i>Heath v. Alabama</i>	1722
	The United States and Puerto Rico: Dual Sovereigns?	1723
	Joint Efforts in the War on Drugs	1723
X.	Controls on Judicial and Prosecutorial Vindictiveness	1724
	A. Judicial Vindictiveness	1724
	<i>North Carolina v. Pearce</i>	1724
	Determining Vindictiveness After <i>Pearce</i>	1727
	More Convictions in the Interim: <i>Wasman v. United</i> States	1727
	Trial After a Guilty Plea: <i>Alabama v. Smith</i>	1727
	B. Prosecutorial Vindictiveness	1728
	Prosecutor’s Conduct After the Defendant Exercises the Right to Appeal: <i>Blackledge v. Perry</i>	1728
	Prosecutor’s Conduct After the Defendant Invokes a Trial Right: <i>United States v. Goodwin</i>	1729
	Applications of <i>Goodwin</i>	1730
XI.	Civil Penalties as Punishment.....	1731
	Does the Double Jeopardy Clause Regulate Civil Penalties? <i>United States v. Halper</i>	1731
	Civil In Rem Forfeiture: <i>United States v. Ursery</i>	1732
	Repudiating <i>Halper</i> : <i>Hudson v. United States</i>	1732
	Chapter 13. Post-Conviction Challenges	1737
I.	Introduction	1737
II.	Grounds for Direct Attacks on a Conviction	1737
	A. Insufficient Evidence	1738
	1. The General Standard	1738
	Review by Trial Judge for Insufficiency	1738
	Timing of a Motion for Acquittal.....	1738
	2. The Standard of Appellate Review of Sufficiency of the Evidence.....	1740
	Rational Trier of Fact Test: <i>Jackson v. Virginia</i>	1740
	Application of <i>Jackson</i> : <i>Wright v. West</i>	1741
	More on Deference to Jury Determinations: <i>Cavazos v.</i> <i>Smith</i>	1742
	Two Layers of Deference to Jury Determinations on Habeas Review: <i>Coleman v. Johnson and Parker v.</i> <i>Matthews</i>	1743
	Court Reviewing Sufficiency of the Evidence Must Consider All Evidence Admitted at Trial, Even if Erroneously: <i>McDaniel v. Brown</i>	1743
	Assessment of Sufficiency Where the Jury Instructions Add an Extra Element to the Crime: <i>Musacchio v.</i> <i>United States</i>	1744

	General Verdict with Insufficient Evidence on One Ground: Griffin v. United States.....	1745
B.	Motion for New Trial	1746
C.	Newly Discovered Evidence Claims.....	1747
	Requirements for a Newly Discovered Evidence Claim	1747
	Newly Discovered vs. Newly Available	1748
	New Forensic Techniques: District Attorney’s Office v. Osborne.....	1748
	Second Thoughts of Witnesses and Jurors.....	1750
	Time Limits	1751
D.	The Effect of an Error on the Verdict	1751
	1. Harmless Error	1751
	Chapman v. California.....	1751
	Errors Subject to the Chapman Analysis	1753
	Harmless Error Review as a Way to Avoid Ruling on the Merits of the Constitutional Challenge	1753
	Constitutional Errors Not Subject to Harmless Error Review.....	1754
	Involuntary Confessions: Arizona v. Fulminante	1754
	Questions About Fulminante	1755
	Error in a Burden of Proof Instruction: Sullivan v. Louisiana	1756
	Erroneous Instructions on the Elements of a Crime: Neder v. United States.....	1757
	Apprendi Violations Can Be Harmless: Washington v. Recuenco	1758
	Automatic Reversal for Violation of the Right to Counsel of Choice: United States v. Gonzalez-Lopez	1759
	Defense Counsel’s Conceding Guilt over the Defendant’s Objection Is a Structural Error: McCoy v. Louisiana	1759
	Breach of Plea Agreement Is Not a Structural Error Justifying Automatic Relief: Puckett v. United States	1761
	Improper Denial of a Peremptory Challenge Is Not Automatically Reversible: Rivera v. Illinois.....	1761
	Overview on Structural Error: Weaver v. Massachusetts	1762
	Harmlessness Standard for Non-Constitutional Error: The Kotteakos-Lane Rule	1764
2.	Plain Error.....	1765
	Application of the Plain Error Standard: United States v. Olano	1765
	Plain Error in Guidelines Sentencing: Rosales-Mireles v. United States.....	1767
	Error “Plain” at the Time of Appellate Review: Johnson v. United States.....	1768

	Plain Error Review of an Apprendi Violation: United States v. Cotton	1769
	Plain Error Review of Failure to Obtain a Knowing and Intelligent Guilty Plea: United States v. Dominguez-Benitez	1770
	Plain Error Standard Applies to Forfeited Objection on Breach of Plea Agreement: Puckett v. United States	1771
	“Any Possibility” Test Is Too Permissive for Plain Error Review: United States v. Marcus	1772
	Appellate Court May Not Invoke Plain Error to Increase a Sentence in the Absence of a Government Appeal: Greenlaw v. United States	1773
E.	Disentitlement from the Right to Appeal	1774
	The Fugitive Dismissal Rule: Ortega-Rodriguez v. United States	1774
III.	Collateral Attack	1775
A.	Remedies Generally	1775
	1. Collateral Attacks	1775
	2. Coram Nobis	1775
	Availability of the Writ of Coram Nobis in Federal Courts: United States v. Morgan and Korematsu v. United States	1775
	3. Habeas Corpus	1776
	History of the Great Writ	1776
	Congressional Power to Restrict Habeas Corpus	1777
	State Habeas Provisions	1778
B.	Federal Habeas Corpus: The Procedural Framework	1779
	1. The Statutes	1779
	Section 2241	1779
	Section 2244	1780
	Section 2253	1782
	Section 2254	1783
	Section 2255	1785
	Sections 2261–68	1787
	2. General Principles Concerning Habeas Relief After AEDPA	1787
	a. Statute of Limitations	1787
	Equitable Tolling: Holland v. Florida	1788
	Relation Back: Mayle v. Felix	1789
	b. Effect on Supreme Court’s Appellate Jurisdiction: Felker v. Turpin	1789
	c. Certificate of Appealability	1791
	3. Factual Findings and Mixed Questions of Law and Fact	1791
	Guidelines on the Deferential Standard of Review in Section 2254(d): Williams v. Taylor	1792

	Application of Deferential AEDPA Standards of Review and Rejection of Relief for “Unreasonable Failure to Extend” Existing Precedent: <i>White v. Woodall</i>	1795
4.	Retroactivity	1796
C.	Claims Cognizable in Collateral Proceedings	1796
1.	Non-Constitutional Claims.....	1797
	Federal Defendants.....	1797
	State Defendants.....	1797
	State Law Violations as Due Process Violations: <i>Estelle</i> <i>v. McGuire</i>	1799
2.	Constitutional Claims Generally	1800
	Consideration of Constitutional Claims: <i>Brown v.</i> <i>Allen</i>	1800
	Fourth Amendment Claims Not Cognizable on Habeas: <i>Stone v. Powell</i>	1801
	Full and Fair Opportunity.....	1801
	Ineffective Assistance of Counsel: <i>Kimmelman v.</i> <i>Morrison</i>	1802
	Miranda Claims: <i>Withrow v. Williams</i>	1802
D.	Limitations on Obtaining Habeas Relief.....	1804
1.	The Custody Requirement.....	1804
	Collateral Harm and Mootness	1805
	Custody and AEDPA.....	1806
2.	Exhaustion of State Remedies	1807
	The Purpose of the Exhaustion Requirement	1807
	Which “Grounds” Have Been Exhausted?	1807
	Mixed Petitions: <i>Rose v. Lundy</i>	1808
	Exhaustion and Multiple Habeas Petitions	1809
	Mixed Petitions and the Statute of Limitations: <i>Pliler</i> <i>v. Ford</i>	1810
	Staying a Mixed Petition to Allow Unexhausted Claims to Be Presented to the State Court: <i>Rhines v.</i> <i>Weber</i>	1810
	Procedural Bars and Exhaustion of Claims	1811
	Waiver by the State	1812
	The Futility Exception to the Exhaustion Requirement	1812
	Inexhaustible State Review and the Exhaustion Requirement: <i>Castille v. Peoples</i>	1813
	Exhaustion and Discretionary Review in the State Supreme Court: <i>O’Sullivan v. Boerckel</i>	1813
3.	Procedural Default.....	1815
a.	Deliberate Bypass	1815
b.	A Required Showing of Cause and Prejudice	1816
	<i>Wainwright v. Sykes</i>	1817
	Fay Overruled: <i>Coleman v. Thompson</i>	1819

	Cause and Prejudice for Federal Habeas Petitioners: <i>United States v. Frady</i>	1820
	Federal Defendant’s Failure to Raise an Ineffective Assistance Claim on Direct Appeal; Is That a Procedural Default?: <i>Massaro v.</i> <i>United States</i>	1820
c.	The Meaning of “Cause and Prejudice”	1822
	An Objection That Could Have Been Brought: <i>Engle v. Isaac</i>	1822
	Failure to Bring a Novel Claim as “Cause”: <i>Reed v.</i> <i>Ross</i>	1823
	The <i>Reed-Engle/AEDPA Whipsaw</i>	1824
	Unavailability of Facts as Cause: <i>Amadeo v. Zant</i>	1825
	Attorney Error Is Not Cause Unless It Constitutes Ineffective Assistance: <i>Murray v.</i> <i>Carrier and Smith v. Murray</i>	1825
	Attorney Abandonment as Cause and Prejudice: <i>Maples v. Thomas</i>	1827
	No Cause Based on Ineffectiveness of Counsel, Where There Is No Constitutional Right to Counsel: <i>Coleman v. Thompson, Martinez v.</i> <i>Ryan, and Davila v. Davis</i>	1828
	Cause and Prejudice in the Context of a Brady Violation: <i>Strickler v. Greene</i>	1831
d.	The Actual Innocence Exception to the Cause and Prejudice Requirement	1832
	Actual Innocence and the Death Penalty: <i>Sawyer v. Whitley</i>	1832
	Actual Innocence of the Crime Itself: <i>Schlup v.</i> <i>Delo</i>	1834
	Actual Innocence and an Untimely Petition: <i>McQuiggin v. Perkins</i>	1836
	Actual Innocence and Invalid Guilty Pleas: <i>Bousley v. United States</i>	1836
4.	Adequate and Independent State Grounds	1838
	Adequate State Ground Without an Explicit Statement: <i>Coleman v. Thompson</i>	1838
	<i>Coleman</i> and the Plain Statement Rule	1840
	State Ground That Is Not Adequate	1840
	Discretionary Rules as Adequate State Grounds: <i>Beard</i> <i>v. Kindler</i>	1841
	Flexible Rules as Adequate State Grounds: <i>Walker v.</i> <i>Martin</i>	1842
	“Exorbitant” Application of an Adequate State Ground: <i>Lee v. Kemna</i>	1842
5.	Successive Petitions; Abuse of the Writ	1843
	Effect of AEDPA	1844

	Premature Claims and Successive Petitions: Stewart v. Martinez-Villareal.....	1845
6.	Newly Discovered Evidence.....	1846
7.	Limitations on Obtaining a Hearing	1848
	AEDPA Limitations on Obtaining a Hearing:	
	Williams v. Taylor and Schiro v. Landrigan.....	1849
8.	Harmless Error in Habeas Corpus Cases.....	1851
	A Less Onerous Standard of Harmlessness for the State to Meet: Brecht v. Abrahamson.....	1851
	Burden of Proof as to Harmlessness: O’Neal v. McAninch.....	1853